

without the intent to influence.” See 124 Cong. Rec. H35,671 (1978) (emphasis added). However, as discussed earlier in connection with the “intent to influence” element in proposed § 2641.201(e), the post-1989 version of section 207 prohibits no communications or appearances that are not made with the intent to influence the Government. The exception in section 207(j)(5) would be surplusage if it only applied to communications and appearances that are not prohibited in the first place, *i.e.*, those made without any intent to influence. Even communications made solely for the purpose of conveying scientific or technological information may be deemed to be made with the intent to influence, if made for the purpose of affecting Government action in a matter that involves an appreciable element of dispute or discretionary Government action. Therefore, proposed § 2641.301(e)(1) reflects that a communication for the purpose of furnishing scientific or technological information may be permitted by the exception even when made in contexts involving intent to influence.

The former Marine Corps employee in proposed example 1 following § 2641.301(e)(4) as proposed, for example, may report the results of a series of scientific tests even though the methodology of those tests is expected to be and is, in fact, the subject of debate at the meeting. Moreover, he could report the results even though they tend to support the company’s argument that it has complied with a certain contract specification. As emphasized in proposed § 2641.301(e)(1)(iii), the exception permits the communication of scientific or technological information in adversarial or other contexts even if the information is “inherently influential.” On the other hand, proposed example 1 emphasizes that the former Marine Corps employee could not present the company’s argument that it has complied with a contract term regarding advance payments.

Proposed § 2641.301(e)(2) offers guidance concerning the meaning of the adjectives “scientific” and “technological.” It would provide that scientific or technological information refers, for example, to “technical or engineering information relating to the natural sciences” as distinguished from information “associated with a nontechnical discipline such as law, economics, or political science.” This distinction is consistent with the legislative history concerning the certification authority in section 207(j)(5). The Conference Report issued in connection with the Ethics in

Government Act of 1978 reflected the intent of the Committee that the phrase “scientific, technological, or other technical discipline” excludes the social sciences. S. Conf. Rep. No. 95–127 at 77 (1978). We expect that an agency will be in the best position to interpret these adjectives in the context of its own programs and consistent with the guidance in proposed § 2641.301(e)(2).

While proposed § 2641.301(e)(2) requires that a communication convey scientific or technological information to be permissible under the exception, proposed § 2641.301(e)(3) recognizes that a communication may be made *for the purpose of* furnishing scientific or technological information notwithstanding an “incidental reference or remark” of a nontechnical character. Thus, like existing 5 CFR 2637.206(b), proposed § 2641.301(e)(3)(ii) recognizes the permissibility of nontechnical communications “when necessary to appreciate the practical significance of the basic scientific or technological information provided.” Moreover, like 5 CFR 2637.206(a), § 2641.301(e)(3)(iii) as proposed would permit incidental communications “[i]ntended to facilitate the furnishing of scientific or technological information \* \* \*.” Significantly, however, proposed § 2641.301(e)(3) emphasizes that, taken as a whole, a communication (or series of related communications) must “primarily” convey information of a scientific or technological character.

Proposed examples 1 and 2 following § 2641.301(e)(3) are illustrative. Example 1 emphasizes that it is the former employee’s own communications that must primarily convey scientific or technological information. Thus, the former employee in that example is not deemed to make a permissible “incidental” reference to a product’s expected cost when the scientific information, although communicated on the same occasion, is communicated by another individual. On the other hand, as indicated in proposed example 2, the former employee could state the product’s expected cost if the whole of her communication otherwise focused primarily on relevant scientific principles.

As specified in proposed § 2641.301(e)(4), the exception is available to a former employee where the communication is made in accordance with procedures adopted by the agency to which the communication is directed. The prerequisite that the agency to which the communication is directed is the agency whose procedures must be complied with is consistent

with existing regulatory guidance at 5 CFR 2637.206(e) and with past OGE advice. See, *e.g.*, OGE Informal Advisory Letter 96 x 21.

The regulation as proposed does not specify any particular procedure or procedures that must be adopted by an agency. The language of the statute affords each agency the discretion to develop procedures it deems “acceptable.” Proposed § 2641.301(e)(4)(i) suggests some possible mechanisms that could be employed by an agency to ensure the proper use of the exception. Many of these are taken from existing guidance at 5 CFR 2637.206(e).

The certification provision in section 207(j)(5) would be implemented by proposed § 2641.301(e)(5). As specified in proposed § 2641.301(e)(5)(iii), these certifications must be issued by the head of the agency with which the former employee would have contact.

We have interpreted section 207(j)(5) as permitting agency heads the discretion to limit their certification to only certain of the statute’s substantive restrictions. For example, in OGE Informal Advisory Letter 97 x 14, we advised a designated agency ethics official that an agency head could waive section 207(c) only. Similarly, we have included a provision at proposed § 2641.301(e)(5)(iii)(E) that confirms our view that the granting authority has discretion to impose other limitations on the scope of a section 207(j)(5) certification. As we said in OGE Informal Advisory Letter 80 x 9, a certification for technical expertise “may be limited in nature at the discretion of the head of the agency or Department \* \* \*.”

While the authority to grant the certification ultimately rests with the appropriate agency head, proposed § 2641.301(e)(5) incorporates the statutory requirement for advance consultation with OGE prior to issuance. We believe that the statutory “national interest” standard contemplates that this authority will be used infrequently. Moreover, legislative history surrounding the amendment of this provision in 1978 supports the view that certifications should be granted only in “exceptional” cases. S. Rep. No. 170, 95th Cong., 1st Sess. 155 (1977).

Proposed § 2641.301(e)(5) provides that a section 207(j)(5) certification may be granted to a “former employee.” We believe that an agency head may entertain a request for a certification from a current employee who has firm post-employment plans, provided that the effective date of the certification occurs after the employee terminates Government service.