

characterization of the material facts can be a form of advocacy. *See, e.g.*, proposed § 2641.201(e)(2) (example 4) (dealing with efforts to persuade Government of safety and efficacy of new drug based on presentation of testing data). Congress recognized this by providing exceptions to section 207, such as the exceptions for scientific or technological information and testimony under oath, which permit certain factual statements, but only under specified safeguards. *See* proposed § 2641.301(e) and (f). It is clear that factual statements may be made with the intent to influence the Government, if they are made for the purpose of seeking discretionary Government action or affecting Government action in connection with an issue or aspect of a matter involving an appreciable element of dispute. Therefore, OGE was careful, in various proposed textual provisions and examples pertaining to factual statements (or appearances in connection with factual matters), to include circumstances that specifically would indicate that there is no intent to influence.

A word of caution is in order with respect to the application of proposed § 2641.201(e)(1) and (2). The presence or absence of the intent to influence typically will be based on a consideration of all the relevant circumstances in a given case. The facts of each case should be examined carefully, therefore, before any conclusion is reached that a particular activity would fall within any of the provisions of proposed § 2641.201(e)(2) indicating no intent to influence, or would more correctly be viewed as meeting the test for the intent to influence in proposed § 2641.201(e)(1).

Proposed § 2641.201(e)(3) makes explicit a principle that was already implicit in the prior section 207 regulations. *See* § 2637.201(b)(5) (example 1). This provision recognizes that certain communications or appearances may commence without any intent to influence the Government, but may take on a different character if unforeseen disputes or other changed circumstances arise. In these cases, the former employee must refrain from any further communication or appearance if it becomes apparent that such further contact would be made with the intent to influence.

Proposed § 2641.201(e)(4) emphasizes that a mere appearance, even without any accompanying communication by the former employee, may be prohibited by section 207(a). As one court put it, applying the pre-1989 language, a representational appearance by a former

employee may be covered “with or without speaking for the client.” *United States v. Coleman*, 805 F.2d 474, 480 (3d Cir. 1986).⁴ Phrased another way, silent appearances can be made with the intent to influence. This conclusion is compelled by the language and history of the statute. The language of section 207(a)(1) explicitly covers former employees who make, “with the intent to influence, any communication to or appearance before” the Government (emphasis added). Historically, as discussed above, representational appearances actually were covered *per se*, even without any explicit requirement of “intent to influence,” although it was recognized even prior to the 1989 amendments that the appearance must have been made under circumstances involving “at least inchoate adversariness.” 2 Op. Off. Legal Counsel at 316. There is nothing in the legislative history of the 1989 Act to indicate that the addition of an explicit “intent to influence” element in connection with appearances was intended to relax the restriction on representational appearances as it had been understood previously.

The question becomes, then, what circumstances would indicate that physical presence alone, without any substantive communication, is intended to influence the Government? The second sentence of proposed § 2641.201(e)(4) provides a nonexhaustive list of factors that can be relevant to such determinations. Many of these factors are derived from judicial and administrative precedents. *See, e.g.*, *Coleman, supra*; *United States v. Schaltenbrand*, 930 F.2d 1554 (11th Cir. 1991); OGE Informal Advisory Letter 82 x 7. Although no one factor is necessarily determinative, these and any other relevant factors should be considered in light of the totality of the circumstances in a given case.

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

The post-Ethics Reform Act of 1989 version of 18 U.S.C. 207(a)(1) prohibits communications to or appearances before any “officer or employee” of any “department, agency, court, or court-martial of the United States or the District of Columbia * * *.” The prior version of the permanent bar had also prohibited communications to and appearances before “any civil, military, or naval commission of the United States or the District of Columbia, or any

officer or employee thereof.” We believe the current version of the permanent bar no longer lists “civil, military, or naval commission” because these commissions are encompassed within the remaining terms. For purposes of summarizing the section 207(a)(1) restriction as briefly as possible at proposed § 2641.201(a), we refer to an employee “of the United States” rather than repeating the words “department, agency, court, or court-martial.” Proposed § 2641.201(f) is titled accordingly. Although a court-martial is held under the auspices of a department, we chose to specifically list this forum in order to avoid possible confusion. Moreover, proposed § 2641.201(f) does not distinguish between “department” and “agency,” because the definition of “agency” includes “department.” *See* proposed § 2641.104.

The term “employee of the United States” is defined at proposed § 2641.201(f)(1) for purposes of identifying those individuals with whom post-employment contact is restricted. The proposed definition specifically includes an individual who, under 5 U.S.C. 3374(a), is considered an employee because appointed or detailed under the IPA. Pursuant to 18 U.S.C. 207(i)(1)(A), it also encompasses the President and the Vice President. Section 207(i)(1)(A) specifically states that “the term ‘officer or employee,’ when used to describe the person to whom a communication is made or before whom an appearance is made * * * shall include in subsections (a), (c), and (d), the President and the Vice President.”

More generally, the proposed definition of “employee of the United States” at § 2641.201(f)(1) includes any “Federal employee” who is “employed by” an agency, court, or court-martial. Our choice of words was guided by a number of factors. First, 18 U.S.C. 207(a)(1) states that a communication or appearance is barred only if directed to an “employee” of a department, agency, court, or court-martial. We specifically intend that the words “employed by” would exclude from the scope of section 207(a) those communications directed to a non-Federal employee who happens to be serving in a department, agency, court, or court-martial. However, as illustrated in proposed example 7 following § 2641.201(f), we recognize that there may be circumstances in which a communication to a non-Federal employee is actually directed to a Federal employee.

Proposed § 2641.201(f)(1)(i) specifies that an agency encompasses a Government corporation. While the

⁴ *Coleman* involved the application of former 18 U.S.C. 207(b)(1), but that statute contained the same language concerning the representational conduct prohibited as section 207(a), prior to the 1989 amendments.