

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:** Final rule.

SUMMARY: OGE regulations have provided guidance concerning the post-employment conflict of interest restrictions of 18 U.S.C. 207 for Government employees terminating service between July 1, 1979 and December 31, 1990. As a result of amendments to section 207 that became effective January 1, 1991, and subsequently, 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 these new regulations 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 final rule would expand the regulatory guidance OGE has previously published concerning the current version of section 207 and make minor modifications to those earlier rulemakings. It would also remove the old obsolete regulations from the Code of Federal Regulations.

DATES: July 25, 2008.**FOR FURTHER INFORMATION CONTACT:**

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SUPPLEMENTARY INFORMATION:**I. Rulemaking History**

On February 18, 2003, the Office of Government Ethics (OGE) published for comment a proposed rule that would provide guidance and certain implementing procedures concerning the post-employment conflict of interest statute, 18 U.S.C. 207, as applied to former officers and employees of the executive branch. *See* 68 FR 7844-7892 (February 18, 2003). The proposed rule was issued pursuant to OGE's authority under the Ethics in Government Act of 1978, as amended, and Executive Order 12674, as modified by E.O. 12731.

As explained in the preamble, the proposed rule provided for minor modifications to existing guidance and procedures in part 2641, as well as

substantially expanded guidance to address more comprehensively the application of section 207.

The proposed rule also provided for the removal of part 2637 (formerly part 737). Part 2637 interpreted and implemented a version of section 207 that was in effect prior to January 1, 1991, the effective date of the relevant provisions of the Ethics Reform Act of 1989. Although part 2637 had provided comprehensive post-employment advice in the past, numerous statutory changes, beginning with the Ethics Reform Act of 1989, rendered the content of much of part 2637 inapplicable to the current statute. For this reason, the current version of part 2637 carries an introductory note emphasizing that the regulation applies to "individuals terminating Government service prior to January 1, 1991." It is OGE's intent that the advice now contained in part 2641, as amended by the final rule, will provide both comprehensive and current guidance applicable to employees terminating subsequent to January 1, 1991. Therefore, part 2637 is being removed in its entirety, with the proviso that the last published edition of the 5 CFR in which part 2637 was published (the one revised as of January 1, 2008) will be retained by OGE, and should be retained by agency ethics officials, to provide interpretive guidance to employees who terminated service before January 1, 1991.

The history of parts 2637 and 2641 is discussed in detail in the preamble to the proposed rule, at 68 FR 7844-7845. In addition, since the publication of the proposed rule, the appendices to part 2641 have been amended three times. First, by a final rule issued November 23, 2004, OGE modified the list of separate agency and departmental component designations in Appendix B, pursuant to 18 U.S.C. 207(h), for purposes of the one-year cooling-off restriction applicable to former senior employees of an agency or department, under 18 U.S.C. 207(c). *See* 69 FR 68053-68056 (November 23, 2004). Second, by a final rule issued March 8, 2007, OGE again modified the list of separate agency and departmental component designations in Appendix B and also modified the list of waived positions in Appendix A, pursuant to 18 U.S.C. 207(c)(2)(C), for purposes of the one-year restriction applicable to former senior employees. *See* 72 FR 10339-10342 (March 8, 2007). Third, by a final rule issued March 6, 2008, OGE once more modified the list of separate agency and departmental component designations in Appendix B. *See* 73 FR 12007-12009 (March 6, 2008).

Additionally, three amendments to 18 U.S.C. 207 have become effective since the publication of the proposed rule, and the effect of these amendments is addressed in the final rule. First, the amendments enacted by section 209(d) of the E-Government Act of 2002, Public Law 107-347, were noted in the preamble of the proposed rule, but the amendments did not become effective until nearly two months after the proposed rule was published. *See* 68 FR 7844. The proposed rule did not implement these statutory amendments, but the preamble specifically invited comments concerning the implementation of the amendments and noted that the effect of the amendments would be addressed in the final rule, as appropriate. During the comment period applicable to the proposed rule, OGE received no recommendations concerning the implementation of these amendments, which involve the addition of a new category of senior employee under 18 U.S.C. 207(c)(2)(A)(v) and a new restriction on contract advice under section 207(l), both applicable only to former private sector assignees under the Information Technology Exchange Program. The final rule implements these amendments, as discussed more fully below, through changes to proposed sections 2641.104 (definition of senior employee), 2641.301(j) (waiver of restrictions of 18 U.S.C. 207(c) and (f) for certain positions), and 2641.301(l) (guide to available exceptions and waivers), and the promulgation of new section 2641.207 (setting out basic outline of new restriction in 18 U.S.C. 207(l)). Second, one category of senior employees covered by 18 U.S.C. 207(c) was amended by section 1125(b)(1) of the National Defense Authorization Act for Fiscal Year 2004, Public Law 108-136, November 24, 2003. Therefore, as discussed more fully below, the definition of senior employee in proposed section 2641.104 has been revised to conform to the current version of 18 U.S.C. 207(c)(2)(A)(ii). Third, the Honest Leadership and Open Government Act of 2007 amended 18 U.S.C. 207(d) by extending the cooling-off period for very senior employees to two years, which is addressed in revised section 2641.205. *See* Public Law 110-81, sec. 101(a), September 14, 2007. Section 104 of the same Act also added a cross-reference, in 18 U.S.C. 207(j)(1)(B), to a revised exception in the Indian Self-Determination and Education Assistance Act; proposed section 2641.301(k)(4) has been revised accordingly.

The proposed rule provided a 90-day comment period. Timely comments were received from 17 sources. After carefully considering all comments and making appropriate modifications, the Office of Government Ethics is publishing this final rule after consulting with the Office of Personnel Management and the Department of Justice in accordance with section 402(b) of the Ethics in Government Act, and further, pursuant to section 201(c) of Executive Order 12674, as modified by E.O. 12731, after obtaining the concurrence of the Department of Justice.

II. Summary of Comments and Changes to Proposed Rule

OGE received comments from 17 entities, all Federal executive branch offices. Most of these comments were from agency ethics offices. Two agency inspector general offices commented, as did the Office of the Vice President. Five different Department of Defense components commented, although these comments were substantially similar or identical in many respects.

General Comments

A number of commenters stated that the proposed rule generally was helpful, thorough and well-organized. Many of these commenters remarked that the examples included in the proposed rule were particularly useful.

The Use of Examples

With respect to the subject of examples, one agency thought that OGE generally needed to include more explanatory information in its examples. The same agency also recommended that OGE address, either in the preamble or the text of the rule, “the way in which examples are to be used as illustrative guidance.” Given the limits of the regulatory format, OGE has attempted to provide examples that contain sufficient explanatory information to illustrate the particular provision of the rule that is at issue. OGE’s practice has been to include examples in most of its rules, e.g., 5 CFR parts 2634, 2635, 2637, and 2640, for the purpose of providing factual scenarios that demonstrate the operation of the substantive provisions articulated in the rules. These examples illustrate how OGE would apply the rule in certain contexts.

Three agencies raised related questions about why various examples in the proposed regulation do not contain facts satisfying each element of the relevant statutory prohibition. OGE has organized its treatment of each of the prohibitions in section 207 by

treating each element separately and then providing examples to illustrate that particular element. OGE believes that it would be unnecessarily discursive to reiterate each statutory element in each example and that the lack of focus would render the examples less convenient for readers to use in analyzing the particular element in the accompanying regulatory text. In a similar vein, one agency also commented on the absence of facts in one particular example to illustrate a knowledge element in the statute. See proposed § 2641.201(f) (example 3). The example to which this commenter referred is intended to illustrate the element that the post-employment contact must be “to or before” a Federal employee, not the scope of the statutory term “knowingly.” Additionally, it is important to note that OGE has not attempted to provide comprehensive guidance as to the scope of the knowledge requirement in the various prohibitions in section 207. In OGE’s experience, knowledge questions more typically arise after the post-employment conduct has already occurred, and legal analysis of such issues is not always well-suited to a regulation that provides general, prospective guidance.

Coordination With the Department of Justice

One commenter recommended that part 2641 be issued “jointly” by the Director of OGE and the Attorney General. The commenter stated that, because “the Attorney General is the officer charged by law to enforce the criminal statutes, including section 207, the Attorney General’s issuance of part 2641 along with the Director of OGE increases the likelihood that the Federal Courts, in construing section 207, will give the interpretive guidance in part 2641 judicial deference.”

OGE has not followed this recommendation. Section 201(c) of Executive Order 12731 states that is the responsibility of OGE to promulgate regulations interpreting sections 207, 208, and 209 of title 18, United States Code. The Executive Order provides that OGE obtain the concurrence of the Attorney General, which OGE has done (and also did with the prior post-employment regulations, see 5 CFR 2637.101(b)). Compare E.O. 12731, section 201(c) (concurrence); with *id.*, section 301(a) (joint promulgation). OGE also has its own statutory rulemaking authority with respect to conflicts of interest in the executive branch, which is exercised in consultation with the Attorney General. See 5 U.S.C. app. section 402. Furthermore, it may be

debatable whether joint promulgation of part 2641 with the Attorney General would necessarily entail judicial deference. See *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring). In any event, there is already a history of judicial recognition and reliance on OGE’s section 207 regulations. E.g., *EEOC v. Exxon Corp.*, 202 F.3d 755 (5th Cir. 2000); *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir. 1989); *U.S. v. Clark*, 333 F.Supp.2d 789 (E.D. Wisc. 2004); *U.S. v. Martin*, 39 F.Supp.2d 1333 (D. Utah 1999); *Conrad v. United Instruments, Inc.*, 988 F. Supp. 1223 (W.D. Wisc. 1997); *Robert E. Derecktor of R. I., Inc. v. U.S.*, 762 F. Supp. 1019 (D.R.I. 1991); *U.S. v. Dorfman*, 542 F.Supp. 402 (N.D. Ill. 1982).

Legislative Recommendations

Several agencies did not confine their comments to the proposed rule, but asked OGE to consider proposing legislative changes to the post-employment statute. Subsequently, OGE completed a review of the criminal conflict of interest statutes, pursuant to section 8403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108–458. See OGE, *Report to the President and to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment* (January 2006), at http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/reports_plans/rpt_title18.pdf. In connection with this review, OGE solicited the views of the public with respect to possible changes to the criminal conflict of interest statutes, including 18 U.S.C. 207. See 70 FR 22661 (May 2, 2005); 67 **Federal Register** 43321 (June 27, 2002). OGE’s evaluation of the need for legislation must be viewed as a separate undertaking from the present rulemaking, which is limited by the text of section 207 as it is currently written.

OMB Circular A–76

Seven agencies, including four DOD components, submitted comments about the application of 18 U.S.C. 207 in the context of public-private competitions under Office of Management and Budget Circular A–76. See OMB Circular A–76, May 29, 2003, available at http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf. In A–76 proceedings, an agency determines whether to contract out certain “commercial” (i.e., not inherently governmental) functions, after a competition between private bids and an agency tender offer based on the agency’s cost estimate for performing

the same function internally. The commenting agencies focused on a number of different elements of section 207(a) as they apply to A-76 proceedings: particular matter involving specific parties, *see* § 2641.201(h); same particular matter involving specific parties, *see* § 2641.201(h)(5); personal and substantial participation, *see* § 2641.201(i); and intent to influence, *see* § 2641.201(e).

The central thrust of the arguments advanced by most of these agencies is that OGE should propound a “workable” interpretation of section 207 that does not interfere with the operation of the A-76 process. In particular, most of the commenting agencies were especially concerned that the interpretation of section 207 not unduly restrict affected employees, whose Government jobs may be contracted out, from going to work for a winning private bidder after those employees participated in some part of the A-76 process. Many affected employees are provided a “right of first refusal” to perform their privatized functions for the winning private bidder, *see* OMB Circular A-76, Attachment B, § D.3.a(2), and these agencies fear that this right may be eroded if significant numbers of affected employees are disqualified from performing private jobs involving communications or appearances that are deemed to be prohibited representational contacts under section 207. A related concern expressed by some of the commenters is that directly affected employees may be reluctant to participate in the A-76 process—whether by serving on the Most Efficient Organization or Performance Work Statement teams or simply by providing relevant job-related information to those teams—for fear of jeopardizing their ability to work for the winning bidder in the event that their Federal positions are eliminated.

The final rule does not address issues pertaining to A-76 proceedings. For one thing, OGE did not raise this subject in the proposed rule. Moreover, the subjects are sufficiently complex and novel that OGE finds it prudent to defer any treatment, for example, to a later rulemaking or other guidance.

Subpart A—General Provisions

Section 2641.101—Purpose

One agency commented on the note following proposed section 2641.101, now designated as paragraph (b) of the section in this final rule, which indicates that part 2641 is not intended to address post-employment restrictions in statutes or authorities other than 18

U.S.C. 207. This agency asked that OGE maintain a list of post-employment restrictions, other than section 207, somewhere in part 2641. OGE expressly declined to propose such a list, as explained more fully in the preamble to the proposed rule. 68 **Federal Register** 7845. The commenter has not persuaded OGE that the reasons for so declining are no longer valid. OGE foresees a burden in maintaining such a list in the regulation and ensuring that it is accurate and up-to-date, which burden is not outweighed by the potential value. The commenter’s suggestion that OGE could include a disclaimer in the regulation indicating that the list is not intended to be exhaustive simply underscores the risks and limitations inherent in promulgating such a list in the Code of Federal Regulations, especially in view of OGE’s experience that post-employment restrictions are a relatively frequent subject of legislative action. However, OGE will consider compiling such a list and making it available to agencies and the public through the DAEOgram process.

On a related topic, another agency recommended that OGE include, in example 1 following proposed § 2641.204(d), a cross-reference to the restrictions on the representational activities of current employees, under 18 U.S.C. 203 and 205. OGE has not followed this recommendation. The purpose of part 2641, and OGE’s responsibility under section 201(c) of Executive Order 12731, is to provide guidance with respect to 18 U.S.C. 207, not guidance with respect to 18 U.S.C. 203 and 205. The rule cannot reasonably identify every restriction, other than section 207, that might apply to a hypothetical set of circumstances. Moreover, OGE believes that agency ethics officials may be relied upon to provide comprehensive training and counseling with respect to the entire range of ethical restrictions that may be applicable in a given situation.

Section 2641.104—Definitions

Employee

OGE has made one change to the definition of “employee” as proposed in section 2641.104. In order to clarify that employees serving without compensation from the Government are subject to the post-employment law, OGE has added the phrase “employees serving without compensation” to the final sentence (before the parenthetical) in the definition.

Former Employee

Three agencies commented on the definition of “former employee” in

proposed section 2641.104. OGE also received one comment concerning the treatment of the Vice President under this definition, which is discussed separately below, under “Applicability of Certain Provisions to the Vice President.”

One of the agencies recommended that OGE amend example 4, in order to clarify when a special Government employee (SGE) serving on an advisory committee becomes a former employee. Consistent with this comment, OGE is revising the example to make clear that the SGE in that example becomes a former employee when his appointment terminates, provided that there is no reappointment without a break in service. However, OGE is not adopting the commenter’s suggestion that the SGE necessarily becomes a former employee immediately upon the expiration of the term of the advisory committee. Personnel appointments for SGEs could outlast the term of the committee on which they serve, and agencies sometimes may use SGEs for other expert or consultant services beyond the work of a particular advisory committee.

