

versions of the memorandum on November 5, 1992 and again on February 17, 2000, by a Memorandum to Designated Agency Ethics Officials, General Counsels, and Inspectors General. Although the 1992 and 2000 memoranda incorporate a few substantive changes, none affects our original 1990 summary of section 207(b). The February 2000 updated summary is available on our Web site under "DAEOgrams," at <http://www.usoge.gov>.

*Proposed § 2641.204—18 U.S.C. 207(c)*

Section 207(c) of title 18, United States Code, is the one-year "cooling-off" restriction that prohibits a former "senior employee" from communicating to or appearing before his former agency, on behalf of another person, with the intent to influence official action. The statutory language of section 207(c) was substantially revised by the Ethics Reform Act of 1989. As noted earlier, OGE published interim regulatory guidance in February 1991 at part 2641 concerning section 207(c) as amended by the Ethics Reform Act of 1989. That rule set forth several definitions in connection with the establishment of interim procedures for the granting of exemptions and designation of components for purposes of section 207(c). As discussed above, in connection with proposed section 2641.104, we are proposing to make certain changes to the interim definitions in existing part 2641. (Our proposed changes to the existing exemption and component designation procedures at 5 CFR 2641.201(d) and (e) are discussed further below in connection with renumbered proposed §§ 2641.301(j) and 2641.302.)

Proposed § 2641.204(a) confirms that an executive branch employee can be subject to either 18 U.S.C. 207(c) or 207(d) but not both. Like section 207(d), section 207(c) states that the restriction applies "[i]n addition to the restrictions set forth in subsections (a) and (b)." Moreover, section 207(c)(2)(A) states that the section 207(c) bar "shall apply to a person (other than a person subject to the restrictions of subsection (d)) \* \* \*." Accordingly, § 2641.204(a) as proposed would specifically provide that a former "very senior employee" is subject to the one-year cooling-off restriction set forth in section 207(d) in lieu of that set forth in section 207(c).

Proposed § 2641.204(b) provides cross-references to the appropriate paragraphs of proposed § 2641.301 for the exemption, exceptions, and waivers that in certain circumstances would negate the prohibition contained in 18 U.S.C. 207(c).

Proposed § 2641.204(c)(1) concerns the application of 18 U.S.C. 207(c) to special Government employees (SGEs). Since its enactment in 1978, section 207(c) has not applied to an SGE who served the Government fewer than 60 days during a statutorily specified time frame. As revised by the Ethics Reform Act of 1989, the current language of the statute provides that the one-year cooling-off period "shall not apply to a special Government employee who serves less than 60 days in the 1-year period before his or her service or employment as such employee terminates." Proposed renumbered § 2641.204(c)(1) confirms that the "60 days" refers to the number of days in which an employee served as an SGE and not to the number of days in which he served as a senior employee.

We are proposing to include a sentence in § 2641.204(c)(1) which addresses the manner in which the 60-day period should be computed for purposes of determining the applicability of section 207(c) to a former senior SGE. Guidance concerning the counting of days in connection with the service of SGEs was contained in the former Federal Personnel Manual and has been endorsed in OGE informal advisory letters and OLC opinions. Consistent with that guidance, § 2641.204(c)(1) as proposed would state that "[a]ny day on which work is performed shall count toward the 60-day threshold without regard to the number of hours worked on that day or whether the day falls on a weekend or holiday." See e.g., OGE Informal Advisory Letter 84 x 4 and 7 Op. Off. Legal Counsel 123 (1983). The first example following proposed § 2641.204(c) illustrates the proper method of counting the 60 days in the case of an SGE. It should be noted, however, that certain *de minimis* activities performed by an SGE on a given day might not be sufficient to count that day, under limited circumstances. See Manning, *supra*, at 28. The Office of Government Ethics has acknowledged a narrow *de minimis* standard where the activity is insignificant, both in terms of substance and in terms of the amount of time expended, and the SGE is not compensated by the Government specifically for that particular effort. An example would be a day on which the SGE did nothing more for the Government than make a brief telephone call to confirm the date of an official meeting. Proposed § 2641.204(c)(1) would also specify the manner in which an SGE's rate of basic pay should be calculated for purposes of

determining whether the rate of basic pay that he receives for his part-time or intermittent work is equal to or greater than the rate of basic pay payable for ES-5 within the meaning of section 207(c)(2)(A)(ii).

Proposed 2641.204(c)(2) concerns the application of 18 U.S.C. 207(c) to certain appointees or detailees. Specifically, this provision sets out those circumstances in which it has been determined that an individual appointed or detailed to an agency pursuant to the Intergovernmental Personnel Act (IPA), 5 U.S.C. 3371-3376, is subject to the restrictions of section 207(c). See "Applicability of the Post-Employment Restrictions of 18 U.S.C. § 207(c) to Assignees Under the Intergovernmental Personnel Act," Memorandum of Daniel L. Koffsky, Acting Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Susan F. Beard, Acting Assistant General Counsel, Department of Energy, June 26, 2000.

Proposed § 2641.204(d) emphasizes that 18 U.S.C. 207(c) is triggered upon termination from a senior employee position, not from termination of Government service, unless the two events occur simultaneously. (This interpretation applies equally with respect to sections 207(d) and 207(f) as specified in proposed §§ 2641.205(c) and 2641.206(c), respectively.) The two examples following proposed § 2641.204(d) illustrate the timing of the section 207(c) restriction in the case of a senior employee who moves from one agency to another. Since the restriction can run while an individual continues to serve as a Government employee, the first example cross-references proposed § 2641.301(a) which states that communications and appearances are permissible if made during the course of performing official duties as an employee of the United States. In the second example, the individual does not cease to be a senior employee until he terminates his senior position at the second agency.

As 18 U.S.C. 207(c) and the permanent bar share several elements in common, proposed § 2641.201 is cross-referenced several times in proposed § 2641.204. For example, both section 207(a)(1) and 207(c) require that there be a communication or appearance made with the intent to influence, although in the case of section 207(c), the representation is prohibited only if made to the former senior employee's former agency. Section 2641.201 is also cross-referenced for its proposed definition of "on behalf of any other person."