

proposed § 2641.301(c) concerns an attorney who does not qualify for the exception because of this distinction.

*Proposed § 2641.301(d)—Communicating Information Based on Special Knowledge*

Proposed § 2641.301(d) implements 18 U.S.C. 207(j)(4), an exception to sections 207(c) and (d) permitting a former senior or very senior employee to make an uncompensated “statement” if “based on [his] own special knowledge in the particular area that is the subject of the statement \* \* \*.”

When originally enacted by Congress in 1978, 18 U.S.C. 207(c) prohibited a former senior employee from representing “anyone” before his former agency. Because section 207(c) barred self-representation (as well as the representation of others), the statute specifically permitted communications or appearances “concerning matters of a personal and individual nature, such as personal income taxes or pension benefits.” The statute also stated that the one-year cooling-off provision did not prevent a former senior employee from “making or providing a statement, which is based on the former officer’s or employee’s own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided for by law or regulation for witnesses.”

The current version of 18 U.S.C. 207(c) no longer prohibits self-representation, and, therefore, the statute no longer includes an exception for communications of a personal and individual nature. On the other hand, the “special knowledge” exception survives. Of course, since self-representation is no longer barred, a former senior or very senior employee need not rely on this or any other exception to section 207(c) or (d) when he makes a communication solely on his own behalf.

For purposes of implementing the section 207(j)(4) exception, we propose guidance as to what the terms “special knowledge,” “statement” and “compensation” mean in section 207(j)(4). We indicate in proposed § 2641.301(d)(1) that a former employee will be deemed to have “special knowledge” with respect to the subject area “if he is familiar with the subject area as a result of education, interaction with experts, or other unique or particularized experience.” While this standard does not require the “outstanding qualifications” in a field that are the prerequisite for a section 207(j)(5) certification, discussed below, a former employee must have become

knowledgeable with the subject prior to making contact with the Government. Proposed § 2641.301(d)(2) defines the term “statement” as “a communication of facts directly observed by the former employee.”

The proposed definition of compensation at § 2641.301(d)(3) is broad. Reflecting the exception’s amendment by the Ethics Reform Act of 1989, the proposed definition does not exclude compensation provided for by law or regulation for witnesses. However, the proposed definition of compensation does exclude the payment of actual and necessary expenses incurred in connection with making the statement. *Cf.* Memorandum of Dawn Johnson, Acting Assistant Attorney General, Office of Legal Counsel, for the Counsel to the President, January 28, 1998 (“compensation,” within the meaning of 18 U.S.C. 203, does not include reimbursement of expenses in connection with representation), available on the DOJ Web site at <http://www.usdoj.gov/olc/1998opinions.htm>.

*Proposed § 2641.301(e)—Communicating Scientific or Technological Information*

Section 207(j)(5) of 18 U.S.C. permits a former employee to make communications “solely for the purpose of furnishing scientific or technological information” notwithstanding sections 207(a)(1), (a)(2), (c), or (d), provided that (1) the communications are made “under procedures” acceptable to the agency or agencies to which the communication is directed or (2) the head of such agency or agencies “makes a certification” that meets certain requirements. A former employee cannot use this exception to avoid the restrictions in sections 207(b) or 207(f). Thus, a former employee cannot escape the reach of either of these latter two restrictions by merely limiting his use of covered trade or treaty information to that which is of a scientific or technological character or by assisting a foreign entity only by means of furnishing scientific or technological information.

Proposed § 2641.301(e) incorporates both the procedures and certification aspects of the section 207(j)(5) exception for communication of scientific and technological information and, in effect, constitutes two exceptions. Proposed § 2641.301(e) states the exception in general terms, and proposed § 2641.301(e)(1)–(e)(3) provides information common to both the procedures exception and the certification exception. Guidance on the

promulgation and implementation of procedures is contained in proposed paragraph (e)(4). Guidance on the certification process is contained in proposed paragraph (e)(5).

As originally enacted in 1962, section 207 had provided an exception from its substantive restrictions for former employees certified as possessing “outstanding scientific or technological qualifications” and only when in the “national interest.” This certification exception, since modified, survives as part of current section 207(j)(5). Prior to the amendments to section 207 in the Ethics Reform Act of 1989, the certification mechanism freed the former employee from any post-employment restrictions attendant to such matter, not just communications solely for the purpose of furnishing scientific and technological information. *See* OGE Informal Advisory Letter 80 x 9. The 1989 amendments changed the wording of the certification exception, limiting recipients of a section 207(j)(5) certification to making contacts “solely for the purpose of furnishing scientific or technological information.” This change imposes a significant limitation on the scope of activities permitted by a certification, because the recipient of the certification is prohibited from making communications that are not “solely for the purpose of furnishing scientific or technological information.”

The part of the exception involving procedures was added by the Ethics in Government Act of 1978. *See* 124 Cong. Rec. 31,983 (1978) (statement of Rep. Stratton) (explaining need for alternative in addition to existing certification mechanism). Since its original enactment, the procedures provision has always been limited to communications solely for the purpose of furnishing scientific or technological information.

The exception in 18 U.S.C. 207(j)(5) permits otherwise prohibited “communications,” but is silent as to “appearances.” We have worded proposed § 2641.301(e) so that procedures and certifications under section 207(j)(5) permit both communications and appearances. It would defeat the purpose of the exception if it permitted a former employee to make communications but not to appear before the Government to make such communications.

When drafting proposed § 2641.301(e)(1), we were aware that certain legislative history in connection with the 1978 amendments indicated that the exception applies only to communications that are made “solely for the purpose of furnishing scientific or technological information and