Another agency recommended that OGE add a new example to illustrate the post-employment implications of what the agency stated was a common practice of appointing retired Foreign Service officers in civil service positions without any break in service. We have adopted this recommendation and have added a new example 6 to the definition of former employee. Additionally, we have amended the definition of “Government service” to emphasize that a period of Government service is not completed, and the individual does not therefore become a former employee, unless there is a break in service.

A third agency recommended that examples 3 and 4 be amended to indicate that current Federal employees remain subject to the representational restrictions of 18 U.S.C. 203 and 205 even though they may not be former employees subject to the restrictions of 18 U.S.C. 207. We have not adopted this recommendation. Presumably, agencies already advise current employees, as appropriate, concerning their restrictions under sections 203 and 205, as well as any other applicable conflict of interest statutes or rules, and it is not the purpose of this post-employment rule to explain those requirements.

Person

One agency recommended that the definition of “person” be amended specifically to include Indian tribal governments. We have not made the recommended change. The definition of

person in section 2641.104 emphasizes that it is “all-inclusive,” and it includes, among other things, “any other organization.” We believe that this definition is sufficiently broad to include tribal governments. Moreover, we note that similar definitions of person in other OGE regulations do not expressly address tribal governments, and we are not aware that this has created any particular difficulties. *See* 5 CFR 2635.102(k); 2638.104; 2640.102(o).

Senior Employee

OGE received two substantive comments concerning the definition of “senior employee,” which governs the application of the one-year cooling-off restriction of 18 U.S.C. 207(c) (described in § 2641.204). One comment was from an agency Inspector General office, which requested that OGE provide a new example addressing the effect of “Law Enforcement Availability Pay” (LEAP) on the rate of basic pay of certain criminal investigators, for purposes of determining whether such investigators would be senior employees under 18 U.S.C. 207(c)(2)(A)(ii) and paragraph (2) of the definition of senior employee in § 2641.104 as proposed. The commenter stated that “LEAP is not meant to ‘elevate’ a GS-14 or GS-15 supervisor into the ‘senior employee’ category” and urged OGE to determine that LEAP is not to be considered part of basic pay. We agree with the commenter that LEAP should not be viewed as part of basic pay for purposes of section 207(c)(2)(A)(ii). The statutory and regulatory provisions governing LEAP make clear that it is to be treated as part of basic pay only for certain specified purposes, which do not include the post-employment restrictions. *See* 5 U.S.C. 554a(h)(2); 5 CFR 550.186(b). We have confirmed this conclusion with the Office of Personnel Management. In view of the number of Federal investigators who may receive LEAP, we are adding a new example 3 following the definition of senior employee to provide guidance on this subject.

A second agency commented that example 2 following the definition of senior employee does not adequately illustrate the fact 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 for senior employee status. *See* 68 FR 7848. OGE has made no change to the rule as proposed in adopting it as final. Example 2 illustrates the point that basic pay, for pay systems employing pay bands, is the actual pay of the employee, including any periodic

adjustments, not the minimum possible pay that employees in the system might receive. *See* OGE Informal Advisory Letters 98 x 2; 92 x 20.

Finally, OGE has made two conforming amendments to the definition of senior employee to reflect statutory amendments to 18 U.S.C. 207(c) since the proposed rule was developed. First, a new paragraph (6) has been added, to reflect section 209(d)(1) of the E-Government Act, Public Law 107–347, December 17, 2002, which became effective 120 days after enactment. This law amended 18 U.S.C. 207(c)(2)(A) by adding a new category of senior employee: Assignees from private sector organizations under the new Information Technology Exchange Program created by the Act. *See* 18 U.S.C. 207(c)(2)(a)(v). Second, paragraph (2) of the proposed definition has been changed to reflect section 1125(b)(1) of the National Defense Authorization Act for Fiscal Year 2004, Public Law 108–136, November 24, 2003, which became effective on the first day of the first pay period on or after January 1, 2004. This law amended 18 U.S.C. 207(c)(2)(A)(ii) by replacing the former standard—a rate of basic pay equivalent to the former level 5 of the Senior Executive Service—with a standard based on 86.5 percent of level II of the Executive Schedule. As reflected in paragraph (2) of the revised definition of senior employee in the final rule, the statutory amendment also provided that employees who had a rate of basic pay equivalent to level 5 of the SES on the day prior to enactment of the new law would be deemed senior employees for two years following the date of enactment. OGE also has made conforming changes to other parts of the rule that refer to the statutory pay threshold for senior employee status, including the provisions in § 2641.204(c) concerning the application of 18 U.S.C. 207(c) to special Government employees and Intergovernmental Personnel Act appointees or detailees.

Section 2641.105—Advice

Two commenters recommended that OGE amend proposed section 2641.105(e), concerning attorney-client privilege. They requested OGE to clarify that the Government itself still may be able to claim certain privileges, even though employees and former employees personally may not enjoy any personal attorney-client privilege with respect to information conveyed to ethics officials. OGE agrees that, although employees and former employees may not enjoy any personal attorney-client privilege with respect to

their communications with ethics officials, this does not mean that the Government itself may not be able to claim its own privileges with respect to such communications. At the same time, however, OGE is concerned that nothing in the regulation should suggest that agencies may invoke attorney-client privilege in connection with an information request made by OGE. Therefore, we are modifying § 2641.105(e) in this final rule only so far as to emphasize that employees do not personally benefit from an attorney-client privilege: “A current or former employee who discloses information to an agency ethics official, to a Government attorney, or to an employee of the Office of Government Ethics does not personally enjoy an attorney-client privilege with respect to such communications.”

One of the commenters also recommended that we revise proposed § 2641.105(b), concerning advice by OGE, to specify how conflicts of opinion between OGE and agency ethics officials will be resolved. We do not believe this subject is amenable to any general rule and therefore have not modified this section in the final rule. On the one hand, OGE recognizes and respects the opinions of agency ethics officials, and we start from the premise that those officials often are in a better position to obtain and understand the facts pertinent to post-employment questions involving their agencies. On the other hand, OGE cannot ignore its oversight responsibilities under title IV of the Ethics in Government Act. When differences of opinion arise, OGE must handle each case as the demands of the situation require.

Section 2641.106—Applicability of Certain Provisions to the Vice President

OGE received a set of comments from one commenter raising issues pertaining to the treatment of the Vice President under section 207 and the proposed rule. The commenter recommended an organizational change, which OGE has made in the final rule. This commenter recommended that OGE place all references to the application of section 207 to the Vice President in one stand-alone section in the rule. The commenter noted that the Vice President is subject only to section 207(d) and section 207(f) and recommended that a single provision governing the Vice President state this fact, without the need for any further references to the Vice President in the definitions of “employee,” “former employee,” or “very senior employee” in § 2641.104. Among other reasons, the commenter requested this change in

order to avoid “the confusion that may result from straining the normal meaning of the words ‘employee’ and ‘former employee’ to reach (for one narrow purpose) a constitutional officer.”

OGE agrees that this recommendation would add clarity. Consequently, this final rule removes the references to the Vice President in the various definitions from § 2641.104 as proposed, and adds a new § 2641.106 to the general provisions in subpart A of part 2641. Following the language proposed by the commenter, OGE has added the new § 2641.106, titled “Applicability of certain provisions to Vice President,” which reads: “Subsections 207(d) (relating to restrictions on very senior personnel) and 207(f) (restrictions with regard to foreign entities) of title 18, United States Code, apply to a Vice President, to the same extent as they apply to employees and former employees covered by those provisions. See §§ 2641.205 and 2641.206. There are no other restrictions in 18 U.S.C. 207 applicable to a Vice President.” Nevertheless, OGE has omitted one recommended phrase, which would have indicated that the Vice President is not subject to any other restriction in part 2641: For one thing, part 2641 itself does not impose any criminal restrictions, and, furthermore, there are other provisions in part 2641, for example, the sections dealing with certain exemptions or exceptions, that may be applicable to the Vice President.

The same commenter also recommended a new section governing certain communications made by former employees at the request of the President or the Vice President. The recommended new section would state that whenever the President, in the performance of constitutional, statutory or ceremonial duties, requests information or advice from a former employee, the provision of such information or advice is made on behalf of the United States or on behalf of the former employee himself or herself and therefore is not prohibited by section 207. The recommended provision would apply this same standard to requests from the Vice President for information or advice, in aid of the President’s functions. In support of this proposal, the commenter cited the President’s “constitutionally-based right to gather information to aid the President in the performance of Presidential functions,” including the gathering of such information “through the Vice President.”

OGE does not dispute the importance of the authority of the President and the Vice President to gather information in

the performance of their constitutional duties. OGE also recognizes that constitutional considerations may have a bearing on post-employment issues in certain circumstances, including circumstances beyond those described by the commenter. *See, e.g., Conrad v. United Instruments*, 988 F. Supp. 1223, 1226 (W.D. Wisc. 1997) (first amendment); *U.S. v. Martin*, 39 F.Supp. 2d 1333 (D. Utah 1999) (sixth amendment). However, OGE does not believe that anything in the post-employment regulations should be viewed as determining, limiting, or otherwise addressing the scope of the constitutional authority of the President or Vice President. Such questions are beyond OGE’s jurisdiction and the scope of this rule, and OGE would have to leave such questions to the guidance of the Department of Justice.

Subpart B—Prohibitions

Section 2641.201—Permanent Restriction

Section 2641.201(d)—Communication or Appearance

Five agencies raised concerns about the guidance in proposed § 2641.201(d) concerning the meaning of the statutory term “communication.” Specifically, these agencies raised questions about the concept, illustrated in example 5 to § 2641.201(d) as proposed, that a former employee can make a prohibited communication to the Government through a third party intermediary, provided that the former employee intends that the information be attributed to himself or herself. Several of these agencies also raised similar concerns about example 7 to proposed § 2641.201(f), as well as the note following proposed § 2641.205(g) and the related example 5 to proposed § 2641.205. Most of the commenters objected on the ground that these proposed provisions blurred the distinction between permissible behind-the-scenes assistance and prohibited contact with Government officials. Some also objected on the ground that the analysis, particularly in example 5 to proposed § 2641.201(d), depended too much on circumstantial evidence of the intent of the former employee that the information be attributed to himself or herself. Two agencies recommended that, if OGE were to retain any version of this third party intermediary concept, it should at least adopt a simpler standard, such as actual attribution by the third party (*e.g.*, “Mr. A told me to tell you this”). Two other agencies also commented that the facts set out in example 4 to § 2641.201(d) as proposed—which deals with

circumstances in which a former employee prepares a grant application and is listed as principal investigator—is difficult to reconcile with the result in example 5.

As OGE pointed out in the preamble to the proposed rule, 68 FR 7850, 7852, 7860, the provisions cited above are based on an opinion issued by the Office of Legal Counsel, Department of Justice, Memorandum for Amy L. Comstock, Director, OGE, from Joseph R. Guerra, Deputy Assistant Attorney General, OLC, January 19, 2001 (OLC Opinion), available under “Other Ethics Guidance, Conflict of Interest Prosecution Surveys and OLC Opinions” on OGE’s Web site, <http://www.usoge.gov>. Indeed, the facts of example 5 to proposed section 2641.201(d) are taken directly from the OLC Opinion, which several of the commenters acknowledged. Although we do not doubt that the OLC Opinion may make it somewhat more difficult to distinguish between permissible behind-the-scenes assistance and prohibited communications, we also think that it is more consistent with the purposes of section 207 to prohibit former employees from using third party intermediaries to make their contacts for them under circumstances in which the former employees intend to be recognized as the source of the information conveyed. *See* OLC Opinion at 5 (“any attempt to draw bright line rules would inevitably create artificial distinctions between equally pernicious types of conduct”). With respect to the concern that the circumstances in example 5 cannot sufficiently be distinguished from example 4 or other common situations in which we have said that former employees may engage in behind-the-scene activities, we believe that example 5 to section 2641.201(d) contains enough significant facts to make it clear that the former employee in that scenario does not intend to limit herself to behind-the-scenes assistance but rather intends to be identified as the real source of the communication. Accordingly, OGE has not revised the cited examples in this final rule.

Finally, one agency proposed that the basic definition of “communication” in proposed § 2641.201(d)(1) should not itself contain any references to the former employee’s intent that the information be attributed to himself or herself, but that additional numbered paragraphs be added to explain in more detail the relevance of attribution under different circumstances. This agency was concerned that the significance of the attribution principle might be lost

on readers if it were simply folded into the basic definition of communication.

OGE has not changed the definition in the final rule. For one thing, attribution is clearly part of the basic definition of communication found in the OLC Opinion. *See* OLC Opinion at 4 (“we conclude that a ‘communication’ is the act of imparting or transmitting information with the intent that the information be attributed to the former official”). Moreover, we believe that proposed example 5 adequately illustrates the concept of attribution without further complicating the basic definition in § 2641.201(d)(1).

Section 2641.201(e)—Intent To Influence

OGE received nine substantive comments on the proposed treatment of the statutory element of intent to influence, including five comments from components of the Department of Defense that made similar or identical recommendations.

Two agencies recommended that OGE use the word “appreciable” in various places in proposed § 2641.201(e)(2) and the accompanying examples—which illustrate situations in which intent to influence is not present—in order to emphasize, as proposed § 2641.201(e)(1)(ii) already does, that the representational activity must not merely present the “potential” for dispute but that such potential must be appreciable. Along similar lines, another agency recommended that OGE add the word “reasonably” before the proposed phrase “involves an appreciable element of actual or potential dispute or controversy” in § 2641.201(e)(1)(ii), which describes the basic concept of intent to influence. OGE has not adopted either recommendation in this final rule. The word “appreciable” already appears in the provision that defines the basic concept of intent to influence, § 2641.201(e)(1)(ii), and we think it is unnecessary to repeat the entire definition of intent to influence in every subsequent discussion. Furthermore, we think that insertion of the word “reasonably” would add little to the concept of “appreciable element of actual or potential dispute or controversy,” because the ordinary meaning of “appreciable” sufficiently limits the intended scope of the phrase. *See Webster’s Third New International Dictionary* 105 (1986) (appreciable means “capable of being perceived and recognized”).

Two agencies commented on proposed § 2641.201(e)(2)(vi), which recognizes certain circumstances in which there is no intent to influence

during the course of a routine Government site visit to non-Federal premises used by actual or prospective contractors or grantees. Both agencies recommended that the provision not be limited to non-Federal premises, in recognition of the fact that many Government contracts are performed in Government space. OGE has not adopted this recommendation either. Section 2641.201(e)(2)(vi), both as proposed and in this final rule, restates a provision that has been in the prior section 207 regulations, in virtually the same form, for over two decades. *See* 5 CFR 2637.201(b)(4). This provision was intended to cover communications “strictly for the Government’s convenience” given the practical realities of site visits. OGE Informal Advisory Letter 81 x 35. Government officials who have gone to the effort to conduct a routine site visit should not have to worry about cutting short their trip or curtailing their activities simply because they happen to encounter a former employee at the site. Where performance of the contract is to occur on Government premises, however, the Government’s practical interests in scheduling site visits are not implicated. Moreover, where the former employee is present on Government premises on an ongoing basis to perform the contract, one can envision more potential for a wider range of communications than would be the case in an occasional site visit. Of course, the fact that a particular set of circumstances may not fall directly within one of the specific types of situations identified in the regulations as involving no intent to influence does not mean that the element of intent to influence is necessarily present. The situations addressed in § 2641.201(e)(2) are not intended to be exclusive, and other situations must be addressed in light of all the relevant facts.

