

Paragraphs (A), (B), and (C) of proposed § 2641.301(e)(5)(i) describe the three statutory criteria that must be satisfied in order for a certification to be issued. Proposed § 2641.301(e)(5)(i)(B) requires that the former employee will actually utilize his scientific, technological, or technical expertise in connection with the matter for which the waiver is granted. We believe this criterion follows from the statutory requirement that the former employee not only possess outstanding qualifications, but that he will be “acting with respect to a particular matter which requires such qualifications.” OGE will carefully examine the facts surrounding a waiver proposed for an individual who will occupy a management position to ensure this criterion is satisfied.

We used the term “matter” in proposed § 2641.301(e)(5)(i)(B). Section 207(j)(5) provides that a certification will apply with respect to a “particular matter” which requires outstanding qualifications in certain disciplines. Since sections 207(c) and (d) apply to any “matter” rather than to any “particular matter,” we reasoned that the policy underlying the certification authority would be ill-served by a distinction permitting experts to contact the Government concerning action focused on a “discrete and identifiable class of persons,” but not on broad policy issues or conceptual work. See the definition of “particular matter” at proposed § 2641.201(h)(1). See also 5 CFR 2640.103(a)(1).

As part of the consultation process, OGE will carefully review an agency’s draft certification to ensure that it specifies all of the information required by proposed § 2641.301(e)(5)(iii). Proposed § 2641.301(e)(5)(iii)(C) requires that a certification specify the name of the person on whose behalf the former employee will be acting. We do not read section 207(j)(5) as requiring that a certification recipient act only on behalf of a person specified in the certification. Rather, as already mentioned, we believe that the certification is specific to the *matter* that will be the subject of the recipient’s post-employment contacts. Accordingly, under proposed § 2641.301(e)(5)(iii)(F), a certification must include a “description of the matter and the communications that will be permissible or, if relevant, a statement that such information is protected from disclosure by statute.”

We did not include in this proposed regulation the provision that has appeared at 5 CFR 2637.207(d) providing for pre-qualification of experts through creation of an “agency

registry.” We are not aware that any agency has set up such a registry. Moreover, we are not convinced that such a registry would have anything but an insignificant impact on certification processing times. Indeed, we suspect that the administrative burden associated with a registry would outweigh any benefit.

Proposed § 2641.301(f)—Testifying under Oath

The amendment of 18 U.S.C. 207 by the Ethics Reform Act of 1989 prompted our proposed major revision of regulatory guidance concerning the permissibility of testimony under oath. In the prior version of the statute, section 207(h) had stated that nothing in section 207 prevented a former employee “from giving testimony under oath * * *.” The Ethics Reform Act of 1989 version of the statute also uses this language, in renumbered section 207(j)(6), but adds that a former employee “who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the United States) in that matter.”

The proposed definition of “testimony under oath” is drawn from language in Rule 603 of the Federal Rules of Evidence. Proposed § 2641.301(f)(1) requires that the former employee’s oral or written testimony be given in a proceeding “in which applicable procedural rules require a witness to declare by oath or affirmation that he will testify truthfully.” In addition, the exception does not apply unless the testimony is given in connection with a “judicial, quasi-judicial, administrative or other legally recognized proceeding.” Taken together, these two requirements emphasize that a former employee cannot escape the restrictions of 18 U.S.C. 207 by merely raising his right hand and assuring those present at any gathering that he is telling the truth. On the other hand, provided the requirements as proposed are met, these provisions would confirm that the exception permits a witness to give testimony, except as limited by proposed § 2641.301(f)(2) concerning service as an expert witness.

As already noted, while the testimony-under-oath exception generally permits testimony offered as an expert witness, the exception is subject to a significant statutory limitation in this regard. As specified in section 207(j)(6)(A), a former employee “who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter” may not

“serve as an expert witness” except for the United States or pursuant to court order.

Proposed § 2641.301(f)(2)(ii) implements the court order provision. We specifically distinguished a subpoena as not falling within this definition. The practical nature of a subpoena is such that in many contexts it may be issued under the court’s authority by counsel’s filling out a form, without reasoned consideration by a court unless and until the subpoena is challenged. See, e.g., *Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir. 1985) (subpoenas—grand jury or otherwise—do not qualify as “order[s] of a court of competent jurisdiction” under the Privacy Act.) Thus, the mere fact that an expert witness appears in court in response to a subpoena does not mean that he is testifying pursuant to court order within the meaning of section 207(j)(6)(A). Also, a court order merely qualifying a witness to testify as an expert is not a court order that directs the witness to testify in such a way as to overcome the expert witness bar. Because the United States will be represented in most proceedings in which it has a “direct and substantial interest” pursuant to 18 U.S.C. 207(a)(1), the United States should make the court aware of the statutory bar where appropriate.

The proposed regulation could not, and does not attempt to, instruct a judge as to the proper standard to apply in determining whether a court order is appropriate. Proposed example 4 suggests our view of an appropriate circumstance for a court to order expert testimony. We would expect that a court would order an expert witness otherwise barred by section 207(a)(1) to testify only where there are extraordinary circumstances present, such as where there is no other equivalent expert testimony available and the employee’s prior involvement in the matter will not cause him to have an undue influence on proceedings.

Of course, fact witness testimony is always allowable under the testimony-under-oath exception. However, some “experts” who could be fact witnesses because of having worked on matters while at their former agencies (thereby triggering the section 207(a)(1) bar) would prefer to serve as expert witnesses. An expert witness can be paid for his service as an expert while a payment for fact testimony may be prohibited by the bribery statute. See 18 U.S.C. 201. When Congress provided for the court order exception to the expert testimony bar in section 207, it did not intend to provide a mechanism for former employees who worked on