

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

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

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

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

Proposed § 2641.104—Definitions

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

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

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

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

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

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

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

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

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