

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

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

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

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

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

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

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

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

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

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

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

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

Proposed § 2641.105—Advice

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