Another agency commented on § 2641.201(e)(4) of the proposed rule, which provides guidance on when an employee’s mere “appearance,” even in the absence of a substantive “communication,” can be viewed as involving an intent to influence the Government. This commenter objected that the rule was too vague because it simply lists a set of factors that may be considered on a case-by-case basis, rather than a definitive set of circumstances that must be present for the statute to be implicated. OGE does not agree that interpretive guidance is fatally vague just because it provides factors to be considered in light of the totality of the circumstances. With a statutory concept such as intent to

influence, any analysis unavoidably must involve the particularized consideration of all the relevant facts. *See, e.g., United States v. Schaltenbrand*, 930 F.2d 1554, 1560–61 (11th Cir. 1991) (reviewing entire record to determine whether former employee could be said to have acted as agent of contractor in meeting with Government). Therefore, this section has not been modified in the final rule OGE is now promulgating.

Finally, six commenters, including five DOD components, commented on the application of proposed section 2641.201(e) to communications made by former employees during the course of performing a Government contract. The five DOD components made substantially similar proposals to exclude from the concept of intent to influence all communications required in order to perform a Government contract. All of the commenters on this subject indicated that the Government sometimes needs to hear the expert advice of former employees with respect to contracts in which they participated as a Government employee, even though the former employees may have gone to work for contractors on the same contract in which they participated personally and substantially for the Government. (Apart from issues under the intent to influence element, the subject of contacts made during the performance of contracts also raises issues under the “on behalf of another person” element, *see* § 2641.201(g), and the exception for communications on behalf of the United States, *see* § 2641.301(a), both of which are discussed below.) Some of the commenters specifically mentioned the prospect of increasing privatization of Government functions, for example, through public-private competitions under OMB Circular A–76, which may result in increasing numbers of former Government employees working for Government contractors on projects in which the former employees had prior Government involvement.

OGE has dealt with similar questions many times over the years in published letters and other informal advice. For example, in OGE Informal Advisory Letter 99 x 19, we concluded that, although certain routine or ministerial communications made during contract performance may lack the requisite intent to influence, many contract performance communications may involve the potential for improper influence because the contractor and the Government have potentially differing views or interests with respect to the matter being discussed. *See also* OGE Informal Advisory Letter 03 x 6. The

fact that a particular Government contract may require certain communications between the Government and the contractor does not eliminate this problem, as we noted in an early OGE advisory letter: "The very terms of the contract between [the Department] and [the Corporation] require communications between the two entities. Their personnel must confer on the terms of subcontracts which [the Corporation] has authority to recommend or award depending on the size of the subcontract. These communications, contractually appropriate, would become legally prohibited in most instances * * * if [the former employee] should perform these services for [the Corporation]. The purpose of the post-employment provisions is to avoid the 'revolving door' syndrome inherent in which are the potentialities for the use of inside information and for continuing personal influence." OGE Informal Advisory Letter 81 x 35; *see also* OGE Informal Advisory Article 95 x 10; 2 Op. O.L.C. 313 (1978).

We also think it is significant that two related statutes, unlike section 207, contain express exceptions for certain representational activity during the performance of Government contracts. Sections 203 and 205 of title 18, which were enacted originally as part of the same legislation as section 207, expressly exempt certain representational activity "in the performance of work under a grant by, or a contract with or for the benefit of, the United States." 18 U.S.C. 203(e), 205(f). These provisions indicate that Congress knew how to exempt, explicitly, representational activity in the performance of contracts. Perhaps more telling, these provisions also indicate that Congress carefully imposed very significant limitations and safeguards when it did choose to exempt such activity. *See* section 203(e) (applicable only to special Government employees; requires certification from agency head that activity is in national interest; requires publication of certification in **Federal Register**); section 205(f) (same). It is difficult to believe that Congress would have intended a broad exclusion in section 207 without even mentioning the subject, let alone without imposing any limits on the circumstances under which such activity would be permitted.

The proposition that Government contractors may have their own interests in recommending certain courses of action as opposed to others should not be surprising. This concern is even illustrated by newspaper headlines. *See* Ariana Eun Jung Cha, *Shuttle Safety vs.*

Profit: Contractors Had 'Potential' Conflict, Washington Post, August 27, 2003, at A13. In some cases, for example, it may be more efficient or economical for a contractor to develop and communicate one option for the Government, even though the Government's interests might best be served by a fuller development of a range of alternatives, as discussed in example 5 following § 2641.201(e)(2). In any event, as we indicated in advisory opinion 99 x 19, this is not a subject with respect to which OGE can or should make broad pronouncements of safe harbor in the abstract. Therefore, we decline to include a broad exception for all communications required in the course of performing Government contracts and are not modifying this section in the final rule. We note, as we did in the preamble to the proposed rule, that some contract performance communications may well fall within other categories described in § 2641.201(e)(2), as illustrated by examples 3 and 7. *See* 68 **Federal Register** at 7850.

Several commenters, recognizing that OGE might not be in a position to read a broad exclusion for contract performance communications into the statute, asked that OGE at least consider seeking legislation that would create an exception. OGE appreciates these comments and in fact has considered the merits of similar proposals in the context of the agency's review of the effectiveness of the conflict of interest statutes, which is discussed above under "Legislative Recommendations."

Finally, in this final rulemaking OGE has made minor changes to example 1 following section 2641.201(e)(3), in order to better illustrate the concept that changes in circumstances during the course of an originally permissible communication or appearance may render further contact impermissible.

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

One agency objected to the conclusion, in example 7 following proposed § 2641.201(f), that a communication conveyed to a Federal employee through an intermediary who is not a Federal employee would be covered by 18 U.S.C. 207. This issue is addressed above, under "Section 2641.201(d)—Communication or Appearance," in the discussion of communications through a "third party intermediary." OGE would add only that the idea of communications conveyed by means of another person is quite commonplace, as people routinely convey instructions or requests through a messenger of one kind or another.

Therefore, OGE has not followed this agency's recommendation to revise example 7 in the final rule. For similar reasons, OGE does not believe it is necessary, as suggested by this agency and another commenter, to add a reference to third parties in the text of § 2641.201(f)(2), especially as example 7 amply illustrates the concept. It should be remembered also that the definition of "communication," in § 2641.201(d)(1), expressly requires an intent on the part of the former employee that the message be attributed to himself or herself, and example 5 following that provision illustrates this attribution principle in the context of a communication through a third party.

One agency also recommended that example 7 be revised to emphasize that the communication must not only be directed to, but also received by, an agency employee. OGE does not believe this change is necessary either. The basic description of the statutory element, in § 2641.201(f)(2), both as proposed and now final, already uses the language "[d]irected to and received by," and the facts recited in example 7 make clear that the information was conveyed to "the project supervisor, who is an agency employee."

The same agency thought that proposed § 2641.201(f), which includes contacts with independent agencies in the legislative and judicial branches, was inconsistent with the definition of "agency" in § 2641.104, which does not include such legislative and judicial agencies. OGE does not believe that the provisions are inconsistent or should be revised. Although the definition of "agency" in proposed and now final § 2641.104 excludes agencies in the legislative and judicial branches, the relevant provision in § 2641.201(f)(1) expressly covers more than an agency as defined in § 2641.104: In subparagraph (i), it includes any "Agency," but in subparagraph (ii) it also includes any "Independent agency in the * * * legislative, or judicial branch." This is necessary in order to emphasize that representational contacts with independent agencies of the legislative or judicial branches are covered by section 207, which is the point of subparagraph (ii). *See* 5 Op. O.L.C. 194 (1981) (related statute, 18 U.S.C. 205, covers representational contact with agencies of legislative branch).

Another agency commented that example 3 following § 2641.201(f) as proposed should state that the former employee in that scenario knows that one of the persons to which she is directing her communications is a Government employee. The agency stated that the example as written does

not account for the knowledge element in section 207(a). OGE has not followed this recommendation. As discussed elsewhere, it is not OGE's intent to illustrate every element of the statute in each example in the rule, as this would be impractical and would detract from the focus of the examples on individual elements. Moreover, OGE has not attempted to define the general scienter element in any of the prohibitions in section 207. Questions about whether a particular representational activity involves the requisite degree of scienter to warrant prosecution are usually addressed to the Department of Justice.

Finally, in this final rule OGE has made minor modifications to two examples following § 2641.201(f) as proposed. OGE has modified example 5 for reasons discussed below under "Treaties and Trade Agreements." OGE also has modified example 6 by coordinating it with the facts of the previous example, which not only illustrates the relationship among subparagraphs (i), (ii), and (iii) of § 2641.201(f)(3), but also avoids extraneous issues pertaining to base closure decisions.

Section 2641.201(g)—On Behalf of Any Other Person

One agency recommended that OGE create an "exception" in proposed § 2641.201(g) to permit former employees to make certain contacts during the performance of a Government contract. According to this agency, a former employee who is now employed by a Government contractor should be permitted to make communications and appearances before the Government during the performance of the contract, provided that the contractor exerts no control over the former employee in the making of the communication or appearance. Under such circumstances, the commenter thought "it is at least arguable that the communication is not made on behalf of" the contractor.

OGE has not followed this recommendation in the final rule. A contractor's employee is fulfilling his or her duties as an employee when performing the work of the contractor. Under such circumstances, OGE cannot avoid the conclusion that the contractor's employee is acting on behalf of his or her employer. *See, e.g.*, Restatement of the Law (Second) Agency section 2(2) (1958) (servant is agent employed by master to perform service in his affairs whose physical conduct in performance of service is controlled or is subject to right to control by master); *id.*, comment a (servant is species of agent).

Another agency recommended that OGE revise example 3 following proposed section 2641.201(g) in order to emphasize that it is primarily the element of "control" by another that is lacking. OGE agrees and has amended the final sentence in the example in the final rule accordingly.

Section 2641.201(h)—Particular Matter Involving Specific Parties

Basic Concept

OGE received seven comments on proposed § 2641.201(h)(1), which articulates the basic statutory concept of "particular matter involving specific parties." Six agencies objected to the use of the phrase "activity or undertaking" in the last sentence of paragraph (1): "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." These commenters perceived this phrase as an expansion beyond the settled understanding of the scope of the concept of particular matter involving specific parties. As one commenter pointed out, the corresponding provision in the old post-employment regulations lacks this phrase and instead reads: "Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties." 5 CFR 2637.201(c)(1). In the view of these commenters, the proposed rule reflects a shift in focus from specific "proceedings" to a more expansive, and less well-defined, category of "activities or undertakings."

It was not OGE's intention to expand, narrow, or otherwise alter the accepted meaning of a statutory concept that has been fundamental not only to section 207 but also to many other provisions in the conflict of interest laws and ethics regulations for many years. However, in order to dispel any possible confusion concerning the intent of the rule, OGE is replacing the phrase, "involve a specific activity or undertaking," with the language found in the former post-employment regulations (as well as in OGE's current financial conflict of interest regulations at 5 CFR 2640.102(l)): "typically involves a specific proceeding." Nevertheless, in making this change, OGE emphasizes that it does not necessarily agree with several commenters who argued that the statutory definition of "particular

matter," in 18 U.S.C. 207(i)(3), was intended to limit the application of section 207(a) to those types of matters that are specifically enumerated in that statutory definition. Nothing in the legislative history of the Ethics Reform Act of 1989, which added the definition, suggests any intent to contract the scope of section 207(a). More important, the definition starts with the phrase "the term 'particular matter' includes * * *" 18 U.S.C. 207(i)(3) (emphasis added). The word "includes," in a statutory definition, is usually a term of enlargement, rather than limitation, and indicates that other items are includable even if not specifically enumerated. *See* Norman J. Singer, *Sutherland on Statutory Construction* 231 (2000).

Four commenters also raised issues concerning the relationship between the concept of particular matter involving specific parties and the broader concept of "particular matter." These commenters made several related points: The treatment of particular matter involving specific parties should not be more expansive than the statutory definition of particular matter in 18 U.S.C. 207(i)(3); OGE should not mix the concept of particular matter with the narrower category of particular matters involving specific parties; and the rule should make clear that general policy matters are not covered by the concept of particular matters involving specific parties.

Although OGE understands these concerns, some of the commenters' proposals appear mutually inconsistent. For example, if OGE is to ensure that the description of particular matters involving specific parties is no broader than the statutory definition of "particular matter" in section 207(i)(3), it must somehow incorporate that statutory definition into the regulatory definition of particular matter involving specific parties. That is why the second sentence in paragraph (h)(1) begins with the definition of particular matter found in section 207(i)(3). However, in order to emphasize that this statutory category of particular matters is further narrowed by the addition of the phrase "involving a specific party or parties" in section 207(a), the second sentence of § 2641.201(h)(1), goes on to state that "such particular matters *also* must involve a specific party or parties in order to fall within the prohibition" (emphasis added). By drafting the rule in this way, it was OGE's intent to remain faithful to the statutory definition of "particular matter" while at the same time pointing out that the phrase is further limited when used in section 207(a) because of the additional requirement that the particular matter

involve specific parties. Furthermore, OGE thinks it unlikely that readers might be misled to think that policy matters of general applicability would be covered by section 207(a), because the very next paragraph is pointedly titled "Matters of general applicability not covered," and it expressly excludes "[l]egislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability." § 2641.201(h)(2). In response to one comment specifically objecting to the use of the term "rulemaking" in paragraph (h)(1), OGE notes, first, that the statutory definition in 18 U.S.C. 207(i)(3) itself uses this word, and, second, that it has long been accepted that certain rulemakings, although rare, may be so focused on the rights of specifically identified parties as to fall within the ambit of section 207(a), even though most rulemaking proceedings are matters of general applicability beyond the scope of section 207(a). See OGE Informal Advisory Letter 96 x 7, n. 1. In response to all of the comments noted above, however, OGE has made one change in the final rule in order to emphasize the "specific party" limitation: the second sentence of paragraph (h)(1), while still starting with the broader statutory definition of "particular matter," goes on to specify that "only" those particular matters that involve specific parties are covered by section 207(a)(1).

Treaties and Trade Agreements

One agency, whose comment was expressly endorsed by another agency, commented on proposed example 3 following § 2641.201(h)(1), which concludes that a treaty between the United States and a foreign government is a particular matter involving specific parties. See also proposed example 5 to § 2641.201(f); proposed example 1 to § 2641.202(j) (official responsibility for a class of treaty negotiations). The commenter objected that example 3 as proposed implies that all treaties are particular matters involving specific parties, even though treaties may involve the adoption of broad national policies that do not focus on the rights of any specific individual or non-sovereign organization. The basic argument is that treaties often are more analogous to legislation and rulemaking of general applicability, which are not particular matters involving specific parties, than to contracts, which are. Although not the focus of this comment, international trade agreements also raise similar concerns, and OGE did receive one comment from another agency, after the close of the comment period,

recommending that OGE change the analysis in proposed example 3 as it would apply to international trade agreements.

