

comments), which established procedures to waive positions pursuant to section 207(c)(2)(C). OGE has published waived positions as appendix A to 5 CFR part 2641.

OGE received three written comments in response to the 1991 rulemaking. One comment was generally supportive of the interim rule. A second comment raised, in part, the issue of the applicability of section 207(c) to employees detailed to senior employee positions. That issue has already been discussed as part of the discussion of the definition of "senior employee" in proposed § 2641.104. The third comment requested "clarification on the standards which will be used in determining whether to grant a waiver." More specifically, the comment stated that the rule "could be improved by adding a list of factors to consider for determining whether there would be a potential for the use of undue influence or unfair advantage."

The statute lists two criteria that must be satisfied in order for the Director to waive a position from section 207(c). First, the Director must determine that the imposition of section 207(c) "would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions," under section 207(c)(2)(C)(i). Second, the Director must determine that "granting the waiver would not create the potential for use of undue influence or unfair advantage," under section 207(c)(2)(C)(ii). Our interim rule listed some factors that could be relevant to such determinations, and the proposed rule would add additional guidance. It is impossible, however, to develop an exhaustive list of factors that could be considered. The waiver procedure envisions a case-by-case evaluation of the facts related to the hardship on the agency and the potential for undue influence and unfair advantage. It is up to the agency to bring any relevant factors to our attention in order to permit the Director to make the determinations required under the statute.

In addition to modifying certain definitions, as already discussed, we are proposing to make several other changes to the existing provisions of part 2641 relating to waivers. First, as the underlying statute states that OGE may waive the restrictions of section 207(c), we have used the term "waiver" throughout the new, renumbered § 2641.301(j) as proposed, rather than the term "exemption" which appears in existing § 2641.201(d). We would also renumber the existing paragraphs concerning waivers so that the

paragraph describing the statutory criteria would appear in proposed § 2641.301(j)(2) as proposed. In addition, we would reorder the statutory criteria in renumbered § 2641.301(j)(2) as proposed to track the order in which they are set forth in the statute.

We propose to modify renumbered § 2641.301(j) to emphasize that a waiver of section 207(c) will operate to waive the restriction of section 207(f). This result follows from the fact that the one-year ban on providing certain assistance to foreign governments or foreign political parties set forth in section 207(f) applies, *inter alia*, to "[a]ny person who is subject to the restrictions contained in subsection (c) \* \* \*" of section 207. Thus, if a former senior employee is not subject to section 207(c) because that restriction has been waived by the Director of OGE, then he will similarly not be subject to section 207(f). We are proposing to insert necessary references to section 207(f) in renumbered § 2641.301(j). Along the same lines, we propose that the Director consider, in relation to the statutory criterion for waiver at renumbered § 2641.301(j)(2)(iii), the consequences of a position's waiver from the restrictions pertaining to foreign entities.

We are proposing to amend renumbered § 2641.301(j)(1) to indicate that OGE may consider waiving restrictions for a position if it "could be occupied by a senior employee." We chose this wording mainly because individuals serving in Senior Executive Service positions are paid basic rates of pay which range from ES-1 to ES-6 depending upon their individual qualifications. As long as a position *could* be occupied by a senior employee, OGE will not decline to consider a waiver merely because the current incumbent's pay rate is less than the ES-5 rate of basic pay triggering senior employee status.

We are proposing to add an example to follow proposed renumbered § 2641.301(j)(1), concerning eligible senior positions. As specified in 18 U.S.C. 207(c)(2)(C) and as would be reflected in renumbered § 2641.301(j)(1), positions for which the rate of basic pay is "specified in" or "fixed according to" the Executive Schedule are ineligible for waiver. Proposed example 1 illustrates the application of this limitation.

Waivers may not be issued to prevent or remedy individual hardships, but rather to address programmatic concerns. In the past, some waivers have been sought to ameliorate the effects of the one-year cooling-off provision as it would apply to a particular individual, rather than to prevent expected recruitment problems.

The Office of Government Ethics has not granted such waivers. *See, e.g.*, OGE Informal Advisory Letter 94 x 12. *See also* OGE Informal Advisory Letter 96 x 15, in which the Director of OGE declined to grant a waiver to remedy the consequences of an agency's misinterpretation of a personnel law which resulted in the retroactive reinstatement of an individual to her former senior position and the renewal of her one-year cooling-off period.

We are proposing to modify renumbered § 2641.301(j)(3)(i) by inserting the word "recommend" to emphasize the role of the designated agency ethics official. OGE expects that a request will not be forwarded for consideration by the Director unless the ethics official believes that waiver is warranted.

We are proposing to reword the description of the "hardship" criterion, at renumbered § 2641.301(j)(2)(i) and (ii), to emphasize what must be central to an agency's recommendation concerning this element. An agency must show that it "has experienced or is experiencing undue hardship in obtaining qualified personnel" and that "[w]aiver of the restriction with respect to the position or positions is expected to ameliorate the recruiting difficulties." *See* OGE Informal Advisory Letter 97 x 16.

We are proposing to add an additional factor that would support an agency's claim of recruitment difficulties. Proposed § 2641.301(j)(2)(i)(A) confirms the relevance of position vacancy rates. Moreover, we are proposing to modify the factor at existing § 2641.201(d)(5)(ii), which currently provides that the Director of OGE will consider, *inter alia*, that the incumbent of a position proposed for waiver possess "outstanding qualifications in a scientific, technological, or other technical discipline." We would revise this factor, at renumbered § 2641.301(j)(2)(i)(C), to include outstanding qualifications in any other "specialized discipline."

We are proposing to add a new sentence, at renumbered § 2641.301(j)(3)(i), indicating that a designated agency ethics official "may, at any time, request that a current waiver be revoked." In addition, we are proposing to delete the requirement that letters must be submitted annually to OGE concerning the continued waiver of the restriction. Finally, because OGE need publish a rule only when a revision to appendix A is warranted as a result of the granting of a new waiver or the revocation of an existing waiver, we propose to drop the requirement in existing § 2641.201(d)(3) that OGE