

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

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

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

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

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

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

Subpart B—Prohibitions

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

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

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

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

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

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

Proposed § 2641.201(d)—Communication or Appearance

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

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

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