The conclusion in proposed example 3 is based largely on a 1979 opinion issued to the Department of State by the Office of Legal Counsel. See 3 Op. O.L.C. 373 (1979). This opinion, which held that the Panama Canal Treaty was a particular matter involving specific parties, expressly rejected the argument that treaties are more analogous to legislation and general rulemaking than to contracts: "Unlike general legislation or rulemaking, treaties are intended to affect specific participating parties, namely their signatories. In form, treaties closely resemble contracts, which are expressly covered by the statute. They are signed after the type of quasi-adversarial proceedings or negotiations that precede or surround the other types of 'particular matters' enumerated in section 207(a). The phrase 'involving a specific party or parties' has been read to limit the section's concern to 'discrete and isolatable transactions between identifiable parties.' * * * Such a characterization aptly describes the treaty negotiation process." *Id.* at 375. Relying on this same analysis, OGE later published an opinion concluding that "bilateral trade agreements," like bilateral treaties, normally are to be viewed as particular matters involving specific parties. See OGE Informal Advisory Letter 90 x 7.

The commenting agency, however, adduces arguments which it suggests may not have been considered in the 1979 OLC opinion. The agency contends that treaties have a status under international law akin to the status of domestic legislation, in that treaties are the "primary way of creating international legal regimes," in the absence of any international legislative body comparable to the U.S. Congress that could create international legislation. The agency also points out that the U.S. Constitution expressly recognizes the status of treaties as a source of law equivalent to Federal legislation: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land * * *." United States Constitution, Art. VI, cl. 2. In this connection, OGE's own examination indicates that courts have long held that treaties are on the same footing with Federal legislation and in fact supersede prior acts of Congress. See *Foster v. Neilson*, 27 U.S. 253 (1829); *Whitney v.*

Robertson, 124 U.S. 190 (1888); *Alvarez y Sanchez v. U.S.*, 216 U.S. 167 (1910). Finally, the agency cites a more recent unpublished OLC opinion, which concluded that certain deliberations, decisions and actions (including discussions with foreign governments) in response to the 1990 invasion of Kuwait by Iraq were not "particular matters." Based on these arguments, the agency maintains that treaties should at least be evaluated on a case-by-case basis to determine whether they are particular matters involving specific parties.

Although this commenter did not suggest specific criteria for making such determinations, OGE believes it is possible to articulate criteria that could be applied on a case-by-case basis. For example, one might argue that treaties that are narrowly focused on specific properties or territories are more closely akin to contractual exchanges of property. Cf. OGE 96 x 7 (although rulemaking usually does not involve parties, rule establishing health and safety standards for operations at a specific site was party matter). Arguably, this was the case with the Panama Canal treaty itself. By contrast, treaties addressing more general sovereign requirements, such as extradition procedures, might be viewed as more akin to general legislation.

In the case of trade agreements, we believe that similar considerations can apply. Some trade agreements, such as the Uruguay Round Agreements under the auspices of the General Agreement on Tariffs and Trade, may be "adopted by the passage of implementing legislation by both Houses of Congress, together with signing by the President." Opinion of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, November 22, 1994, available at <http://www.usdoj.gov/olc/gatt.htm>. In determining whether trade agreements are more akin to legislation of general application than to contracts, OGE thinks that relevant criteria could include such factors as whether the agreement addresses a wide range of economic sectors and issues. In this connection, OGE notes the difficulties that some agency ethics officials have experienced in the past in determining whether such matters as the various phases of World Trade Organization negotiations over a wide range of subjects are particular matters involving specific parties and, if so, how to define the scope or limits of any such matters. These matters often involve multifaceted discussions among representatives of numerous countries in a decision-making process that more

closely resembles legislative policymaking than contracting.

Therefore, OGE is adding a new sentence, at the end of § 2641.201(h)(2) of the final rule, to provide guidance with respect to international agreements between sovereigns, such as treaties and trade agreements. In this final rule, OGE has moved proposed example 3 following § 2641.201(h)(1) to be a new example 7 following § 2641.201(h)(2), and the example text has been revised to follow more closely the facts in the OLC Panama Canal opinion. OGE also has added new example 8 following § 2641.201(h)(2) and has made related revisions to example 5 following § 2641.201(f) and example 1 following § 2641.202(j).

Parties During Preliminary or Informal Stages

Three agencies commented on the proposed guidance in § 2641.201(h)(4) concerning when a particular matter first may be said to involve specific parties. The comments particularly concerned the discussion of contracts in the last sentence of proposed paragraph (h)(4), as well as examples 4 and 5. The proposed rule stated that matters such as contracts “ordinarily” involve specific parties when expressions of interest are first received by the Government, but that, “in unusual circumstances,” a prospective contract may involve specific parties even earlier “if there are sufficient indicia that the Government has specifically identified a party.” Two agencies objected that this provision and the accompanying examples do not provide adequate guidance as to what might constitute “sufficient indicia” that the Government has identified parties prior to the expression of interest by those parties. These agencies believed that ethics officials and others would be led to conclude that a potential contract involves specific parties virtually any time the Government has conducted purely internal discussions about the possibility that a particular potential contractor might be particularly qualified to perform the work. In the view of these commenters, it will often be the case that the Government can identify potential contractors who might bid and who might be particularly well-qualified, and thus the “ordinary” rule that the Government must receive expressions of interest would be swallowed by the exception. Another agency indicated that sole source procurements are a good example of a contract that might be said to involve specific parties even before an expression of interest is received. Along the same lines, another agency

suggested that internal discussions about a potential sole source procurement would be a clearer example than proposed example 5 of a situation where specific parties have been identified prior to any expression of interest by a prospective contractor.

OGE did not mean to suggest in the proposed rule that parties are involved in a potential contract merely because the Government might be able to identify potentially qualified bidders in advance. OGE intended, in proposed example 5, to provide a number of factors indicating that a particular potential contractor was more directly involved because of work on a prior contract that is “intimately related” to the potential new contract. OGE recognizes, nonetheless, that the provision may be difficult to apply. Consequently, OGE is making two changes to the proposed rule in this final rulemaking. First, OGE is replacing proposed example 5 with a new example that deals specifically with a sole source procurement, which is determined to be a matter involving specific parties even prior to any expression of interest on the part of the prospective sole source contractor being considered internally by the Government. Second, OGE is making minor revisions to the last sentence of § 2641.201(h)(4) as proposed, in order to refer to sole source procurements, as well as other procurements (and prospective grants and agreements) in which the Government explicitly may identify a specific party prior to the receipt of a proposal or expression of interest. By making these changes, OGE does not mean to suggest that a sole source procurement is necessarily the only set of circumstances in which specific parties may be identified prior to an expression of interest in the contract, but it is probably the one most often encountered.

Same Particular Matter Involving Specific Parties

Eight agencies commented on proposed § 2641.201(h)(5), which provides guidance on determining whether two particular matters involving specific parties are the same.

Five DOD agencies raised related questions concerning the treatment of multi-contract programs. By “multi-contract program,” the commenters appear to mean a large Government program, such as the development of a new generation of military aircraft, that is supported by a number of contracts to develop discrete aspects of the project, such as separate contracts to develop the engine, body, electronics, etc. In the view of these agencies, each of the

separate contracts should be viewed as a separate particular matter involving specific parties, rather than simply as parts of the same project, viewed as one comprehensive particular matter involving specific parties.

Depending on how the project is structured, OGE agrees with this point. OGE does not necessarily equate “Government program” with “particular matter involving specific parties.” For one thing, some Government programs are not even, in and of themselves, particular matters involving specific parties. For example, a Government program to understand the causes of a particular disease is not, in and of itself, a particular matter involving specific parties, even though the program may involve several grants, contracts or cooperative agreements all designed to support or implement different aspects of the overall program. *See, e.g.*, OGE Informal Advisory Letter 80 x 9; 5 CFR 2637.201(c)(1) (example 4).

Furthermore, OGE generally views separate contracts as being separate particular matters involving specific parties, absent either some indication that one contract directly contemplated the other contract or other circumstances indicating that both contracts are really part of the same proceeding involving specific parties. *See id.*; 5 CFR 2637.201(c)(4) (example 1). Although a number of commenters raised questions about whether OGE’s 2002 Yucca Mountain opinion has opened the door to a general “doctrine of convergence,” whereby multiple contracts in support of a Government project can be viewed as being merged into a single “super contract,” OGE does not agree with that interpretation of the opinion: We concluded there that all of the contracts in that case were in support of one adjudicatory proceeding, and work produced under those contracts was directly involved in the ensuing adjudication, such that former employees who participated personally and substantially in the support contracts could not be permitted to represent private parties in the adjudication. *See* OGE Informal Advisory Letter 02 x 5, at 9 and n. 7. Not only did Yucca Mountain involve a very unique set of circumstances, but nothing in that opinion indicates that separate contracts must be viewed as being part of the same particular matter involving specific parties where those contracts are not directly in support of the same proceeding involving specific parties.

Nevertheless, it is not clear from the examples proffered by the commenters exactly what the relationship is between the separate contracts involved in the particular Government programs. If, for

example, the so-called “super contract” is a prime contract involving oversight of several subcontracts, it could be problematic to view the subcontracts as being separate particular matters from the prime contract, depending on the circumstances. *Cf.* OGE Informal Advisory Letter 82 x 2. Because the exact scenarios are not specified, and the same particular matter determination would have to depend on an examination of the circumstances of each situation, OGE does not believe this area is ripe for any general standard in the post-employment regulations at this time.

However, in response to a related comment from another agency, OGE is making one change in the final rule. This commenter recommended that OGE add a new sentence at the end of proposed § 2641.201(h)(5) indicating that new contracts generally will be viewed as being separate particular matters from each other. The same agency also recommended the addition of an example illustrating that a new contract, even if awarded to an existing contractor with no major changes to the prior contract, is a new particular matter. OGE generally agrees with this recommendation. Therefore, OGE has reorganized § 2641.201(h)(5) in this final rule by designating the first part of the text as proposed, dealing with the same particular matter generally, as new subparagraph (i) and by creating a new subparagraph (ii), emphasizing several considerations especially relevant in the case of contracts and other agreements. The new subparagraph adds, among other things, the following: “Generally, successive or otherwise separate contracts (or other agreements) will be viewed as different matters from each other, absent some indication that one contract (or other agreement) contemplated the other or that both are in support of the same specific proceeding.” OGE thought it necessary to include the qualifying clause at the end of the latter sentence because OGE has encountered various situations in which an initial contract contemplated additional contracts, *see* OGE 80 x 9, one contract was in support of agency operations in connection with another contract, *see* OGE 99 x 19, or successive support contracts were deemed inseparable from the same underlying adjudication, *see* OGE 02 x 5. We also agree that a new example 2 illustrating the more typical “successive contract” question would be helpful, and we are including the recommended example in the final rule, with certain modifications.

The new subparagraph (ii) also addresses another related issue that was

raised by several commenters: The treatment of what some have called “umbrella” contracts, which involve multiple task orders or delivery orders placed against an existing contract. Several DOD agencies referred to the procurement mechanism for indefinite delivery contracts, outlined in the Federal Acquisition Regulation at 48 CFR 16.500–16.506, as one example. As described by these agencies, such contracts often involve a “broad scope of work encompassing a wide geographical area.” Under such contracts, according to these agencies, “the general nature of the work (*e.g.*, environmental remediation) and contract terms will remain the same,” while “the precise timing, quantity, location, and specific performance of the work may vary from delivery order to delivery order.” In at least some cases, the actual scope of work under the task or delivery orders is separately negotiated by different agency offices with different needs, sometimes even with multiple contractors competing for work under the same task or delivery order.

In response to these comments, OGE has added subparagraph (ii)(c) to the final version of § 2641.201(h)(5). This provision states OGE’s general view that a contract is almost always a single particular matter involving specific parties. However, the provision recognizes that, in compelling circumstances, an umbrella contract may be of such magnitude and cover such a large scope of work that it could be divided into individual particular matters involving specific parties. Accordingly, the provision acknowledges that agencies may determine that such a contract is divisible into separate particular matters involving specific parties where articulated lines of division exist. The regulation lists various considerations for agencies to take into account when applying the previously described factors in determining whether two particular matters involving specific parties are the same. These agency determinations may be made in consultation with OGE and, if more than one agency is involved, other affected agencies.

OGE wants to emphasize that the treatment of certain large umbrella contracts under this rule is a special case, owing to the use of distinct task or delivery orders that sometimes can involve very different circumstances. In this connection, it is also relevant that individual task or delivery orders sometimes are viewed as having the attributes of contracts in and of themselves. *See, e.g.*, Comptroller

General Decisions B–278404.2 (1998) (task orders are “contracts” within the overall contract, under the FAR definition of contract at 48 CFR 2.101); B–277979 (1998) (delivery order is a “contract” under FAR definition of contract). Therefore, nothing in this provision should be taken as authority for dividing contracts generally, or for dividing other kinds of particular matters involving specific parties, such as lawsuits or enforcement actions.

New examples 7 and 8 have been added to § 2641.201(h)(5) of the final rule to illustrate situations in which it would be justifiable for an agency to make the determination that an umbrella contract should be divided into individual particular matters involving specific parties. Example 7, the substance of which was taken from submitted comments, also includes a caution that anyone participating personally and substantially in the overall contract will be deemed to have also participated personally and substantially in all particular matters involving specific parties that result from an agency determination to divide such contract. The basis for this conclusion is that each task or delivery order is subject to the terms and conditions of the overall contract. *See, e.g.*, 48 CFR 52.216–18.

Three agencies proposed identical language for a new example to illustrate that a contract “may become a different particular matter involving specific parties as a result of changes in the work to be performed under the contract, not as a result of a specific milestone, such as a contract modification.” OGE has not made the recommended change in the final rule. OGE already has provided several “contracting” examples following § 2641.201(h)(5). The examples cannot illustrate every type of contract issue that may arise under that section, nor are those examples that are included intended to be exhaustive. Another agency proposed a fact-specific and agency-specific example to illustrate when two proceedings related to antitrust issues are to be viewed as the same particular matter. Again, OGE believes that an additional example is unnecessary at this time, in view of the relatively large number of examples already included.

One agency recommended that re-numbered example 6 (proposed example 5), which concerns the relationship between certain wiretap applications and subsequent prosecutions, be rewritten with the assistance of the Department of Justice in order to make the example more clear and detailed. OGE has not changed the example. This example, in its present

form, has been in the prior post-employment regulations for over two decades, and we are not aware that it has created any particular difficulties during that time. *See* 5 CFR 2637.201(c)(4) (example 2). Moreover, the prior post-employment regulations, like the present regulations in part 2641, were developed in consultation with the Department of Justice. *See* 5 U.S.C. app. section 402(b)(2); Executive Order 12731, section 201(c) (1990); 5 CFR 2637.101(b). Also in connection with example 6, we note that another agency recommended that OGE provide a new example following proposed § 2641.201(h)(3) to illustrate that the same parties need not always be present for a matter to be deemed the same particular matter involving specific parties. We believe that example 6 to § 2641.201(h)(5) already illustrates this point, and, in fact, the example recommended by this agency is very similar to example 6. Therefore, we are not including the recommended new example in the final rule.

