

where an agent represents an unnamed principal.

Consistent with this basic test and with § 2637.201(c)(1), proposed § 2641.201(h)(2) confirms that matters of general applicability are not particular matters involving specific parties. *See also Shakeproof Indus. Prod. Div. of Ill. Tool Works, Inc. v. Department of Commerce*, 104 F.3d 1309, 1313–14 (Fed. Cir. 1997). As illustrated by the examples following this provision, section 207(a) ordinarily does not prohibit former employees from making representations in connection with general rulemaking, policy and legislative matters, notwithstanding any personal and substantial participation or official responsibility they may have had with respect to such matters as a Federal employee.

Proposed § 2641.201(h)(3) indicates that specific parties must be involved, under section 207(a), both at the time the former employee was involved in the matter and at the time of the post-employment representation. This reflects a longstanding interpretation of section 207(a), which was codified in 5 CFR 2637.201(c)(4). Nevertheless, the Ethics Reform Act of 1989 made certain adjustments to the grammatical structure of section 207(a) that may require some explanation. Prior to the 1989 Act, section 207(a) read, in pertinent part: “Whoever \* \* \* knowingly acts as agent or attorney for, or otherwise represents, any other person \* \* \* in connection with any \* \* \* particular matter involving specific parties \* \* \* in which he participated personally and substantially as an officer or employee \* \* \*.” In 1989, the language pertaining to specific parties was broken out and moved to its own lettered subparagraph, which now reads: “(C) which involved a specific party or specific parties *at the time of such participation*.” 18 U.S.C. 207(a)(1)(c) (emphasis added).<sup>5</sup> Based on the legislative history, it appears that the amendment was intended simply to resolve any doubt that specific parties must have been involved at the time that the former employee participated in the matter, not to cast doubt on the well-understood requirement that specific parties must be involved at the time of the representation.<sup>6</sup>

<sup>5</sup> Similar language was enacted in 1989 in section 207(a)(2)(C), which pertains to particular matters pending under an employee’s official responsibility: “(C) which involved a specific party or specific parties *at the time it was so pending* (emphasis added).”

<sup>6</sup> The leading Senate proponent of the 1989 amendments stated that many of the changes to section 207 “simply reflect an effort to make the statute more readable.” 135 Cong. Rec. S15954

Proposed § 2641.201(h)(4) pertains to the related issue of when specific parties can be said to be involved in a particular matter. Section 207(a) can apply to participation in preliminary or informal stages of a particular matter. *See, e.g.*, 2 Op. O.L.C. 313 (1978). Consequently it becomes important to determine, in light of the facts surrounding a given matter, at what point specific parties are first identified. Proposed § 2641.201(h)(4) and the examples that follow are intended to provide guidance in making such determinations. In addition to general guidance applicable to all types of matters, the proposed regulation also provides more specific guidance with respect to contracts, grants, and other agreements, which historically have posed some of the most difficult and recurring questions. *See* OGE Informal Advisory Letter 96 × 21.

Another set of difficult and recurring questions is addressed by proposed § 2641.201(h)(5), which explains the requirement that the same particular matter must be involved both at the time of the former employee’s Government service and at the time of post-employment representation. The proposed regulation uses substantially the same test as 5 CFR 2637.201(c)(4), including a similar list of factors that should be taken into consideration, where relevant, in determinations as to whether two matters constitute the same particular matter involving specific parties. The proposed examples following proposed § 2641.201(h)(5) would illustrate the application of some

(November 17, 1989) (remarks of Sen. Levin). Senator Levin also entered into the record a section-by-section analysis stating that section 207(a)(1) is “similar to current law” and describing it as a prohibition against “lobbying \* \* \* on a particular matter involving specific parties,” *id.*, which suggests this was not a novel effort to cover matters that do not involve specific parties at the time of the lobbying. Furthermore, the Department of Justice testified at a 1989 hearing with respect to H.R. 9, which contained the same language as the enacted amendments concerning the timing of the specific parties requirement. The Justice Department commented on this aspect of the proposal and specifically noted its consistency with the OGE regulation discussed above: “The requirement that a specific party must have been involved at the time of the employee’s government service clarifies present law in a way that is consistent with current regulations. It means, for example, that a Government employee who helped develop a set of regulations or policies is not precluded from becoming involved in a particular case or matter involving the application of the regulation or policy. *See* 5 CFR 737.5 (c)[now 5 CFR 2637.201(c)].” Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, on H.R. 2267 and Related Bills: Post-Employment Restrictions Act of 1989, 101st Cong., 1st Sess. 151 (April 27, 1989)(statement of John C. Keeney, Deputy Assistant Attorney General, Criminal Division).

of these factors and draw on various administrative and judicial precedents. *E.g.*, *United States v. Medico Indus., Inc.*, 784 F.2d 840 (7th Cir. 1986); *CACI, Inc.-Federal v. United States*, 719 F.2d 1567 (Fed. Cir. 1983); OGE Informal Advisory Letter 93 × 32. For purposes of clarity, one factor was not carried over from the previous list in § 2637.201(c)(4), namely, “the continuing existence of an important Federal interest”; this factor was thought to add little to the analysis of section 207, since the statute already applies only to matters in which the United States is a party or at least has a “direct and substantial interest.” 18 U.S.C. 207(a)(1), (a)(2).

The principle reflected in proposed § 2641.105—that the primary responsibility for rendering post-employment advice resides in the ethics official at the agency where the former employee served—is particularly important in connection with these “same particular matter” determinations. These questions frequently require an understanding of the specific operations, programs, and missions of the agencies involved. Moreover, there is judicial recognition that agency determinations with respect to the “same particular matter” element are “entitled to weight.” *CACI*, 719 F.2d at 1576; *see also Shakeproof*, 104 F.3d at 1314. This is not to suggest, of course, that deference to the agency is absolute. *See, e.g.*, *United States v. Gonzalez-Florida*, 986 F.Supp. 687 (D.P.R. 1997).

#### *Proposed § 2641.201(i)—Participated Personally and Substantially*

Proposed § 2641.201(i) defines the terms “participate,” “personally,” and “substantially.” The first regulatory definition of these terms for purposes of 18 U.S.C. 207 was published in 1980 at 5 CFR 2637.201(d). When Congress amended section 207 in 1989, it added a statutory definition of “participated” at section 207(i)(2). In the 1990s, OGE published regulatory guidance concerning the meaning of these terms in connection with its implementation of 18 U.S.C. 208 at 5 CFR part 2635 and 5 CFR part 2640. The current definitions of “personal and substantial” at 5 CFR 2635.401(b)(4) and “personal and substantial participation” at 5 CFR 2640.103(a)(2) were patterned closely after definitions in 5 CFR part 2637. The language of proposed § 2641.201(i) deviates somewhat from the language of these existing OGE regulations for several reasons. First, we are proposing to more clearly separate the definitions of the terms “participate,” “personally,” and “substantially.” We would also exactly track the language of the