

policies, gain information, decide issues, and make contacts that may serve him well in his post-Government life. On the other hand, in proposing this regulatory provision, we sought to balance the concerns underlying section 207(a)(2) against the likelihood that a temporary assignment would permit an employee to acquire the knowledge and experience necessary to make those concerns legitimate. Such assignments occur frequently throughout the executive branch, sometimes lasting only a few days or otherwise involving circumstances indicating that the employee had no reasonable expectation of being able to exercise the full authority of the position. In many cases, where the employee functions only in a limited "caretaker" role, it seems remote that the policy concerns underlying section 207(a)(2) would be implicated. Although we were unable to establish a bright line test for determining when temporary duties implicate section 207(a)(2), we are proposing a nonexclusive list of factors that agencies can utilize in making such determinations, as set out in proposed § 2641.202(j)(3)(i)–(iv).

Proposed § 2641.202(j)(4) indicates that "[t]he scope of an employee's official responsibility is not affected by annual leave, terminal leave, sick leave, excused absence, leave without pay, or similar absence from assigned duties." Related § 2641.202(j)(5) as proposed would state that "[o]fficial responsibility for a matter is not eliminated through self-disqualification or avoidance of personal participation in a matter * * *." Thus, a matter is not removed from an employee's official responsibility when he recuses himself from participation in the matter due to a conflicting financial or personal interest or during a job search as required by subparts D, E, and F of 5 CFR part 2635 and 5 CFR part 2640. Example 8 following proposed § 2641.202(j) is illustrative. This interpretation is consistent with *United States v. Dorfman* 542 F. Supp. 402 (N.D. Ill. 1982), in which the court advised that a U.S. Attorney's recusal coupled with assignment of a particular matter to a "first assistant" would not remove the case from the U.S. Attorney's official responsibility. The court cited 5 CFR 737.7 (now 5 CFR 2637.202(b)(5)), a provision which was also the subject of OGE Informal Advisory Letter 86 x 2. As interpreted by OGE in that advisory letter, a contract could be removed from an employee's official responsibility if he had "not only the contract but also the actual function dealing with the

contract removed from his duties under his position description." Proposed § 2641.202(j)(5)) recognizes that the scope of an employee's official responsibility may be changed by an amendment of a position description.

Proposed § 2641.202(j)(6) does not explicitly address the scope of the term "official responsibility" in the case of an employee whose Government service lasted less than one year and was preceded by a break in Government service. However, proposed example 9 does provide our interpretation of the application of section 207(a)(2) where there has been a break in service in the last year of the former employee's Government service. By way of background, this issue was brought to our attention when a former high-ranking employee, after a break in service lasting a few months, agreed to serve as an SGE for a short period of time. When he left Government the second time, less than one year had passed since serving in his previous Government job. We noted that an initial section 207(a)(2) bar would have commenced at the end of his first period of Government service. The issue was whether the section 207(a)(2) bar triggered by his second departure from Government should apply to particular matters for which he had responsibility during his first period of service (provided they were actually pending within the one-year period prior to his termination from his second Government job.) We determined that the second section 207(a)(2) restriction applied only to those particular matters that were actually pending under his official responsibility during his most recent period of Government service. (Of course, any section 207(a)(2) restriction remaining from the employee's termination from Government service immediately preceding the break in service would still be in effect.)

Section 207(a)(2) also requires that the particular matter be one that the former employee "knows or reasonably should know" was pending under his official responsibility during his last year of Government service. As described in existing part 2637, section 207(a)(2) had been interpreted to mean that the restriction would not apply to a former employee "unless at the time of the proposed representation of another, he or she knows or learns that the matter had been under his or her responsibility." The proposed new guidance similarly provides that it is the former employee's knowledge at the time of the post-employment representation that is critical. Thus, the last sentence of proposed

§ 2641.202(j)(7) notes that "[i]t is not necessary that a former employee have known during his Government service that the matter was actually pending under his official responsibility."

Proposed § 2641.202(j)(7) makes it clear that it is enough that the former employee "reasonably should know" at the time of his post-employment representation that the matter was actually pending under his official responsibility within his last year of Government service. We are proposing to include a note following § 2641.202(j) of the new regulation that would warn an employee that prudence dictates that he make inquiry "when the facts suggest that a particular matter involving specific parties *could* have been actually pending under his official responsibility" (emphasis added). The proposed note cross-references the provision in proposed § 2641.105(d) stating that an employee will not be deemed to violate section 207 when he contacts an employee of the United States for purposes of determining the applicability or meaning of section 207 as applied to his own activities.

Proposed § 2641.203—18 U.S.C. 207(b)

Pursuant to 18 U.S.C. 207(b), a former employee may not utilize specified nonpublic information to assist another person in relation to certain ongoing trade or treaty negotiations in which the former employee participated personally and substantially during his last year of Government service. The prohibition lasts for one year or until the termination of the negotiation, whichever occurs first. Enacted by the Ethics Reform Act of 1989 to protect sensitive Government information relating to certain trade or treaty negotiations, section 207(b) represents a significant departure from the earlier post-employment restrictions of section 207 since, like section 207(f) discussed below, it extends to "behind-the-scenes" assistance.

While OGE intends to publish comprehensive regulatory guidance concerning 18 U.S.C. 207(b), § 2641.203 of this proposed rule includes only a brief introductory summary of the restriction and paragraphs concerning applicable exceptions and waivers, and the commencement and duration of the restriction. We have reserved § 2641.203(d)–(i) for additional guidance.

To date, OGE's written guidance relating to 18 U.S.C. 207(b) remains the interpretation of the restriction that was distributed by means of a memorandum dated October 26, 1990, which was published as OGE Informal Advisory Letter 90 x 17. OGE reissued updated