Section 2641.201(i)—Personal and Substantial Participation

OGE received several comments on aspects of the proposed provision dealing with personal and substantial participation. One agency thought it was potentially confusing to include the phrase, “to purposefully forbear in order to affect the outcome of a matter,” in the definition of participation. *See* proposed § 2641.201(i)(1). The agency thought that this language might suggest that every act of forbearance, including recusal from a matter, could constitute personal and substantial participation in a matter. OGE has not changed the text of proposed § 2641.201(i)(1) in adopting it as final. For one thing, the prior post-employment rule had similar language concerning the subject of inaction, and we are not aware that this language created any particular confusion over the last two decades. *See* 5 CFR 2637.201(d)(3). Moreover, the proposed rule makes clear that definition includes only “purposeful” forbearance with the object to “affect the outcome of the matter,” which plainly does not include every kind of inaction. OGE also does not believe that such purposeful forbearance reasonably can be confused with recusal, as the latter constitutes the removal of the employee from a matter, whereas the former involves intentional inaction in order to affect a matter to which an employee remains assigned. At the recommendation of this agency, however, OGE has provided a new example to this section in the final rule to illustrate what is meant by purposeful forbearance to affect the outcome of a

matter. New example 7 pertains to the director of an office who must personally sign off on every application for a certain type of agency assistance. A particular application comes across her desk, but she intentionally takes no action on it because of her belief that the application may raise difficult policy concerns for her agency at this time. As a consequence of her inaction, resolution of the application is deferred indefinitely. The example concludes that the employee has participated personally and substantially in the matter.

Another agency commented that example 2 following proposed § 2641.201(i) did not contain sufficient facts to support the conclusion that the attorney in that scenario, who provided advice concerning discovery strategy in a lawsuit, participated substantially in that matter. OGE does not believe that further detail is needed and has not modified the text of the example in this final rule. Advice concerning discovery strategy requires the exercise of discretion and professional judgment and does not concern an aspect that is merely peripheral to a lawsuit, but rather pertains to an integral and important part of the litigation process.

One agency commented on example 4, which concludes that a supervisor did not participate in any particular matter merely by checking on the status of a subordinate’s work on all matters of a certain type without commenting on any particular matter. The agency recommended that OGE state more specifically that the supervisor did not participate “substantially” in any particular matter. OGE agrees that the agency’s recommendation more fully describes the application of the statutory element and has revised the wording of the example accordingly.

Section 2641.201(j)—U.S. Is Party or Has Direct and Substantial Interest

One agency commented on OGE’s proposed treatment of what it means for the United States to have a direct and substantial interest. This agency stated that it frequently must advise former employees concerning representational activity in various antitrust proceedings and that it has found the example dealing with antitrust proceedings in the prior post-employment regulations to be particularly helpful. *See* 5 CFR 2637.201(c)(5) (example 1). The agency noted that the proposed rule did not include this example and requested that OGE restore the example to § 2641.201(j). OGE agrees that the particular example from the old post-employment regulations is useful, not only for the reasons stated by the

commenter, but also because it illustrates circumstances in which an agency can be said to have a direct and substantial interest in a matter involving purely private parties, which is a question that arises periodically. *See* OGE Informal Advisory Letter 94 x 7 (relying on example 1 to 5 CFR 2637.201(c)(5)). Therefore, OGE is adding this example to the final rule.

Section 2641.202—Two-Year Restriction Concerning Matters Under Official Responsibility

Four agencies commented on proposed § 2641.202, interpreting 18 U.S.C. 207(a)(2), the two-year restriction on representation of others in connection with a particular matter involving specific parties with respect to which the former employee had official responsibility.

One agency commented on example 7 following proposed § 2641.202(j), which illustrates when an employee temporarily acting as head of an office does not acquire official responsibility for all matters pending in the office. This commenter recommended that OGE add an additional scenario to the example, positing that the acting official actually assigned a matter to a subordinate during this period of temporary service. OGE has not made this change in the final rule, as it would raise complicated questions, extraneous to the purpose of the example, concerning whether, or under what factual circumstances, the assignment of work might constitute personal and substantial participation, not just official responsibility.

Another agency objected that example 4 following proposed § 2641.202(j) is not a good illustration of the knowledge requirement in section 207(a)(2), which is set out in proposed § 2641.202(j)(7). The same agency also recommended that the basic definition of “official responsibility” in proposed § 2641.202(j)(1) should specify that nonsupervisory employees have no official responsibility for their own work. Example 4 was not intended to address the issue of knowledge of one’s official responsibility, and, in fact, makes no reference to this subject. Moreover, § 2641.202(j)(1) already does state that “[a] nonsupervisory employee does not have official responsibility for his own assignments within the meaning of section 207(a)(2).”

A different agency objected to the latter provision and found it illogical to say that a nonsupervisory employee does not have official responsibility for his or her own assignments. OGE does not agree with this comment. As described by the Senate Judiciary

Committee in connection with the 1962 act, the rationale for the restriction is that there is “a distinct possibility of harm to the Government when a *supervisory employee* may sever his connection with it one day and come back the next seeking an advantage for a private interest in the very area where he has just had *supervisory functions*.” S. Rep. 2213, 87th Cong., 2d Sess., 1962 U.S.C.A.N. 3861 (emphasis added). The proposed rule, by limiting “official responsibility” to persons with supervisory functions, is consistent with the legislative purpose.

The same agency also objected to two other aspects of the treatment of official responsibility. First, the agency argued that the list of sources that ordinarily determine the scope of an employee’s official responsibility—i.e., “those functions assigned by statute, regulation, Executive order, job description, or delegation of authority”—is too limited and ignores the reality of the workplace. See § 2641.202(j)(1). The commenter, however, did not suggest any additional or alternative sources of official authority, or any other method for determining the scope of official authority. More important, the language in question is virtually identical to the language that has been used in the prior post-employment regulation for over two decades, and OGE is not aware that this provision has proven inadequate. See 5 CFR 2637.202(b)(2). Therefore, as noted, OGE is not changing § 2641.202(j)(1) in this final rule.

Second, the agency objected to proposed § 2641.202(j)(5), which indicates that an employee’s self-disqualification or avoidance of personal participation in a matter is not sufficient to remove the matter from his or her official responsibility. The agency recommended, instead, a kind of totality-of-the-circumstances test that would recognize recusal as an appropriate means to limit official responsibility in some cases. OGE has not made the recommended change to this section of the final rule. A very similar provision concerning self-disqualification has been a part of the post-employment rules since 1979, and OGE has seen no indication during that time that this approach has, as the commenter predicted with respect to the proposed rule, done “serious harm to the Executive Branch’s continuing problems in recruiting and retaining talented individuals from outside of Government to serve in managerial positions.” See 5 CFR 2637.202(b)(5). Moreover, the court in *United States v. Dorfman* specifically endorsed OGE’s approach with respect to self-

disqualification and added that a contrary rule would mean that employees “could selectively recuse themselves from particular matters actually pending under their official responsibility enabling them to participate directly in those matters a year hence,” thus evading the intent of Congress “to avoid even the appearance of a public office being used for personal or private gain.” 542 F. Supp. 402, 409–410 (N.D. Ill. 1982) (quoting S. Rep. 170, 95th Cong., 2d Sess. 32 (1977)).

One agency acknowledged that example 9 following proposed § 2641.202(j) was intended to illustrate the effect of a break in Government service on the application of 18 U.S.C. 207(a)(2), as discussed in the preamble to the proposed rule at 68 FR 7857. However, this agency recommended that the effect of a break in service be discussed in the regulatory text of this provision as well. The agency made a similar comment in connection with proposed § 2641.204, concerning the effect of a break in service on the application of 18 U.S.C. 207(c), as illustrated by example 3 following proposed section 2641.204(g). OGE has not made the recommended changes to these sections in the final rule. The effect of a break in service is a subject relevant to all of the prohibitions discussed in the rule, not just the prohibitions discussed in §§ 2641.202 and 2641.204. Consequently, the requirement that an individual must have “completed a period of service as an employee” is already treated generally in the definition of “former employee” in § 2641.104 and is illustrated in example 3 following that definition, which discusses “break in service.” In any event, we believe that the examples cited by the agency adequately illustrate the application of 18 U.S.C. 207 in situations involving a break in service. Moreover, as noted above, OGE has revised the definition of “Government service” in § 2641.104 of the final rule to illustrate the effect of a break in service.

Finally, OGE has modified example 1 following § 2641.202(j), for reasons discussed above under “Treaties and Trade Agreements.”

Section 2641.203—One-Year Restriction Concerning Trade or Treaty Negotiations

One agency commented that it was not immediately clear, from the language of proposed § 2641.203(a), whether “on the basis of covered information” modifies only “advise” or also modifies “represent” and “aid.” This commenter recommended that the

rule be revised to track the language of the statute more closely by placing the phrase “on the basis of covered information” before “represent, aid, or advise,” thus clarifying that the phrase modifies all three verbs. It was not OGE’s intention, in proposed § 2641.203(a), to go beyond a recitation of the basic statutory prohibition. As discussed in the preamble to the proposed rule, 68 FR 7857, the present rule is intended only to provide a brief introductory summary of the statute, and paragraphs have been reserved for additional guidance in the future. Therefore, OGE is making the recommended change to § 2641.203(a) of the final rule, in order to follow the statutory language more closely.

Section 2641.204—One-Year Restriction for Senior Employees

Proposed section 2641.204 interprets various elements of the so-called “one-year cooling-off period” for senior employees. OGE received comments on several parts of this provision, discussed below. As noted above, in connection with the definition of “senior employee” in § 2641.104, 18 U.S.C. 207(c) has been amended twice since the proposed rule was developed, and those amendments are implemented in the final definition of “senior employee.”

Section 2641.204(c)—SGEs and IPAs

Five agencies, including four DOD components, commented on proposed § 2641.204(c), which concerns special issues arising in the application of section 207(c) to special Government employees (SGEs) and persons assigned to the Federal Government under the Intergovernmental Personnel Act (IPAs).

With respect to SGEs, one agency commented on the statement in the preamble to the proposed rule that “certain de minimis activities performed by an SGE on a given day might not be sufficient to count that day, under limited circumstances.” 68 FR 7858. The commenter agreed with this statement, but recommended that it be incorporated into the text of § 2641.204(c)(1). OGE has not changed the text of this section in the final rule. Delineation of the circumstances in which certain de minimis activities would not be sufficient to count as a day of service would require an extended explication that is not well-suited to the text of this provision. Moreover, the question of when to count a particular day of service for an SGE is not peculiar to section 207(c), and we believe this issue is better addressed in more general guidance concerning the ethical requirements applicable to SGEs. See

OGE DAEogram DO-07-002, available on OGE's Web site at http://www.usoge.gov/pages/daeograms/dgr_files/2007/do07002.pdf.

With respect to IPAs, four DOD components made essentially the same point concerning proposed § 2641.204(c)(2). These commenters objected to the fact that the proposed rule makes the applicability of section 207(c) turn on the amount of pay received by IPA detailees and appointees, without sufficient regard for either the source of pay (i.e., Federal or non-Federal) or the level of responsibility associated with the particular position. OGE has not changed the rule in response to these comments. As explained in the preamble to the proposed rule, 68 FR 7858, § 2641.204(c)(2) merely implements an opinion on this subject issued by the Office of Legal Counsel, Department of Justice. 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, available at <http://www.usdoj.gov/olc/doe207.htm>.

One commenter also objected that the focus on an individual's pay, for purposes of applying section 207(c) to IPA personnel, appears to be at odds with OGE's recent guidance concerning the circumstances in which IPA detailees are required to file a public financial disclosure statement, under section 101 of the Ethics in Government Act of 1978 (EIGA), as amended. See OGE Informal Advisory Memorandum 02 x 11. As OGE has explained on other occasions, the language and legislative history of the financial disclosure provisions in EIGA differ from those of 18 U.S.C. 207(c), and different approaches to coverage are warranted. See OGE Informal Advisory Letter 98 x 2.

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

One commenter suggested that proposed § 2641.204(g)(1)(iii), which states that a former senior employee may not contact "an individual detailed to the former senior employee's former agency from another agency," is inconsistent with a provision in proposed § 2641.201(f), which states that the permanent restriction of section 207(a)(1) applies to contacts with any employee who is detailed to the various entities listed in proposed § 2641.201(f).

The reference to detailees in proposed § 2641.204(g)(1)(iii) was intended to implement a statutory provision that has particular significance in connection with the senior employee restriction. Specifically, § 2641.204(g)(1)(iii) implements 18 U.S.C. 207(g), which states 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 departments, agencies, or such entities." Proposed § 2641.204(g)(1)(iii) therefore emphasized that a detailee from another agency is also deemed to be an employee of the former senior employee's former agency. However, to clarify that the rule is intended to implement section 207(g), OGE is revising the provision in this final rule to track the language of the statute more closely. The revised final rule provision also indicates that detailees from the legislative and judicial branches are included.

For similar reasons, OGE is making a minor change to § 2641.204(g)(3)(ii). As proposed, this provision stated that a communication or appearance is to or before an employee of the former senior employee's former agency if, inter alia, it is directed to and received by "an employee in his capacity as an employee of a former senior employee's former agency" (emphasis added). OGE is concerned that the highlighted language could be interpreted as indicating that an employee of the former senior employee's agency may be contacted if that employee is serving on a detail to a different agency and is acting in his capacity as a detailee to that agency. Such an interpretation would be inconsistent with 18 U.S.C. 207(g), as explained in OGE Informal Advisory Letter 03 x 9, which concluded that the representational bar applies to contacts with current employees of the former senior employee's former agency, even if those employees happen to be on a detail to another agency in which the former senior employee did not serve. Therefore, the final rule simply uses the phrase, "in his official capacity," without the further limitation that the contact be made with an employee specifically in his capacity as an employee of the former senior employee's former agency.

Another commenter asked why proposed § 2641.204(g)(4) repeated the "public commentary" provision from proposed § 2641.201(f)(3), even though other elements common to the senior employee restriction and the permanent restriction are handled simply by cross-

references to § 2641.201. The treatment in § 2641.204(g)(4) actually differs from the provision in 2641.201(f)(3) in an important respect. Whereas the permanent restriction covers contacts with employees of a broad range of Federal entities, the senior employee cooling-off period applies only to contacts with the individual's own former agency. Therefore, the provisions in § 2641.204(g)(4) contain references to the former agency, in place of the broader language found in § 2641.201(f)(3).

Section 2641.205—Two-Year Restriction for Very Senior Employees

Two agencies commented on proposed § 2641.205(g), specifically the conclusion, which is reflected in the proposed explanatory note to paragraph (g) and in proposed example 5 to § 2641.205, that a former very senior employee is considered to be communicating with an official described in 5 U.S.C. 5312-5316 if the communication is made 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. Both commenters objected to this conclusion on the same grounds on which they objected to similar provisions in proposed § 2641.201(d) and (f), i.e., they disagreed that a prohibited communication could include a communication conveyed through a third party to an officer or employee of the United States. As discussed in the preamble to the proposed rule, 68 FR 7860, the principle that section 207 may cover certain communications conveyed through a third party is supported by a 2001 opinion issued by the Office of Legal Counsel. 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>.

