

Proposed § 2641.201(g)—On Behalf of Any Other Person

Proposed § 2641.201(g) defines the phrase “on behalf of” for purposes of 18 U.S.C. 207(a)(1), (a)(2), (c) and (d). As enacted in 1962, the lifetime restriction originally barred a former employee from acting as “agent or attorney” for anyone. Similarly, the predecessor of current section 207(a)(2), concerning matters under an employee’s official responsibility, originally barred a former employee from appearing personally as “agent or attorney.” These restrictions were amended by the Ethics in Government Act of 1978 to extend to the former employee who acts “as agent or attorney for, or otherwise represents, any other person * * * in any formal or informal appearance * * * or * * * makes any oral or written communication on behalf of any other person.” Congress used this same language in 1978 when it enacted section 207(c), the one-year “cooling-off” restriction applicable to former senior employees. Since the Ethics Reform Act of 1989, these three restrictions have barred a former employee from making any “communication to or appearance before” an employee of the United States “on behalf of” any other person. The same language appears in section 207(d), the one-year cooling-off restriction applicable to former very senior employees.

We determined that a communication or appearance that is in the interest of another person is not sufficient to be considered “on behalf of” that person. Accordingly, the proposed definition at § 2641.201(g)(1) states that “[a] former employee does not act on behalf of another merely because his communication or appearance is consistent with the interests of the other person, is in support of the other person, or may cause the other person to derive a benefit as a consequence of the former employee’s activity.” While we recognize that the terms “agent” and “attorney” no longer appear in the current version of the permanent, two-year, or one-year cooling-off restrictions, proposed § 2641.201(g)(1) indicates that when a former employee acts as another’s “agent” or “attorney,” he necessarily acts on behalf of the principal. Even when a former employee is not acting as an agent or attorney, however, proposed § 2641.201(g)(1) recognizes that a former employee may nevertheless act on behalf of another provided the criteria at proposed § 2641.201(g)(1)(i) and (ii) are satisfied. As specified in proposed § 2641.201(g)(1)(i), the former employee

must be acting with the consent, express or implied, of the other person. And, as specified in proposed

§ 2641.201(g)(1)(ii), the former employee must be subject to some degree of *control or direction* by the other person in relation to the communication or appearance.

The former employee in example 2 following proposed § 2641.201(g) has broad authority to further the interest of the organization with which she is serving as a volunteer. For purposes of the consent requirement in proposed § 2641.201(g)(1)(i), the organization is deemed to have consented to her dispatch of the letter to the Government. In contrast, the circumstances in proposed example 3 would indicate that the former employee is not acting on behalf of the nonprofit group with which he is serving as an employee.

OGE has fielded many questions from agencies that wish to contact former employees who have gone to work for private sector employers. We have generally been counseling that all relevant factors must be considered, including the relationship between the communication or appearance and any related interest of the former employee’s new employer or other organization with which he is affiliated. *See, e.g.*, OGE Informal Advisory Letter 97 x 9. We believe that the focus on the two factors at proposed § 2641.201(g)(1) would make certain contacts between an agency and its former employee less problematic and would allow OGE and agency ethics officials to advise accordingly.

An appearance or communication is barred by 18 U.S.C. 207(a)(1), (a)(2), (c), or (d) only if made on behalf of “any other person.” Proposed § 2641.201(g)(2) cross-references the definition of “person” in proposed § 2641.104, but specifically states that self-representation is not prohibited. Proposed example 1 following proposed § 2641.201(g) is illustrative. Proposed § 2641.201(g)(2) also includes a reference to sole proprietorships that is intended to distinguish that form of business enterprise from partnerships and corporations for purposes of the “exception” for self-representation. The proposed rule reflects that a corporation is a person separate from its owner or owners. As a result, if a former employee chooses to incorporate his consulting business, he must ensure that his communications with the Government do not run afoul of the post-employment statute’s requirements since he will be representing another “person.” On the other hand, if the same former employee had chosen not to incorporate his business, he would be

free to interact with current Government employees without fear of violating section 207(a)(1) since he would be representing only himself.

Proposed § 2641.201(h)—Particular Matter Involving Specific Parties

Proposed § 2641.201(h) explains a concept that has been central to the understanding of 18 U.S.C. 207 since its original enactment in 1962. The phrase “particular matter” is broadly defined in section 207(i)(3) to include “any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding.” In section 207(a)(1) and (2), however, particular matter is modified by the additional phrase “which involved a specific party or specific parties.” *See* B. Manning, *Federal Conflict of Interest Law* 204 (1964) (explaining significance of the phrase); 2 Op. O.L.C. 151 (1978) (same). Proposed § 2641.201(h) is intended to explain the nature and scope of this statutory element.

The proposed regulation uses basically the same test for particular matters involving specific parties that is used in 5 CFR 2637.201(c). Proposed § 2641.201(h)(1) states: “These matters involve a specific activity or undertaking affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.” One minor change worth noting is that the proposed regulation speaks of “identified” parties, whereas section 2637.201(c)(1) used the term “identifiable” parties (following identical language originally found in B. Manning, *supra*, at 204). This change is consistent with the more recent definition of particular matter involving specific parties in 5 CFR 2640.102(l). *See* 60 FR 47207, 47211 n.1 (September 11, 1995). The use of “identified,” rather than “identifiable,” is intended to distinguish more clearly between particular matters involving specific parties and mere “particular matters,” which are described elsewhere as including matters of general applicability that focus “on the interests of a discrete and *identifiable* class of persons” but do not involve specific parties. 5 CFR 2640.102(m) (emphasis added). *See also* 5 CFR 2640.103(a)(1); 5 CFR 2635.402(b)(3). The use of the term “identified,” however, does not mean that a matter will lack specific parties just because the name of a party is not disclosed to the Government, as