

statutory definition of “participated.” More significantly, however, we are proposing to include some additional guidance that reflects our experience with several questions arising since publication of the earlier regulations.

The first sentence of the definition of “participate” at proposed § 2641.201(i)(1) is from 18 U.S.C. 207(i)(2). Consistent with existing guidance at 5 CFR 2637.201(d)(3), the definition then indicates that to participate can also mean to “purposefully forbear in order to affect the outcome of a matter.” The proposed definition also distinguishes participation from mere knowledge of a matter and from the definition of “official responsibility” as set forth in proposed § 2641.202(j). Additionally, the proposed definition points out that an employee can participate in a particular matter even though it is not pending at his own agency. Finally, it would state that an employee does not participate in a particular matter within the meaning of section 207(a)(1) unless he does so in his official capacity.

Under the proposed definition at § 2641.201(i)(2), to participate “personally” includes the direct and active supervision of others. The existing regulations refer to active supervision of a “subordinate.” As proposed, § 2641.201(i)(2) indicates that the person supervised need not technically be a subordinate. An employee may participate in a matter, for example, by means of direct and active supervision of an employee who is merely on loan from another office. Separately, we are also proposing to make the fairly obvious point that an employee participates in a matter whether he does so “individually or in combination with other persons.”

The definition of “substantially” at proposed § 2641.201(i)(3) closely tracks the definitions of that term in 5 CFR part 2635 and 5 CFR part 2640. However, we are proposing to insert an additional sentence in response to two recent scenarios. The first concerned a former employee’s involvement as a Government employee in a meeting with a private sector company. The meeting was preliminary to the company’s submission of an application to the Government. The former employee was willing to concede that the meeting and the application were the same “particular matter.” He argued, however, that the meeting constituted an aspect of the matter that was insignificant in relation to the application process as a whole and that the former employee’s participation was, therefore, insubstantial. In another case, a former employee argued that his

participation in a multi-million dollar project had not been substantial since the dollar value of the aspect of the project in which he was involved was insignificant in relation to the dollar value of the project as a whole. The Office of Government Ethics rejected both arguments, noting that in both cases the former employee had made a substantive contribution to the matter.

As we propose to explain in § 2641.201(i), “[p]rovided that an employee participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole.”

We have included an additional sentence in the definition at proposed § 2641.201(i)(3) emphasizing that participation in “peripheral” aspects of a matter or in aspects not directly involving the substantive merits of a matter is not substantial. We would note, however, that such an aspect might itself constitute a particular matter with respect to which the permanent bar might apply. This is set forth in 5 CFR 2637.201(d)(2) and example 1 following 5 CFR 2637.201(d)(1).

Although reworded, proposed examples 1 and 2 following proposed § 2641.201(i) are from existing 5 CFR 2637.201(c) and 2637.201(d). Proposed example 3 would make the point that an employee’s participation may be substantial even though her role in the matter may be minor in relation to the matter as a whole.

*Proposed § 2641.201(j)—United States is a Party or Has a Direct and Substantial Interest*

Finally, proposed § 2641.201(j) focuses on how to determine whether the United States is a party or has a direct and substantial interest in a particular matter at the time of a former employee’s post-employment representational activity.

The definition of “United States” at proposed § 2641.201(j)(1) is intended to encompass the entire Federal Government. As explained earlier in connection with the definitions in proposed § 2641.104, we cited the definition of “Government corporation” in 18 U.S.C. 6 for purposes of defining “United States” in proposed § 2641.201(j)(1). Also, as explained below in connection with proposed § 2641.301(a), the Government of the District of Columbia is not encompassed by the term United States. Separately, we note that the proposed definition of United States at § 2641.201(j)(1) encompasses the entire judicial branch.

*Compare* proposed § 2641.201(f) which provides that a representation is not made “to” an employee of the United States unless made, *inter alia*, to an employee of a Federal court. The narrower interpretation in proposed § 2641.201(f) reflects the statutory language “department, agency, court, or court-martial of the United States” in 18 U.S.C. 207(a).

Proposed § 2641.201(j)(2) specifically states that “the United States is neither a party to nor does it have a direct and substantial interest in a particular matter merely because a Federal statute is at issue or a Federal court is serving as the forum for resolution of the matter.” *See, e.g.*, 14 Op. Off. Legal Counsel O.L.C. 139 (June 7, 1990) (predecessors to 18 U.S.C. 207(a)(1) and (a)(2) determined not to bar former employees from serving as trustees in bankruptcy cases unless the United States is a party or has a direct and substantial interest in the bankruptcy proceeding, *e.g.*, if the United States is a creditor of the estate.) Of course, when a former employee wishes to participate in a judicial proceeding concerning the same particular matter with which he was involved while a Government employee, it is likely that his former agency will be a party to or have a direct and substantial interest in the subject of the proceeding or that the agency will itself be serving as the forum.

As OGE has noted in relation to 18 U.S.C. 205, determining whether or not the United States has a direct and substantial interest in a particular matter “may not be easy.” OGE Informal Advisory Letter 94 × 7. Proposed § 2641.201(j)(2)(i) assigns the primary responsibility for coordinating this determination to the designated agency ethics official at the former employee’s agency. This assignment is consistent with the DAEO’s responsibility, as specified in proposed § 2641.105(a), to provide advice to a former employee of his agency or to the individual’s representative. If any agency has a continuing direct and substantial interest in a matter, we suggest that it will most likely be the agency in which the matter was pending when the former employee worked on it as a Government employee. If the circumstances suggest that another agency may have a direct and substantial interest in the matter, the DAEO should contact an agency ethics official at the other agency. Moreover, we anticipate that an agency’s ethics staff will need only pursue resolution of a direct and substantial interest issue when all other elements of 18 U.S.C. 207(a)(1) or 207(a)(2) appear satisfied.