The rationale is further discussed above, under "Section 2641.201(d)—Communication or Appearance" and "Section 2641.201(f)—To or Before an Employee of the United States." For these reasons, OGE has retained the explanatory note to paragraph (g) of § 2641.205 and example 5 to that section in this final rule. OGE has, however, made minor changes to example 5, including an additional sentence at the end of the example, to emphasize that the circumstances indicate the former very senior employee intends that the information he provides to the subordinate will be conveyed directly to

the Secretary of Labor and attributed to the former senior employee; these changes are consistent with the language of the explanatory note.

Finally, subsequent to the publication of the proposed rule, Congress amended 18 U.S.C. 207(d) to extend the cooling-off period for very senior employees from one year to two years. See Public Law 110–81, § 101(a), September 14, 2007. Therefore, § 2641.205 has been modified in the final rule to replace all references to a one-year cooling-off period with references to a two-year period. The two-year restriction provided in the amendments to 18 U.S.C. 207(d) is applicable to very senior employees who “who leave Federal office or employment to which such amendments apply on or after * * * December 31, 2007.” Public Law 110–81, section 105(a). Very senior employees who left office or employment prior to this effective date remain subject to the previous one-year restriction.

Section 2641.206—Foreign Entity Restriction

Three DOD components submitted virtually identical comments on proposed § 2641.206, pertaining to the foreign entity restriction found in 18 U.S.C. 207(f). They pointed out that recitation of the basic prohibition, in proposed § 2641.201(a), does not reproduce the statutory language limiting the restriction on representation of foreign entities to representation before “an officer or employee of any department or agency of the United States.” The omission of the language cited by these commenters was inadvertent, and OGE agrees that the rule as proposed should be changed and has done so in this final rule to reflect more clearly the statutory language. It should be noted, however, that this change will not affect the final rule’s treatment of the separate prohibition on aiding and advising foreign entities.

Additionally, OGE has modified proposed § 2641.206(a) in this final rule to reflect subsequent guidance provided by the Office of Legal Counsel in a 2004 opinion issued to OGE. Memorandum of Renée Lettow Lerner, Deputy Assistant Attorney General, for Marilyn L. Glynn, Acting Director, OGE, June 22, 2004, available at http://www.usoge.gov/pages/laws_regs_fedreg_stats/lrfs_files/othr_gdnc/olc_06_22_04.pdf.

This opinion concludes that 18 U.S.C. 207(f) prohibits covered former employees from representing a foreign entity before Members of Congress. The opinion cites the language in section 207(i)(1)(B), which indicates that

Members of Congress are included in the term “officer or employee” for purposes of describing the persons to whom representational contacts may not be made under section 207(f). In this connection, the opinion also concludes that the term “department,” as included in the language of section 207(f) prohibiting representational contact with an “officer or employee of any department or agency,” includes the legislative department, *i.e.*, the legislative branch of the Federal Government. OGE has reworked the final rule consistent with the OLC opinion.

Section 2641.207—Information Technology Exchange Program Assignee Restriction

The final rule includes a new section, § 2641.207, which provides a brief description of a new restriction in 18 U.S.C. 207(l) that became effective after the proposed rule was published. Section 209(c) of the E-Government Act of 2002, Public Law 107–347, December 17, 2002, created the Information Technology Exchange Program. Under this new program, an agency and a “private sector organization” may agree to the assignment of certain information technology personnel from the private sector organization to the agency for a period of time. Section 209(d)(3) of the Act amended 18 U.S.C. 207 by adding a new section (l), which applies to former assignees to an agency under the program. Specifically, section 207(l) prohibits these former assignees, for one year after the termination of their assignment, from representing or aiding, counseling or assisting in representing any other person in connection with any contract with their former agency.

Section 2641.207 is not intended to provide comprehensive guidance with respect to 18 U.S.C. 207(l). Rather, it is intended to provide a basic description of the restriction, and consequently paragraphs (d) and (e) are reserved. As OGE and other officials in the executive branch acquire more experience with the operation of the Information Technology Exchange Program and the post-employment issues related to former private sector assignees under the program, it is expected that OGE will revisit the reserved provisions.

Subpart C—Exceptions, Waivers and Separate Components

Section 2641.301—Statutory Exceptions and Waivers

Section 2641.301(a)—Action on Behalf of United States

Section 2641.301(a) interprets both the exemption in 18 U.S.C. 207(j)(1) for

acts done in carrying out official duties on behalf of the United States and the parenthetical exemption, found in sections 207(a), (b), (c), and (d), for communications and appearances on behalf of the United States. One agency recommended that the rule as proposed be revised to permit certain communications and appearances made by a former employee during the performance of a contract with the Government. Specifically, this agency argued that communications made to perform contracts pertaining to “internal agency operations” would be analogous to the other types of activities recognized to be on behalf the United States in proposed § 2641.301(a)(2).

For the reasons discussed above, under “Section 2641.201(e)—Intent to Influence,” we do not view contacts made during the performance of a Government contract to be free from the concerns at which section 207 is directed. As we indicated in that earlier discussion, the Government and its contractors have their own interests in the performance of a contract, which are not necessarily identical. Moreover, as we discussed in the preamble to the proposed rule, not all contractors agree to represent or act on behalf of the Government. See 68 **Federal Register** at 7862. Accordingly, with the exception of the one change discussed in the next paragraph, OGE has not modified the text of § 2641.301(a) in adopting it as final in this rulemaking document.

We have made one change, however, to the language of § 2641.301(a)(2)(ii)(1). As proposed, this provision required that the activity be undertaken 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” (emphasis added). The final rule omits the phrase pertaining to fiduciary services. OGE has made this change so that this provision will more closely parallel the provision in the rule in which OGE states what it means for a former employee to act “on behalf of” another person, § 2641.201(g)(1). Although the latter provision describes a number of circumstances that no doubt involve fiduciary duties, the rule does not require a showing that a former employee has fiduciary duties in order to be acting on behalf of another person. Since the same statutory language is at issue in § 2641.301(a)(2), OGE has concluded that it is unnecessary to include the fiduciary duty phrase in this provision. The practical effect of this change may not be great, as we would expect that most instances in which there is a specific agreement to provide

representational services to the United States will involve some kind of fiduciary relationship, such as a contract to provide legal services to the Government.

Another agency proposed that OGE add a new example following § 2641.301(a) to illustrate that the representation of a “co-party,” such as a co-defendant in a lawsuit in which the United States also is a defendant, does not constitute acting on behalf of the United States. This agency reported that former employees frequently assume, erroneously, that they may represent a co-party with the United States because they do not see this as switching sides. OGE certainly agrees that the representation of a co-party does not constitute acting on behalf of the United States. OGE is not sure, however, how frequently this is misunderstood. Moreover, the potential for misunderstanding is diminished by § 2641.301(a)(2)(B), which states that a “former employee will not be deemed to engage in an activity on behalf of the United States merely because * * * he or the person on whose behalf he is acting may share the same objective as the Government.” OGE also notes that there are already seven examples following paragraph (a) of § 2641.301. Therefore, OGE has determined that the proposed new example is not necessary and has not made the recommended change in this final rule.

Section 2641.301(b)—Acting as Elected Official of State or Local Government

One agency commented on proposed § 2641.301(b), which interprets the part of 18 U.S.C. 207(j)(1) that excepts acts done in carrying out official duties as an elected official of a State or local government. The commenter objected to example 2 following the proposed provision. Example 2 states that a former employee who serves in a non-elective position with a State government is not eligible for this exception. The commenter stated that the proposed communication in that example is otherwise permissible under a different exception—18 U.S.C. 207(j)(2)(A), as implemented by proposed 5 CFR 2641.301(c)—and recommended that OGE use a different scenario that is not covered by some other exception. OGE does not agree that the scenario in proposed example 2 would be covered by the exception in section 207(j)(2)(A) and, therefore, is not changing this example in the final rule. In this example, the individual had participated personally and substantially as a Federal employee in the decision to award a grant to a state for a particular construction project. The

exception in section 207(j)(2)(A) does not apply to the permanent restriction on representation of others in connection with particular matters involving specific parties in which the former employee participated personally and substantially.

Section 2641.301(c)—Representation of Specified Entities

Two agencies commented on proposed section 2641.301(c), which interprets 18 U.S.C. 207(j)(2), the exception to the prohibitions of section 207(c) and (d) for representation of certain specified entities. One agency requested that OGE provide an additional example to illustrate the scope of the exception for representation as an employee of an “accredited, degree-granting institution of higher education, as defined in section 101 of the Higher Education Act of 1965 [20 U.S.C. 1001].” Section 207(j)(2)(B). Specifically, this commenter requested a new example “clarifying” that private colleges are included in the definition. OGE does not believe that an additional example is necessary and has not added one in the final rule. The definition of institution of higher education, which is referenced in both the rule and the statute, makes clear that both “public” and “other nonprofit” institutions are covered. 20 U.S.C. 1001(a)(4). Moreover, if only public institutions, and not private colleges, were included in section 207(j)(2)(B), the provision would be surplusage, as section 207(j)(2)(A) already covers “an agency or instrumentality of a State or local government.”

As discussed above, under “Section 2641.301(b)—Acting as Elected Official of State or Local Government,” another agency suggested that the exception in section 207(j)(2)(A) would cover activity otherwise prohibited by the permanent restriction in section 207(a)(1). It bears repeating that section 207(j)(2)(A)—unlike the exception for actions as an elected State or local government official in section 207(j)(1)—is not an exception to the permanent restriction or any other prohibition applicable to executive branch personnel besides the cooling-off provisions in section 207(c) and (d).

Section 2641.301(d)—Uncompensated Statements Based on Special Knowledge

Two agencies commented on § 2641.301(d) as proposed, interpreting the exception in 18 U.S.C. 207(j)(4). One agency objected that the proposed definition of “statement” is too narrow. Proposed § 2641.301(d) provides that a “statement for purposes of this

paragraph is a communication of facts directly observed by the former employee.” The commenter asserted that this definition would preclude certain “innocent” communications that are not, strictly speaking, facts that the former employee observed, “such as a statement defining a technical principle or asserting that the principle is widely interpreted a certain way.”

OGE acknowledges that its interpretation of the exception for statements based on special knowledge is relatively narrow, but this is consistent with the history of the provision. As discussed more fully in the preamble to the proposed rule, this exception was originally provided in the 1978 Act to mitigate the impact of the new senior employee cooling-off restriction, which then prohibited even self-representation. 68 **Federal Register** 7863. After section 207(c) was amended in 1989 to remove the ban on self-representation, the need for reliance on the special knowledge exception was greatly reduced, and OGE believes it would undermine the purposes of section 207(c) to take an expansive view of the exception that would allow a wide range of representational activity solely on the ground that the former employee has personal familiarity with certain “principles.” Moreover, OGE notes that its definition of “statement” is not unusual. *See Black’s Law Dictionary* 1263 (1979) (“a declaration of matters of fact”). That is not to say that a statement of fact would fall outside the scope of the exception simply because the former employee made incidental references to certain principles necessary to understand the significance of the facts conveyed. Nevertheless, in view of the fact that the statute already contains other exceptions allowing “expert” communications under carefully limited circumstances—e.g., 18 U.S.C. 207(j)(5), (6)(A)—OGE cannot read section 207(j)(4) as a broad license for former employees to engage in communications focusing on general principles with which they may claim some particular expertise. However, recognizing that statements based on inferences from facts observed by a former employee may be permissible, OGE has revised the text of § 2641.301(d)(2) by removing the word “directly.”

A second agency proposed that OGE include an express statement, either in a note or in the text of section 2641.301(d), to the effect that “statements and opinions made on one’s own behalf are not prohibited.” OGE has not followed this recommendation in the final rule. The provisions stating the basic prohibitions to which this

exception applies are quite clear in excluding self-representation. *See* § 2641.201(g)(2), as referenced in §§ 2641.204(h) and 2641.205(h).

Section 2641.301(e)—Scientific or Technological Information

Two agencies commented on proposed § 2641.301(e), which implements the exception in 18 U.S.C. 207(j)(5) for communicating scientific or technological information. One agency recommended that OGE remove a parenthetical reference in proposed § 2641.301(e)(5)(iii)(E) to a deputy or acting head of an agency, since there are no other references to deputy or acting agency heads in the provision. By technical correction published in the **Federal Register** on March 31, 2003, 68 FR 15385, OGE already removed this phrase from the proposed rule as “unintended text.”

Another agency commented on the list of possible considerations for agency procedures in § 2641.301(e)(4)(i) as proposed. The agency recommended that OGE specify, in § 2641.301(e)(4)(i)(B), when a former employee must give notice that he or she is invoking the exemption pursuant to agency procedures. OGE does not agree with this recommendation and is adopting this section as final without change. It is not OGE’s intent to mandate any particular procedures for agencies that wish to implement section 207(j)(5) through agency procedures. The statute itself specifies that the procedures must be “acceptable to the department or agency concerned.” Agencies may well have different preferences with respect to the timing of any notices or the need for any such notices at all.

Section 2641.301(f)—Testimony Under Oath and Statements Under Penalty of Perjury

One agency commented on proposed § 2641.301(f), which interprets the exception in 18 U.S.C. 207(j)(6) for testimony under oath and statements required to be made under the penalty of perjury. The agency referenced § 2641.301(f)(2)(ii), which deals with the limitation, found in section 207(j)(6)(A), on service as an expert witness in matters covered by the permanent ban in section 207(a)(1). This provision states that the limitation on expert testimony may be lifted by court order and then specifies that neither a subpoena nor a court order qualifying an individual as an expert satisfies the court order requirement in section 207(j)(6)(A). The commenter asked that OGE address specifically whether experts appointed by a court itself,

pursuant to Rule 706 of the Federal Rules of Evidence, would be covered by the “pursuant to court order” language in the exception.

In adopting § 2641.301(f) as final, OGE has not changed the rule text as proposed to address this subject. By its own terms, Rule 706 does not displace authorities permitting parties to call “expert witnesses of their own selection.” Rule 706(d). Under Rule 706, court-appointed experts may be appointed by the court either upon the motion of the parties or upon the court’s own motion, and the latter may be either with or without nominations by the parties. Rule 706 also contemplates that the parties may agree upon an expert to be appointed by the court. Furthermore, Rule 706 provides that the appointed expert then may be called to testify by either party, or by the court itself, and that either party may cross-examine the expert, including that party that called the expert as a witness. Under some or all of these possible scenarios, there may be questions as to whether 18 U.S.C. 207(a)(1) even applies in the first place, as it may not be clear whether the court-appointed experts are acting “on behalf of” any party within the meaning of the statute. *See* § 2641.201(g). OGE does not believe this regulation is the appropriate place to opine generally about Rule 706. Such questions as may actually arise can be handled on a case-by-case basis.

