

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

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

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

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

Prior to the 1989 amendments, the phrase “with the intent to influence” modified only “communication,” not “appearance.” See S. Rep. No. 170, 95th Cong., 1st Sess. 152–53 (1977); OGE Informal Advisory Letter 81 x 35.<sup>3</sup> After the 1989 Act, it became clear that both

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

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

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

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

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

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