

filed by [the agency], and discuss future strategy,” because communications and appearances made for these purposes were characterized as lacking the necessary “intent to influence” element.

In drafting proposed § 2641.301(a)(2)(ii)(A), we followed the result reached in 82 x 16, although we departed, in part, from the analysis in that opinion. We have concluded that a former employee acts on behalf of the United States when he serves “[a]s a representative of the United States pursuant to a specific agreement with the United States to provide representational services involving a fiduciary duty to the United States.” Consequently, the “on behalf of the United States” provision would permit not only representational contacts made by the former employee to a court (or another agency) but also any contacts with the agency with which there is an agreement to provide representational services, if those contacts are necessary for the former employee to carry out his representational duties under the agreement. Contrary to the analysis in 82 x 16, however, we decline to base the latter conclusion on the absence of intent to influence with respect to such contacts, because we do not believe that it is always the case that communications required during the course of performing a contract with an agency are necessarily made without the intent to influence the agency. This subject is discussed in more detail above in connection with the “intent to influence” element.

We specify in proposed § 2641.301(a)(2)(ii)(A) that the representational services must involve a “fiduciary duty to the United States.” This serves to emphasize that the former employee must have an independent obligation to act primarily for the benefit of the Government. See *Restatement of the Law (2d) Agency* § 13 (1958) (agreement to act on behalf of another person makes one a fiduciary with duty to act primarily for benefit of other person). It is important, therefore, to remember that a former employee will not be deemed to act on behalf of the United States merely because he is performing some kind of contract with the United States. See *Restatement* § 14N, comments a & b (distinguishing between contractor who agrees to act on behalf of principal and thereby becomes fiduciary, and non-agent contractor who is not fiduciary). OGE Informal Advisory Letter 81 x 35 focused on the restrictions applicable to a former employee who went to work for a corporation that had a contract to provide certain services to the Government. The opinion is noteworthy

for its conclusion that “[t]he fact that the contract between [the Department] and [the Corporation] requires communication between them on many questions arising under [the Project] does not authorize [the former employee’s] participation in such communications.”

Communications to and appearances before the legislative branch are not prohibited by sections 207(a)(1), (a)(2), (c), or (d). On the other hand, communications or appearances before the legislative branch can be barred by section 207(b) or (f). In addition, a section 207 issue can arise when an employee of the executive branch is present at a forum held under the auspices of the legislative branch, as discussed in connection with the “to or before” element in proposed § 2641.201(f)(2). Under proposed § 2641.301(a)(2)(ii)(B), however, a communication or appearance made by a former employee at the request of the Congress, in the context of a Congressional hearing, will be deemed made on behalf of the United States. This interpretation makes effective the permission, under the statute, for communications to Congress and its members. The provision is limited to hearings, however, in order not to permit a former employee to use the good offices of a Congressman to facilitate otherwise prohibited contacts with executive branch personnel.

*Proposed § 2641.301(b)—Acting as an Elected State or Local Government Official*

In addition to excepting communications or appearances made in carrying out official duties on behalf of the United States, 18 U.S.C. 207(j)(1) authorizes a former employee to carry out official duties as an elected official of a State or local government notwithstanding sections 207(a)(1), (a)(2), (b), (c), (d), or (f). As we noted in OGE Informal Advisory Letter 87 x 1, this exception “is grounded in considerations of federalism” in that “statutory restrictions should not unduly impede the ability of the elected representative of the people to perform the duties of his position.” The two examples following proposed § 2641.301(b) highlight the requirement that the former employee be acting as an “elected official” of the State or local government. The term “State” is defined in proposed § 2641.104 to include the District of Columbia, the Commonwealth of Puerto Rico, and United States territories or possessions.

*Proposed § 2641.301(c)—Acting on Behalf of Specified Entities*

Proposed § 2641.301(c) describes a second exception permitting representational activity on behalf of a State or local government. The exception in 18 U.S.C. 207(j)(2) would permit communications and appearances in carrying out official duties as an employee of “an agency or instrumentality of a State or local government” notwithstanding sections 207(c) or (d). It also would except from those prohibitions communications and appearances made as an employee of certain institutions of higher education, hospitals, or medical research organizations. The wording of proposed § 2641.301(c) indicates that the exception also applies when the former employee is employed by more than one of the entities specified in § 2641.301(c)(1), such as by an interstate compact organization composed of several States. See OGE Informal Advisory Letter 87 x 1. However, as proposed example 3 illustrates, the exemption does not apply to an association of States or State officials that is not an entity carrying out governmental functions. See Memorandum for An Agency General Counsel, from Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of the Exemption Provisions of 18 U.S.C. § 207(j)(2) to the Employment of a Former Federal Official by [an] Association* (July 2, 1999) (OGE Informal Advisory Letter 87 x 1 distinguished).

In order to qualify for the exception, the former employee must be an “employee” of the State or local government or other specified entity and not merely a consultant or independent contractor. This interpretation had been adopted in OGE Informal Advisory Letter 87 x 1 concerning the same exception in the previous version of 18 U.S.C. 207. That letter, citing legislative history relating to the Ethics in Government Act of 1978, had determined that the exception does not apply in the case of so-called “hired guns.” Use of the term “employee” in the new version of the statute is consistent with that legislative history. See 125 Cong. Rec. H3696, H3697 (daily ed. May 24, 1979). Accordingly, proposed § 2641.301(c)(2) incorporates the distinction, providing that the term “employee” means a person who has an employee-employer relationship with a specified entity and excludes individuals serving a specified entity as a consultant or independent contractor. Example 2 following