The same agency also commented on the relationship between section 207(j)(6) and a provision in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450i(j), which is listed as a miscellaneous statutory exception in section 2641.301(k) of the proposed rule. This comment is addressed below, under “Section 2641.301(k)—Miscellaneous Statutory Exemptions.”

Section 2641.301(h)—Acting on Behalf of International Organization

OGE received one comment on proposed § 2641.301(h), which concerns the provision in 18 U.S.C. 207(j)(3) for waivers issued by the Secretary of State to permit former employees to represent, aid or advise an international organization in which the United States participates. The comment, from the Department of State, suggested that a statement in the preamble to the proposed rule, to the effect that the “Secretary of State has issued several section 207(j)(3) waivers,” does not completely reflect the actual operation of this provision in the Department. 68 **Federal Register** 7866. Specifically, the comment pointed out that the Secretary of State had delegated the authority to

issue such waivers to the Assistant Secretary for International Affairs, who has issued a number of waivers. OGE takes notice of this delegation, which was issued by the Secretary of State in 1992.

The same commenter objected to the language of the proposed rule stating that “the Secretary of State may grant a *former employee* a waiver.” Proposed § 2641.301(h)(1) (emphasis added). The commenter pointed out that the statutory provision itself does not even use the phrase “former employee” or otherwise specify that a waiver must be issued to a former employee, as opposed to a current employee who has plans for post-employment activity on behalf of an international organization. The commenter noted that “207(j)(3) certifications are usually issued prior to the employees’ departure from U.S. Government service, to apply prospectively with the employees’ taking up of the position at the international organization.” The commenter recommended that OGE use the following substitute language in the first sentence of § 2641.301(h)(1): “(1) The Secretary of State may grant an individual certification that one or more of the restrictions in 18 U.S.C. 207 not apply where the former employee would act on behalf of, or provide advice or aid to, an international organization in which the United States participates.”

OGE has largely adopted the recommended language in this final rule, with minor modifications for the sake of consistency with the statutory language and the treatment of other waiver provisions in subpart C of the rule: “(1) The Secretary of State may grant an individual waiver of one or more of the restrictions in 18 U.S.C. 207 where the former employee would appear or communicate on behalf of, or provide aid or advice to, an international organization in which the United States participates.” OGE recommends, however, that any current employees who receive such waivers be counseled that the waivers permit only certain activities covered by section 207 and do not affect any restrictions still applicable to current employees under 18 U.S.C. 203 and 205.

Section 2641.301(j)—Waiver of Certain Senior Positions

In this final rule, OGE has modified the proposed version of § 2641.301(j), which pertains to the authority of OGE, under 18 U.S.C. 207(c)(2)(C), to waive the application of section 207(c) and (f) with respect to certain senior positions. The revisions were necessary because, as described above in connection with

the definition of “senior employee,” a new category of senior employee was added by the E-Government Act of 2002. See 18 U.S.C. 207(c)(2)(A)(v). This new category, assignees from private organizations under the Information Technology Exchange Program, is not covered by the position waiver provision in section 207(c)(2)(C). Therefore, this section of the rule being adopted as final has been changed to make clear that assignees under the Information Technology Exchange Program may not benefit from a position waiver.

Section 2641.301(k)—Miscellaneous Statutory Exemptions

Proposed § 2641.301(k) lists statutes, other than section 207 itself, that provide relief from the post-employment restrictions. OGE specifically invited commenters on the proposed rule to review the list of miscellaneous statutory exceptions and suggest modifications or additions, in part because such provisions occasionally are enacted as part of organic acts and other legislation not primarily focused on conflict of interest subjects. 68 **Federal Register** 7868.

Only one agency responded to this invitation, and it proposed the addition of three statutory provisions. Two of those statutes, however, do not actually provide exceptions to the prohibitions of 18 U.S.C. 207, but rather add certain post-employment restrictions or requirements for employees in specific positions or agencies. See Public Law 99–239, section 107 (1986) (extending certain provisions of section 207(b), as it then read, with respect to persons involved in Micronesian status negotiations or Micronesian Interagency Group); Public Law 104–293, section 402 (1996) (requiring agreements restricting post-employment activities of Central Intelligence Agency employees). Consequently, OGE does not believe it would be appropriate to list these statutes in a provision devoted to “Miscellaneous statutory exceptions.” The third statute suggested by the commenter, Public Law 97–241, section 120 (1982), is an actual exception to section 207. The exception is applicable to private sector representatives, designated to speak on behalf of or otherwise represent the interests of the United States on a United States delegation to an international telecommunication meeting or conference, provided that the Secretary of State (or a designee) certifies that no Government employee on the delegation is well qualified to represent United States interests with respect to such matter and that the designation serves

the national interest. OGE has added a new paragraph (k)(8) to § 2641.301 of this final rule to reflect this statutory exemption.

Another agency submitted detailed comments on proposed § 2641.301(k)(4), which lists a statutory exception, found in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450i(j), for certain activity on behalf of Indian tribal organizations and inter-tribal consortia. Among other things, the commenter recommended that OGE’s rule “elaborate” on the scope of coverage of this provision, explain the effect of a notice requirement specified in the provision, clarify the applicability of this provision to expert testimony, and reflect the charging practices of the Department of Justice. OGE has not made these recommended changes in the final rule. OGE does not believe that part 2641 is the appropriate place to provide detailed guidance concerning the Indian Self-Determination and Education Assistance Act. The rule as proposed and as now being adopted as final does not contemplate detailed guidance with respect to any of the miscellaneous provisions not set out in section 207 itself. (As noted below, section 207 now has been amended to add a cross-reference to the provision in the Indian Self-Determination and Education Assistance Act, but the substance of the exception continues to be set out in the latter, rather than in section 207.) Section 2641.301(k) is intended simply to alert readers to the general substance of certain exceptions that would not be apparent from a reading of section 207 alone. Moreover, with respect to the Indian Self-Determination and Education Assistance Act specifically, we have stated that “this statute would normally be interpreted by the Office of the Solicitor of the Department of the Interior,” OGE Informal Advisory Letter 82 x 11, and we ordinarily would not address significant legal issues arising under the statute without the benefit of review by that Department. In this connection, we note that the Department of the Interior did not comment on proposed § 2641.301(k)(4).

Finally, subsequent to the publication of the proposed rule and the receipt of comments, Congress amended the exception in the Indian Self-Determination and Education Assistance Act, and also added a cross-reference to this provision in 18 U.S.C. 207(j)(1)(B). See Public Law 110–81, section 104, September 14, 2007. The general description of this exception in § 2641.301(k)(4) has been modified accordingly.

Section 2641.301(l)—Guide to Available Exceptions and Waivers

OGE has revised the chart set out at § 2641.301(l) as proposed by adding a new column indicating which exemption or waiver provisions are applicable to the new restriction, 18 U.S.C. 207(l), with regard to private sector assignees under the Information Technology Exchange Program.

Appendix A—Positions Waived Pursuant to 18 U.S.C. 207(c)(2)(C)

Appendix A of part 2641 lists those positions that have been waived by OGE, pursuant to its authority under 18 U.S.C. 207(c)(2)(C). Regulations implementing this provision have been previously codified at 5 CFR 2641.201(d) and will be set forth in § 2641.301(j) of this final rule once it becomes effective on July 25, 2008.

Subsequent to the proposed rule, OGE revised the list of waived positions in appendix A. See 72 FR 10339–10342 (March 8, 2007). This final rule therefore reflects the revised list.

Appendix B—Agency Components for Purposes of 18 U.S.C. 207(c)

OGE received comments from one agency concerning appendix B to part 2641, which sets out agency components that have been designated by OGE, pursuant to 18 U.S.C. 207(h), as separate agencies, for purposes of the one-year cooling-off restriction for senior employees. The comments proposed certain amendments to the list of components for this agency. It was not OGE’s intent to use this rulemaking as the vehicle to add or delete components in appendix B. OGE requires that agencies submit annual updates verifying the accuracy and appropriateness of the list of components and has made numerous additions and deletions with respect to the list since 1991, as described above and in the preamble to the proposed rule. 68 **Federal Register** 7844. OGE contacted this commenting agency and advised that its proposed amendments to appendix B would be considered separately, in connection with OGE’s annual review of agency submissions.

Therefore, Appendix B is revised as proposed, except that the final rule also reflects amendments to Appendix B made by final rules published on November 23, 2004, March 8, 2007, and March 6, 2008, which were issued subsequent to the proposed rule. See 69 FR 68053–68056 (November 23, 2004); 72 FR 10339–10342 (March 8, 2007); 73 FR 12007–12009 (March 6, 2008).

III. Matters of Regulatory Procedure

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 rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and will submit a report thereon to the U.S. Senate, House of Representatives and Government Accountability Office in accordance with that law at the same time this rulemaking document is sent to the Office of the Federal Register for publication in the **Federal Register**.

Executive Order 12866

In promulgating this final 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 rule has also been reviewed by the Office of Management and Budget under that Executive order. Moreover, in accordance with section 6(a)(3)(B) of E.O. 12866, the preamble to this final regulation notes the legal basis and benefits of, as well as the need for, the regulatory action. There should be no appreciable increase in costs to OGE or the executive branch of the Federal Government in administering the final rule because provisions only concern the current post-employment law in effect. Finally, this rulemaking is not economically significant under the Executive Order and will not interfere with State, local or tribal governments.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this final regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

List of Subjects in 5 CFR Parts 2637 and 2641

Conflict of interests, Government employees.

Approved: June 4, 2008.

Robert I. Cusick,

Director, Office of Government Ethics.

■ Accordingly, for the reasons set forth in the preamble, under the authority of 5 U.S.C. App. (Ethics in Government Act of 1978), 18 U.S.C. 207, and Executive Order 12674, as modified by Executive Order 12731, the Office of Government Ethics is amending 5 CFR chapter XVI as follows.

- 1. Part 2637 is removed; and
- 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.
- 2641.106 Applicability of certain provisions to Vice President.

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.
- 2641.202 Two-year restriction on any former employee's representations to United States concerning particular matter for which the employee had official responsibility.
- 2641.203 One-year restriction on any former employee's representations, aid, or advice concerning ongoing trade or treaty negotiation.
- 2641.204 One-year restriction on any former senior employee's representations to former agency concerning any matter, regardless of prior involvement.
- 2641.205 Two-year restriction on any former very senior employee's representations to former agency or certain officials concerning any matter, regardless of prior involvement.
- 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.
- 2641.207 One-year restriction on any former private sector assignee under the

Information Technology Exchange Program representing, aiding, counseling or assisting in representing in connection with any contract with former agency.

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.

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 prohibits 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.*)

(a) This part 2641 explains 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.

(b) 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, Pub. L. 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, Pub. L. 96-28, 93 Stat. 76). Regulations providing guidance concerning 18 U.S.C. 207 to these employees were last published in the 2008 edition of title 5 of the Code of Federal Regulations, revised as of January 1, 2008.

(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 July 25, 2008. An employee who terminated Government service (or service in a "senior" or "very senior" employee position) between January 1, 1991, and July 25, 2008 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, 1996, and 2004 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); (5) a change to section 207(j)(2)(B), an exception to section 207(c) and (d); (6) the addition of assignees under the Information Technology Exchange Program to the categories of "senior

employee" for purposes of section 207(c); (7) the addition of section 207(l), applicable to former private sector assignees under the Information Technology Exchange Program; (8) a change to the length of the restriction set forth in section 207(d); and (9) the addition of a cross-reference in section 207(j)(1)(B) to a revised exception in the Indian Self-Determination and Education Assistance Act.

§ 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, 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, special Government employees, and employees serving without compensation. (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 Government Accountability Office), the Postal Service, the Postal Regulatory 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.

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." She becomes a "former employee" when her appointment terminates, provided that she is not reappointed without break in service to the same or another Federal Government position.

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.

Example 6 to the definition of former employee: A foreign service officer served as a "senior employee" of the Department of State. After retiring, and with no break in service, he accepted a civil service appointment on a temporary basis, at the GS-15 level. Since he did not terminate Government service, he did not become a "former employee" when he retired from the foreign service. He did, however, become a "former senior employee."

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 without a break in service. As applied to a special Government employee (SGE), Government service refers to the period of time covered by the individual's appointment or appointments (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 Government Accountability 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 employee is paid at a rate of basic pay which is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule; or, for a period of two years following November 24, 2003, was employed on November 23, 2003 in a position for which the rate of basic pay was equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service; for purposes of this paragraph, "rate of basic pay" does not include locality-based adjustments or additional pay such as bonuses, awards and various allowances;

(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);

(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; or

(6) Assigned from a private sector organization under chapter 37 of 5 U.S.C. (Information Technology Exchange Program).

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 his rate of basic pay is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule. 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 86.5 percent of the rate of basic pay payable for level II of the Executive Schedule. 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 86.5 percent of the rate of basic pay payable for level II of the Executive Schedule, the doctor will become a senior employee.

Example 3 to the definition of senior employee: A criminal investigator in the Office of the Inspector General at the Department of Housing and Urban Development is a GS-15 employee but also receives Law Enforcement Availability Pay (LEAP), pursuant to 5 U.S.C. 5545a. Even if the sum of the employee's LEAP payment plus the employee's basic pay for GS-15 equaled 86.5 percent of the rate of basic pay for level II of the Executive Schedule, LEAP is not considered part of an employee's "rate of basic pay" for purposes of section 207(c), and therefore the employee would not be 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) 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;

(2) 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;

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

(4) 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. 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 personal attorney-client privilege.* A current or former employee who discloses information to an agency ethics official, to a Government attorney, or to an employee of the Office of Government Ethics does not personally enjoy an attorney-client privilege with respect to such communications.

§ 2641.106 Applicability of certain provisions to Vice President.

Subsections 207(d) (relating to restrictions on very senior personnel) and 207(f) (restrictions with regard to foreign entities) of title 18, United States Code, apply to a Vice President, to the

same extent as they apply to employees and former employees covered by those provisions. See §§ 2641.205 and 2641.206. There are no other restrictions in 18 U.S.C. 207 applicable to a Vice President.

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.

(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 an 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. She has not made a communication. She also may sign an assurance to the agency that she will be personally responsible for the direction and conduct of the research under the grant, pursuant to § 2641.201(e)(2)(iv). Moreover, she may personally communicate scientific or technological information to NIH

concerning the application, provided that she does so under circumstances indicating no intent to influence the Government pursuant to § 2641.201(e)(2) or she makes the communication in accordance with the exception for scientific or technological information in § 2641.301(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 another employee of a contractor to a routine meeting with agency officials to deliver technical data 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 Federal Trade Commission economist participated in her agency's review of a proposed merger between two companies. After terminating Government service, she goes to work for a trade association that is interested in the proposed merger. She would like to speak about the proposed merger at a conference sponsored by the trade association. The conference is attended by 100 individuals, 50 of whom are employees of entities specified in paragraphs (f)(1)(i) through (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 proposed merger in response to a question posed by a Department of Justice employee in attendance.

Example 6 to paragraph (f): The former employee in the previous example may, on behalf of her employer, write and permit publication of an op-ed piece in a metropolitan newspaper in support of a particular resolution of the merger proposal.

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 subject to the control of the group.

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 the statute defines “particular matter” 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), only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between 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.

