

of section 207(c) is at issue as a result of an agency reorganization.

The guidance concerning the meaning of “to or before” in proposed § 2641.204(g)(3) closely tracks the corollary guidance in proposed § 2641.201 as does the guidance at proposed § 2641.204(g)(4) concerning public commentary. The guidance is repeated in § 2641.204 as proposed only because it has been tailored to the one-year restriction which is aimed only at communications to or appearances before an individual’s former agency. Proposed § 2641.204(h), concerning the phrase “on behalf of any other person”, similarly cites the corollary discussion in proposed § 2641.201(g).

As amended by the Ethics Reform Act of 1989, 18 U.S.C. 207(c) prohibits a former senior employee from making certain communications or appearances on behalf of “any other person” in connection with “any matter on which *such person* seeks official action” (emphasis added). The guidance at proposed § 2641.204(i)(1) reflects that the reference to “such person” refers to the former senior employee.

Proposed § 2641.204(i)—Matter in Which Former Employee Seeks Official Action

Proposed § 2641.204(i)(2) emphasizes that a communication or appearance can be prohibited even if not in connection with a “particular” matter or a “particular matter involving a specific party or parties.” The adjective “particular” does not appear in the section 207(c). See 17 OP. Off. Legal Counsel. 37, 41–42 (1993) (describing effect of 1989 amendments to statute). Thus, proscribed contacts include those made in connection with “[b]road policy options that are directed to a large and diverse group of persons.” Compare 5 CFR 2637.204(d). See also 5 CFR 2640.103(a)(1) and 2635.402(b)(3).

Consistent with existing part 2637, proposed § 2641.204(i)(2)(iii) emphasizes that a communication or appearance may be barred even though made in connection with a new matter not pending at nor of interest to the agency prior to the post-employment contact. The Ethics Reform Act of 1989 deleted the requirement in 18 U.S.C. 207(c) that the subject of a communication or appearance be “pending before” the former senior employee’s former agency or of “direct and substantial interest” to it. In commenting upon H.R. 3660 prior to its passage, Senator Levin noted that “the offense is committed if the former employee seeks official action by an agency or department employee.” 135

Cong. Rec. S15954 (1989) (statement of Sen. Levin).

The language “seeks official action” distinguishes between official and unofficial acts. As implemented in proposed § 2641.204(i)(1), “[a] former senior employee seeks official action when the circumstances establish that he is making his communication or appearance for the purpose of inducing a current employee * * * to make a decision or to otherwise act in his *official capacity*” (emphasis added).

The proposed examples following § 2641.204(i) as proposed illustrate the concept of “official capacity.” In proposed example 1, the former senior employee can solicit a personal charitable contribution from a current employee of his former department since he is not requesting that the current employee act in his official capacity. In example 2 as proposed, a former senior employee wishes to invite the Secretary of his former department to a cocktail party where he would introduce the agency head to several of his private clients. The former senior employee and the Secretary do not have a history of socializing outside the office, the clients could be affected by the Secretary’s official duties, and the expenses of the party are being charged to the former senior employee’s consulting firm. The example advises that the former senior employee should not contact the Secretary since “[t]he circumstances do not establish that the communication would be made other than for the purpose of inducing the Secretary to make a decision in his official capacity about the invitation.”

Proposed § 2641.205—18 U.S.C. 207(d)

The one-year “cooling-off” restriction of 18 U.S.C. 207(d) was enacted by the Ethics Reform Act of 1989. Section 207(d) differs from section 207(c) in that, in addition to being barred from contacting employees of his former department or agency, a former very senior employee is barred from representing another person before any individual currently appointed to an Executive Level position listed in 5 U.S.C. 5312–5316.

Proposed § 2641.205(b) provides cross-references to the appropriate paragraphs of § 2641.301 as proposed for the exceptions and waivers that in certain circumstances would negate the prohibition contained in 18 U.S.C. 207(d).

Paragraphs (d)–(i) of proposed § 2641.205 cross-reference the elements described in proposed §§ 2641.201 and 2641.204 where relevant. Where cross-references to the § 2641.204 elements are made, proposed § 2641.205

highlights the differences between the senior employee and very senior employee restrictions. Proposed § 2641.205(f) points out that, unlike section 207(c), section 207(d) does not provide for the designation of departmental or agency components as a means of narrowing its impact. Proposed § 2641.205(f) also indicates that section 207(d) applies to communications to or appearances before any agency in which an individual served *as a very senior employee* during his last year of very senior service. By comparison, as interpreted in proposed § 2641.204(g)(2)(ii), section 207(c) applies to contacts with an employee of any agency in which the individual served “in any capacity” during the year prior to his termination from a senior position. Also, and more significantly, section 207(d) bars contacts not only with the individual’s former agency but, as noted in proposed § 2641.205(a) and (g), also with any official currently appointed to an Executive Schedule position. As emphasized in Example 2 following § 2641.205, however, we have interpreted the bar to apply only with respect to Executive Level officials who are actually listed in sections 5312–5316 of title 5 of the *United States Code*. This interpretation accords with the plain language of the provision (“any person appointed to a position in the executive branch which is listed in” those sections).

The note following proposed § 2641.205(g) indicates that a communication to an Executive Level official may include a communication made through a subordinate of such official. A former very senior employee cannot evade the prohibition of 18 U.S.C. 207(d) simply by making a communication to a subordinate official, as long as such communication is still made with the intent that the information be conveyed to an Executive Level official and attributed to the former very senior employee, *Cf.* Memorandum for Amy L. Comstock, Director, OGE, from Joseph R. Guerra, Deputy Assistant Attorney General, OLC, January 19, 2001, available under “Other Ethics Guidance, Conflict of Interest Prosecution Surveys and OLC Opinions” on OGE’s Web site, <http://www.usoge.gov>. This point is illustrated in proposed example 5.

Proposed § 2641.206—18 U.S.C. 207(f)

Section 207(f) of 18 U.S.C. was enacted by the Ethics Reform Act of 1989. It prohibits both former senior and former very senior employees from representing, aiding, or advising a foreign government or foreign political