

*Section 2641.204(g)—To or Before Employee of Former Agency*

Proposed § 2641.204(g)(1) defines “to or before employee of former agency.” This provision is different from proposed § 2641.201(f) because that section focuses on employees “of the United States” rather than employees at the senior employee’s “former agency.”

The term “employee” is defined in proposed § 2641.204(g)(1) for purposes of identifying the individuals to whom a former senior employee may not direct a communication or appearance.

Proposed § 2641.204(g)(1)(ii) reflects the fact that an individual serving in an agency pursuant to the IPA is deemed an “employee” of that agency and, hence, is an individual to whom a former senior employee of that agency may not direct a communication or appearance. Notably, the definition of employee at proposed § 2641.204(g)(1) also includes an individual detailed to a former senior employee’s former agency. Section 207(g) of the statute provides that “a person who is detailed from one department, agency, or other entity to another department, agency, or other entity shall, during the period such person is detailed, be deemed to be an officer or employee of both \* \* \*.” As reflected in proposed § 2641.204(g)(2)(iii), we interpreted this statutory provision to mean that an employee is barred from contacting any agency to which he was detailed during his last year of senior service, regardless of the duration of the detail. We also decided, however, that section 207(g) is relevant when identifying those employees serving in a former senior employee’s former agency to whom a communication or appearance cannot be directed. Accordingly, proposed § 2641.204(g)(1)(iii) specifies that the term employee encompasses an individual detailed from an agency to the former senior employee’s former agency.

As noted earlier, 18 U.S.C. 207(i)(1)(A) states that “the term ‘officer or employee’, when used to describe the person to whom a communication is made or before whom an appearance is made \* \* \* shall include in subsections (a), (c), and (d), the President and the Vice President \* \* \*.” Under the proposed rule, a former senior employee of the Executive Office of the President is barred from contacting not only employees of that Office, but also the President and Vice President. On the other hand, former senior or very senior employees who formerly served in entities other than the Executive Office of the President would not be barred by section 207(c) or (d) from contacting the President or Vice President. This

reasoning is reflected in proposed § 2641.204(g)(1)(v); proposed § 2641.204(g) is cross-referenced in § 2641.205(f) as proposed for purposes of the section 207(d) restrictions.

The definitions of “department” and “agency” in proposed § 2641.104, combined with the proposed guidance in § 2641.204(g)(2), are key to understanding the scope of 18 U.S.C. 207(c). As we noted earlier in connection with the definition of “agency” in proposed § 2641.104, we specifically included independent agencies (not in the legislative or judicial branches) within that definition.

As already mentioned, and as explained further below in connection with proposed § 2641.302, the Director of OGE is authorized to designate distinct and separate agency components for purposes of section 207(c). The designation of such components within an agency has the effect of narrowing the scope of the restriction as applied to former senior employees eligible to benefit from such designations.

Proposed § 2641.204(g)(2)(i) emphasizes that the 18 U.S.C. 207(c) bar applies only with respect to an agency in which the former employee served within his last year of service as a senior employee. Example 3 following proposed § 2641.204(g) illustrates the application of section 207(c) when a former senior employee’s period of Government service was preceded by a break in Government service.

Consistent with past interpretation, 18 U.S.C. 207(c) is described in proposed § 2641.204(g)(2)(ii) as extending to any agency in which a former senior employee served *in any capacity* prior to his termination from a senior position, “regardless of his position, rate of basic pay, or pay grade.” See, e.g., OGE Memorandum to Designated Agency Ethics Officials, General Counsels, and Inspectors General (February 17, 2000), available under “DAEOgrams” on OGE’s Web site, <http://www.usoge.gov>. Thus, the former employee in proposed example 2 following § 2641.204(g) is barred as to both the Commodity Futures Trading Commission (CFTC) and the Export-Import Bank of the United States even though she served in only a GS-15 position at the CFTC.

Proposed § 2641.204(g)(2)(iii) explains that, in addition to a detail, an employee may otherwise be deemed to be serving two entities simultaneously. The regulation would recognize that many employees are required to serve on committees or similar entities as a collateral duty. The regulation would

specify that an employee will be deemed an employee of such an entity if required to serve pursuant to statute or Executive order.

Defining the boundaries of an employee’s former agency is key to the proper interpretation of 18 U.S.C. 207(c). Proposed § 2641.204(g)(2)(iv) addresses situations where organizational changes affecting an agency could make it difficult to determine if a successor agency is substantially the same as a former senior employee’s former employing entity. For example, subsequent to an employee’s termination from a senior employee position, his former employing entity could be made larger or smaller, merged in whole or in part with another agency, or even abolished.

Significantly, proposed § 2641.204(g)(2)(iv) need not be consulted unless the agency to which 18 U.S.C. 207(c) applies “has been significantly altered by organizational changes after [a senior employee’s] termination from senior service \* \* \*.” Thus, it is not necessary to consult § 2641.204(g)(2)(iv) as proposed merely because the name of a former senior employee’s former agency has changed or because some personnel have retired or transferred. If, however, an organizational change is such that the former senior employee’s former employing entity “is not identifiable as substantially the same agency from which the former senior employee terminated \* \* \*”, then the guidance in proposed § 2641.204(g)(2)(iv)(A) applies and the section 207(c) bar will not apply with respect to that entity. See OGE Informal Advisory Letter 85 x 5 and example 4 following proposed § 2641.204(g).

Under proposed § 2641.204(g)(2)(iv)(B), a former senior employee’s 18 U.S.C. 207(c) bar will extend to the whole of an employing entity that has been affected by organizational changes if it “remains identifiable as substantially the same entity” from which he terminated. Proposed example 5 emphasizes that a former employee would be barred from contacting current employees who had joined the new employing entity, but would not be barred from contacting an employee who had been transferred elsewhere. Under proposed § 2641.204(g)(2)(iv)(C), if a former employing entity is made separate but otherwise remains “substantially the same,” the section 207(c) bar would apply with respect to the separate entity. Proposed § 2641.204(g)(2)(iv) would require designated agency ethics officials to provide counseling in consultation with OGE when the scope