(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. International agreements, such as treaties and trade agreements, must be evaluated in light of all relevant circumstances to determine whether they should be considered particular matters involving specific parties; relevant considerations include such factors as whether the agreement focuses on a specific property or territory, a specific claim, or addresses a large number of diverse issues or economic interests.

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 Department of Homeland Security (DHS) drafted official comments submitted to Congress with respect to a pending immigration reform bill. After leaving the Government, he contacts DHS 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 a DHS 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.

Example 7 to paragraph (h)(2): An employee of the Department of State participated in the development of the United States' position with respect to a proposed treaty with a foreign government concerning transfer of ownership with respect to a parcel of real property and certain operations there. After terminating Government employment, this individual seeks to represent the foreign government before the Department with respect to certain issues arising in the final stage of the treaty negotiations. This bilateral treaty is a particular matter involving specific parties, and the former employee had participated personally and substantially in this matter. 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).

Example 8 to paragraph (h)(2): The employee in the previous example participated for the Department in negotiations with respect to a multilateral trade agreement concerning tariffs and other

trade practices in regard to various industries in 50 countries. The proposed agreement would provide various stages of implementation, with benchmarks for certain legislative enactments by signatory countries. These negotiations do not concern a particular matter involving specific parties. Even though the former employee would not be prohibited under section 207(a)(1) from representing another person in connection with this matter, she must comply with any applicable restrictions in 18 U.S.C. 207(b) and (f).

(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, such as a sole source procurement or when there are sufficient indicia that the Government has explicitly identified a specific party in an otherwise ordinary prospective grant, contract, or agreement, specific parties may be identified even prior to the receipt of a proposal or expression of interest.

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 a 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 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, and the Government had determined to pursue a sole source contract with that same firm for the new work. Even before the firm was contacted or expressed any interest concerning the sole source contract, the former employee participated in meetings in which specifications for a potential sole source contract with the firm were discussed. The former employee may not represent XYZ before the Government in connection with this matter.

(5) *Same particular matter—(i) General.* 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.

(ii) *Considerations in the case of contracts, grants, and other agreements.* With respect to matters such as contracts, grants or other agreements:

(A) A new matter typically does not arise simply because there are amendments, modifications, or extensions of a contract (or other agreement), unless there are fundamental changes in objectives or the nature of the matter;

(B) Generally, successive or otherwise separate contracts (or other agreements) will be viewed as different matters from each other, absent some indication that one contract (or other agreement) contemplated the other or that both are in support of the same specific proceeding;

(C) A contract is almost always a single particular matter involving

specific parties. However, under compelling circumstances, distinct aspects or phases of certain large umbrella-type contracts, involving separate task orders or delivery orders, may be considered separate individual particular matters involving specific parties, if an agency determines that articulated lines of division exist. In making this determination, an agency should consider the relevant factors as described above. No single factor should be determinative, and any divisions must be based on the contract's characteristics, which may include, among other things, performance at different geographical locations, separate and distinct subject matters, the separate negotiation or competition of individual task or delivery orders, and the involvement of different program offices or even different agencies.

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): In the previous example, a new software contract was awarded to the same contractor through a full and open competition, following the employee's departure from the agency. Although no major changes were made in the contract terms, the new contract is a different particular matter involving specific parties.

Example 3 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 4 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 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 5 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 6 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.

Example 7 to paragraph (h)(5): The Navy awards an indefinite delivery contract for environmental remediation services in the northeastern U.S. A Navy engineer is assigned as the Navy's technical representative on a task order for remediation of an oil spill at a Navy activity in Maine. The Navy engineer is personally and substantially involved in the task order (e.g., he negotiates the scope of work, the labor hours required, and monitors the contractor's performance). Following successful completion of the remediation of the oil spill in Maine, the Navy engineer leaves Government service and goes to work for the Navy's remediation contractor. In year two of the contract, the Navy issues a task order for the remediation of lead-based paint at a Navy housing complex in Connecticut. The contractor assigns the former Navy engineer to be its project manager for this task order, which will require him to negotiate with the Navy about the scope of work and the labor hours under the task order. Although the task order is placed under the same indefinite delivery contract (the terms of which remain unchanged), the Navy would be justified in determining that the lead-based paint task order is a separate particular matter as it involves a different type of remediation, at a different location, and at a different time. Note, however, that the engineer in this example had not participated personally and substantially in the overall contract. Any former employee who had—for example, by participating personally and substantially in the initial award or subsequent oversight of the umbrella contract—will be deemed to have also participated personally and substantially in any individual particular matters resulting from the agency's determination that such contract is divisible.

Example 8 to paragraph (h)(5): An agency contracts with Company A to install a satellite system connecting the headquarters office to each of its twenty field offices. Although the field offices are located at various locations throughout the country,

each installation is essentially identical, with the terms of each negotiated in the main contract. Therefore, this contract should not be divided into separate particular matters involving specific parties.

(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 substantially 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.

Example 7 to paragraph (i): The director of an agency office must concur in any decision to grant an application for technical assistance to certain nonprofit entities. When a particular application for assistance comes into her office and is presented to her for decision, she intentionally takes no action on it because she believes the application will raise difficult policy questions for her agency at this time. As a consequence of her inaction, the resolution of the application is deferred indefinitely. She has participated personally and substantially in the matter.

(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.

Example 1 to paragraph (j): An attorney participated in preparing the Government's antitrust action against Z Company. After leaving the Government, she may not represent Z Company in a private antitrust action brought against it by X Company on the same facts involved in the Government action. Nor may she represent X Company in that matter. The interest of the United States in preventing both inconsistent results and the appearance of impropriety in the same factual matter involving the same party, Z Company, is direct and substantial. However, if the Government's antitrust investigation or case is closed, the United States no longer

has a direct and substantial interest in the case.

§ 2641.202 Two-year restriction on any former employee's representations to United States concerning particular matter for which the employee had official responsibility.

(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.* 18 U.S.C. 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 § 2641.105 concerning advice.

Example 1 to paragraph (j): The position description of an Assistant Secretary of Housing and Urban Development specifies that he is responsible for a certain class of

grants. These grants are handled by an office under his supervision. As a practical matter, however, the Assistant Secretary has not become involved with any grants of this type. The Assistant Secretary has official responsibility for all such grants 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 the 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.

(a) *Basic prohibition of 18 U.S.C. 207(b).* For one year after his Government service terminates, no former employee shall, on the basis of "covered information," knowingly represent, aid, or advise 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.

(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 two-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 86.5 percent of the rate of basic pay for level II of the Executive Schedule, 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 86.5 percent of the rate of basic pay for level II of the Executive Schedule (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 86.5 percent of level II of the Executive Schedule, 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 86.5 percent of level II of the Executive Schedule.

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 86.5 percent of the rate of basic pay for a full-time employee at level II of the Executive Schedule. 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 86.5 percent of the rate of basic pay for level II of the Executive Schedule. 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 86.5 percent of the rate of basic pay for level II of the Executive Schedule, 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 section 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 department, agency or other entity, including agencies and entities within the legislative or judicial branches;

(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 of a former senior employee's former agency in his official capacity, 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.

Example 5 to paragraph (g): A chemist serves in a senior employee position in the Agency for Clean Rivers. Subsequent to his termination from the position, the mission of the Agency for Clean Rivers is expanded and it is renamed the Agency for Clean Water. A number of employees from the Agency for Marine Life are transferred to the reorganized agency. If it is determined that the Agency for Clean Water is substantially the same entity

from which the chemist terminated, the section 207(c) bar will apply with respect to the chemist's contacts with all of the employees of the Agency for Clean Water, including those employees who recently transferred from the Agency for Marine Life. He would not be barred from contacting an employee serving in one of the positions that had been transferred from the Agency for Clean Rivers to the Agency for Clean Land.

(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 the interests of 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 Two-year restriction on any former very senior employee's representations to former agency or certain officials concerning any matter, regardless of prior involvement.

(a) *Basic prohibition of 18 U.S.C. 207(d).* For two years 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 two-

year restriction. The two-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.

Note to paragraph (g): 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 Director of the Office of Management and Budget (OMB) 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 OMB Director 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 two years 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. The former employee expects that the special assistant would brief the Secretary about any discussions at the proposed meeting and refer specifically to the former employee. Because the circumstances indicate that the former employee intends that the information provided at the meeting would be conveyed by the assistant directly to the Secretary and attributed to the former employee, he 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.

(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 represent a foreign government or foreign political party before an officer or employee of an agency or department of the United States, or aid or advise such a foreign entity, with the intent to influence a decision of such officer or employee. For purposes of describing persons who may not be contacted with the intent to influence, under 18 U.S.C. 207(f) and this section, the phrase “officer or employee” includes the President, the Vice President, and Members of Congress, and the term “department” includes the legislative branch of government.

(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* examples 1 and 2 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]

§ 2641.207 One-year restriction on any former private sector assignee under the Information Technology Exchange Program representing, aiding, counseling or assisting in representing in connection with any contract with former agency.

(a) *Basic prohibition of 18 U.S.C. 207(l)*. For one year after the termination of his assignment from a private sector organization to an agency under the Information Technology Exchange Program, 5 U.S.C. chapter 37, no former assignee shall knowingly represent, or aid, counsel or assist in representing any other person in connection with any contract with that agency.

(b) *Exceptions and waivers*. The prohibition of 18 U.S.C. 207(l) 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 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(l) is a one-year restriction. The one-year period is measured from the date when the individual's assignment under the Information Technology Exchange Program terminates.

(d) *Represent, aid, counsel, or assist in representing*. [Reserved]

(e) *In connection with any contract with the former agency*. [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 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 Transportation (DOT) 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 DOT employee may press the PBGC's point of view in a meeting with DOT employees concerning an airline bankruptcy case in which he was personally and substantially involved while at the DOT. His communications to the DOT 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 NSA 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 NSA 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) Exception for 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 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): A senior employee of the Department of the Treasury was personally and substantially involved in discussions with other Department officials concerning the advisability of a three-phase reduction in the capital gains tax. After Government service, the former senior employee affiliates with a nonprofit group that advocates a position on the three-phase capital gains issue that is similar to his own.

The former senior employee, who receives no salary from the nonprofit organization, may meet with current Department officials on the organization's behalf to state what steps had previously been taken by the Department to address the issue. The statement would be permissible even if the nonprofit organization reimbursed the former senior employee 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 exception 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 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 Deputy Director of the Office of Management and Budget becomes the full-time head of the President's re-election committee. The former Deputy Director may, within two years 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.* The Secretary of State may grant an individual waiver of one or more of the restrictions in 18 U.S.C. 207 where the former employee would appear or communicate on behalf of, or provide aid or advice to, an international organization in which the United States

participates. The Secretary of State must certify in advance that the proposed activity is in the interest of the United States.

Note to paragraph (h): 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 (OGE).

(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.* A position which could be occupied by a senior employee is eligible for a waiver of the 18 U.S.C. 207(c) restriction except:

(i) The following positions are ineligible:

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

(B) Positions for which occupants are appointed by the President pursuant to 3 U.S.C. 105(a)(2)(B); or

(C) Positions for which occupants are appointed by the Vice President pursuant to 3 U.S.C. 106(a)(1)(B).

(ii) Regardless of the position occupied, private sector assignees under the Information Technology Exchange Program, within the meaning of paragraph (6) of the definition of senior employee in section 2641.104, are not eligible to benefit from a waiver.

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 the 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 carrying out official duties as an employee or elected or appointed official of a tribal organization or inter-tribal consortium to act on behalf of the organization or consortium in connection with any matter related to a tribal governmental activity or Federal Indian program or service, 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 Director of National Intelligence, 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;

(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; and

(8) Public Law 97-241, title I, section 120, August 24, 1982 (18 U.S.C. 203 note), providing that 18 U.S.C. 207 shall not apply under certain circumstances to private sector representatives on United States delegations to

international telecommunications meetings and conferences.

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.*

(l) *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.

Exception/waiver	Section 207 Prohibitions affected						
	(a)(1)	(a)(2)	(b)	(c)	(d)	(f)	(l)
(1) Acting for the United States, <i>see</i> § 2641.301(a)	•	•	•	•	•	•	•
(2) Elected State or local government official, <i>see</i> § 2641.301(b)	•	•	•	•	•	•	•
(3) Acting for specified entities, <i>see</i> § 2641.301(c)				•	•		
(4) Special knowledge, <i>see</i> § 2641.301(d)				•	•		
(5) Scientific or technological information, <i>see</i> § 2641.301(e)	•	•		•	•		
(6) Testimony, <i>see</i> § 2641.301(f)	•	•	•	•	•	•	•
(7) Acting for a candidate or political party, <i>see</i> § 2641.301(g)				•	•		
(8) Acting for an international organization, <i>see</i> § 2641.301(h)	•	•	•	•	•	•	•
(9) Employee of a Government-owned, contractor-operated entity, <i>see</i> § 2641.301(i)	•	•	•	•	•	•	•
(10) Waiver for certain positions, <i>see</i> § 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 86.5 percent of that payable for level II of the Executive Schedule. 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).
Deputy Chief Litigation Counsel, Division of Enforcement (effective November 10, 2003).

SK-17 positions (effective November 10, 2003).

SK-16 and lower-graded SK positions supervised by employees in SK-17 positions (effective November 10, 2003).

SK-16 and lower-graded SK positions not supervised by employees in SK-17 positions (effective December 4, 2003).

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 Industry and Security (formerly Bureau of Export Administration) (effective January 28, 1992).
- Economic Development Administration.
- International Trade Administration.
- Minority Business Development Agency (formerly listed as Minority Business Development Administration).
- National Institute of Standards and Technology (effective March 6, 2008).
- National Oceanic and Atmospheric Administration.
- National Technical Information Service (effective March 6, 2008).
- National Telecommunications and Information Administration.
- United States Patent and Trademark Office (formerly Patent and Trademark Office).

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 Geospatial-Intelligence Agency (formerly 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

Components:¹

- 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 Alcohol, Tobacco, Firearms and Explosives (effective November 23, 2004).
- 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 States Attorneys² (effective January 28, 1992).
- Executive Office for United States Trustees³ (effective January 28, 1992).
- Federal Bureau of Investigation.
- Foreign Claims Settlement Commission.
- Independent Counsel appointed by the Attorney General.

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.

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.

- 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).
- Office on Violence Against Women⁴ (effective March 8, 2007).
- Tax Division.
- United States Marshals Service (effective May 16, 1997).
- United States Parole Commission.

Parent: Department of Labor

Components:

- Bureau of Labor Statistics.
- Employee Benefits Security Administration (formerly Pension and Welfare Benefits Administration) (effective May 16, 1997).
- 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).

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).

Parent: Department of the Treasury

Components:

- Alcohol and Tobacco Tax and Trade Bureau (effective November 23, 2004).
- Bureau of Engraving and Printing.
- Bureau of the Mint.
- Bureau of the Public Debt.
- Comptroller of the Currency.
- Financial Crimes Enforcement Center (FinCEN) (effective January 30, 2003).
- Financial Management Service.
- Internal Revenue Service.
- Office of Thrift Supervision.

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⁴ The Office on Violence Against Women shall not be considered separate from the Office of Justice Programs, but only from other designated components of the Department of Justice.