

As proposed, the regulation does not establish any procedures for the internal coordination of an agency's direct and substantial interest determination. Under proposed § 2641.201(j)(2)(i), it is within an agency's discretion to determine who must be consulted within the agency (or any department of which the agency is a part) in order to determine whether the agency will assert a direct and substantial interest in a particular matter. A DAEO may accept the assurance of another agency's DAEO (or equivalent official in the legislative or judicial branch) that he has been authorized by competent agency authority to convey the agency's direct and substantial interest determination.

In making this determination, proposed § 2641.201(j)(2)(ii) provides that appropriate officials shall consider "all relevant factors." Thus, the proposed factors listed in § 2641.201(j)(2)(ii)(A)-(D) are not all-inclusive. We specifically seek public comment concerning useful revisions or additions to our proposed list.

*Proposed § 2641.202—18 U.S.C. 207(a)(2)*

All relevant statutory changes that were made to 18 U.S.C. 207(a)(1) by the Ethics Reform Act of 1989 were also made to section 207(a)(2), formerly section 207(b)(i), a two-year bar which similarly applies to all "former employees." Proposed § 2641.202(b) provides cross-references to the appropriate paragraphs of proposed § 2641.301 for each of the exceptions and waivers that in certain circumstances negate the prohibition contained in section 207(a)(2). As sections 207(a)(1) and (a)(2) are identical except for their duration and the degree of involvement in a particular matter during Government service necessary to trigger the restriction, proposed § 2641.202(d)-(i) cross-reference relevant portions of proposed § 2641.201 relating to the permanent bar.

*Proposed § 2641.201(j)—Official Responsibility*

The first sentence of the definition of "official responsibility" in proposed § 2641.202(j)(1) quotes the statutory definition of the term in 18 U.S.C. 202(b). In addition, consistent with existing guidance at 5 CFR 2637.202, proposed § 2641.202(j)(1) explains that the scope of an employee's official responsibility is ordinarily determined by statute, regulation, Executive order, job description, or delegation of authority. Example 1 following proposed § 2641.202(j) emphasizes that subject matter jurisdiction assigned by

position description is not removed from the scope of an employee's official responsibilities merely because the employee does not actually exercise his authority to direct Government action in that subject area.

Proposed § 2641.202(j)(1), drawing from existing 5 CFR 2637.202(b)(2), emphasizes the potential breadth of the term "official responsibility," noting that "[a]ll particular matters under consideration in an agency are under the official responsibility of the agency head and each is under that of any intermediate supervisor who supervises a person, including a subordinate, who actually participates in the matter or who has been assigned to participate in the matter within the scope of his duties" (emphasis added). The highlighted language is new. It is intended to make clear that a supervisor can have official responsibility for a pending matter even though his subordinate has not yet retrieved the assigned matter from his in-box or, although having retrieved it, has not yet worked on it "personally and substantially." This language would also make it clear that a supervisor need not have personally assigned the matter to the subordinate, provided the matter is pending with the subordinate and it falls within the scope of the subordinate's official duties. Proposed example 3 would emphasize the requirement that the assigned matter fall within the scope of the supervised employee's official duties. On the other hand, the proposed language is intended to indicate that an employee can have official responsibility for a matter even though he exercises only nominal supervision over the person actually doing the work; the supervised employee need not be a true subordinate. Thus, for example, OGE has advised that a former employee had official responsibility for a matter even though all work on a project was being accomplished by employees "on loan" from another office.

As drafted, proposed § 2641.202(j) indicates that a nonsupervisory subordinate is not deemed to have official responsibility for a matter to which he has been assigned, whether or not he has begun to work on it. *But see United States v. Coleman*, 805 F.2d 474 (3d Cir. 1986) (affirming conviction of nonsupervisory employee for violation of 18 U.S.C. 207(b)(i), the predecessor to section 207(a)(2).) Proposed example 4 following proposed § 2641.202(j) emphasizes, however, that the nature of a nonsupervisory employee's participation in a particular matter could potentially make her subject to

the permanent section 207(a)(1) bar as to that matter.

Existing 5 CFR 2637.202(b)(3) provides that authority for an "ancillary" consideration does not constitute responsibility for the particular matter as a whole. As proposed, § 2641.202(j)(1) continues to make the point that responsibility for ancillary matters, such as budgeting, or equal employment considerations, does not constitute official responsibility for the whole of a matter. Proposed example 2 following § 2641.202(j) illustrates this point. The proposed guidance makes the additional point that responsibility for nonsubstantive aspects of a matter similarly does not cause an employee's official responsibility to extend to the whole of a substantive matter.

Guidance in proposed § 2641.202(j)(2) concerning the meaning of "actually pending" also derives from existing guidance in 5 CFR 2637.202. New language clarifies that a supervisory employee acquires official responsibility for a matter as soon as it is referred to him for assignment, regardless of whether he subsequently assigns the matter to another employee or retains it for his own action. Thus, proposed § 2641.202(j)(2) provides that a supervisory employee acquires official responsibility for any matter referred to the employee "for assignment." In proposed example 5, the General Counsel is said to have acquired official responsibility for a certain matter as soon as it was referred to him as an issue requiring action by the legal department. In addition, as already noted, the proposed guidance notes that there is no requirement that a matter have been pending under an individual's official responsibility for any particular length of time. *See, e.g., OGE Informal Advisory Letter 94 x 13.* In proposed example 5, therefore, it would be enough that the particular matter had been pending under the General Counsel's official responsibility for 2 days. Proposed § 2641.202(j)(2) also indicates that a matter remains pending when it is not under "active" consideration, as discussed in *OGE Informal Advisory Letter 85 x 6.* Proposed example 6 is a reworded version of the current example following 5 CFR 2637.202(c).

Proposed § 2641.202(j)(3) addresses the applicability of section 207(a)(2) with respect to particular matters that fell within an employee's official responsibility only by virtue of a temporary assignment to a position. We recognize that while on detail or serving in an acting capacity, a temporary supervisor can potentially establish