



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

February 19, 2003
DO-03-003

MEMORANDUM

TO: Designated Agency Ethics Officials and
Inspectors General

FROM: Amy L. Comstock
Director

SUBJECT: Proposed Post-employment Rule

On February 18, 2003, the Office of Government Ethics (OGE) published a proposed post-employment rule for the executive branch. See [68 Federal Register 7843-7892](#) (February 18, 2003), available under "Laws & Regulations" on OGE's web site at www.usoge.gov. When published in its final form, the rule will be the first comprehensive interpretive guidance, in regulation form, concerning 18 U.S.C. § 207 since that statute was substantially revised by the Ethics Reform Act of 1989 and subsequent amendments.

We hope you will review the proposed rule carefully for clarity and usefulness. We value the experience and knowledge of agency officials in this area, and we welcome any comments you may have. Comments on the proposed rule must be received by OGE on or before May 19, 2003.

History

The 1989 amendments to section 207 added new restrictions, deleted other restrictions, and made extensive revisions to the remaining restrictions and various exception and exemption provisions.¹ Several subsequent statutory amendments also made

¹ The 1989 amendments to section 207 became effective on January 1, 1991. For practical purposes, the only remaining application of the pre-1989 Act versions of section 207 is the lifetime ban on particular matters involving specific parties in

(continued...)

further revisions to the post-employment statute. OGE has continued to provide guidance concerning the revised version of section 207 through memoranda to agency ethics officials, written advisory opinions, and oral advice. In 1991, OGE did issue an interim rule, codified at 5 C.F.R. part 2641, for the very limited purpose of implementing OGE's authority to provide certain relief from the one-year cooling-off restrictions of 18 U.S.C. § 207(c). Once published in its final form, the new rule will augment this brief regulatory guidance concerning OGE's authorities with respect to section 207(c). However, the new rule also will add guidance concerning all of the substantive prohibitions, not just section 207(c), as well as all of the exemptions and exceptions in the statute that are applicable to executive branch employees.

Prior to the 1989 amendments, OGE had issued interpretive regulations concerning the version of section 207 enacted by the Ethics in Government Act of 1978 (and amended in 1979). See 5 C.F.R. part 2637. OGE has continued to publish this part in the Code of Federal Regulations mainly because certain discussions of certain key statutory concepts -- such as "personal and substantial participation" and "particular matter involving specific parties" -- continue to have some relevance to the interpretation of the same or similar phrases in the newer version of section 207. However, part 2637 now is largely obsolete, owing to the many changes in the law effected by subsequent legislation. The guidance in part 2637 also has been supplemented by years of advice and opinions from OGE and the Office of Legal Counsel (OLC), Department of Justice, as well as court cases. Consequently, the new rule, once published in its final form, will revoke part 2637 in its entirety. Where practicable, the proposed rule uses language and examples derived from part 2637, but, in view of the number and significance of the statutory changes, the proposed rule necessarily must be viewed as a substitution rather than a mere revision of part 2637.

Structure of the Proposed Rule

For each substantive prohibition, exemption, or exception provision in the revised statute, the proposed rule sets out OGE's interpretation of the relevant statutory elements. This

¹(...continued)
which the former employee participated personally and substantially during Government service; we would expect that few such matters are still continuing.

interpretive guidance generally codifies prior advice rendered by OGE in written or oral form.

Subpart A of the proposed rule includes general provisions pertaining to the purpose and applicability of the rule, the enforcement of the criminal statute, and the rendering and legal effect of advice from ethics officials. Subpart A also includes a list of definitions of terms used in the regulation.

Subpart B, which is the principal core of the proposed rule, contains separate sections outlining the elements of each of the substantive restrictions in the revised statute that apply to former employees of the executive branch. Each section includes: (a) a basic statement of the statutory prohibition; (b) a list of statutory exceptions or waivers that may be applicable to that particular prohibition; (c) an explanation of the commencement and duration of the prohibition; and (d) a list of the elements of the prohibition, with appropriate guidance concerning the interpretation of each element. In some cases, the discussion of certain elements of the prohibition contains a cross-reference to another section in the proposed rule where the same element is explained in more detail. Also, in some cases -- notably the treatment of 18 U.S.C. § 207(b) and § 207(f) -- the discussion of certain elements of the prohibition may be reserved for future rulemaking. The six sections comprising Subpart B are as follows:

- Proposed section 2641.201 sets out OGE's interpretation of the statutory elements of the lifetime ban on representation in connection with particular matters involving specific parties in which a former employee participated personally and substantially, 18 U.S.C. § 207(a)(1). The guidance contained in this section parallels existing section 2637.201, to the extent that the old version of the statute contained a similar prohibition. However, the proposed rule includes a number of changes, including new examples, to clarify the scope of the restriction and to reflect changes in the statutory language and more recent opinions of OGE, OLC, and the courts.
- Proposed section 2641.202 sets out OGE's interpretation of the statutory elements of the two-year ban on representation in connection with particular matters involving specific parties which were pending under a former employee's official responsibility during the last year of his

Government service, 18 U.S.C. § 207(a)(2). The guidance contained in this section parallels existing section 2637.202, to the extent that the old version of the statute contained a similar prohibition. However, the proposed rule includes a number of changes, including new examples, to clarify the scope of the restriction and to reflect statutory and more recent opinions.

- Proposed section 2641.203 sets out the statutory elements of the one-year restriction on representing, aiding or advising on the basis of covered nonpublic information in connection with trade agreement or treaty negotiations in which a former employee participated personally and substantially, 18 U.S.C. § 207(b). This section has no parallel in existing part 2637, as this statutory prohibition was first added with the 1989 amendments.
- Proposed section 2641.204 sets out OGE's interpretation of the statutory elements of the one-year cooling-off restriction applicable to former senior employees, 18 U.S.C. § 207(c). To some degree, this guidance parallels existing section 2637.204, which interpreted a similar provision in the old version of the statute. However, certain statutory changes -- such as the removal of the prior ban on self-representation, and changes to the definition of senior employee -- required significant revision of the old regulatory guidance.
- Proposed section 2641.205 sets out OGE's interpretation of the statutory elements of the one-year cooling-off period applicable to former very senior employees, 18 U.S.C. 207(d). This part of the proposed rule has no parallel in existing part 2637, as the statutory restriction was first added with the 1989 amendments.
- Proposed section 2641.206 sets out the statutory elements of the one-year prohibition, applicable to former senior and very senior employees, on representing, aiding or advising certain foreign entities, 18 U.S.C. § 207(f). This part of the proposed rule has no parallel in existing

part 2637, as the statutory restriction was also first added with the 1989 amendments.

Subpart C of the proposed rule sets out OGE's interpretation of the various exception and exemption provisions in the current statute. Many of these provisions have parallels to provisions under the old law, but the guidance contained in the proposed rule reflects numerous important changes to those statutory provisions as well as the addition of new exception or exemption provisions.

Finally, Appendixes A and B to the proposed rule simply reflect current positions that OGE has already exempted from the prohibition of section 207(c) and current departmental components that OGE already has designated as separate agencies for purposes of section 207(c). These provisions would effect no change to existing part 2641, as revised.