

From: (b)(6) public citizen  
To: [Contact OGE: ecampaign@gop.com](mailto:ecampaign@gop.com)  
Subject: What the hell do you do?  
Date: Tuesday, March 07, 2017 12:38:22 PM

---

GOP - we (the people you work for) want something done about Trump - take action!!!! his travel ban & deportation / immigration trauma - the wall - baseless accusations against Obama for which he should be impeached - Russia who clearly helped him steal the election no doubt by threatening the electoral college -- refusing to disclose conflicts - signing exec orders as PR Stunts then waiving them and removing transparency regulations put in place by Obama so we do not know he waived his own exec orders - hiring lobbyists as advisors - angering N. Korea & China both enough to threaten us w nuclear strikes - the list of real issues is endless - & none of you do anything!!!

Understand something Net Neutrality must remain intact - I expect to read updates on this via our FREE PRESS

Office of Government Ethics - I now want to know who - other than Trump The-Man-Who-Would-Be-King -- who do I go to in order to complain about you and get your worthless office shut down? You are wasting my tax \$\$\$ We pay your salaries and your overhead so that you can do NOTHING?

Trump has been good for the country insofar as he shows us -- we, the people you work for OGE -- that agencies like yours actually DO NOTHING.

There are SO many ethics violations by Trump & you DO NOTHING.

*The Independent* provided information on Trump hiring three lobbyists -- lobbyists demonstrably not interested in serving the public -- in violation of his own order, and eliminated Obama's transparency safeguards - relaxing Obama's anti-lobbying laws - eliminating Obama's requirement re waivers and public justification thereof.

**From *The Independent*:**

**"It is possible that Mr Trump has issued a waiver to exempt Ms Knight and other lobbyists from the [executive order](#) signed in January. There is little way of knowing that, however, as in the same order he removed Obama-era requirements to publish an annual report disclosing the waivers as well as providing a public interest justification for any such exemptions."**

Trump = The-man-who-would-be-dictator & the-man-who-is-well-on-his-way-to-starting-WWIII must be stopped - while everyone is distracted with his escalating antics he quietly goes off in a corner & pulls this stuff. And you do nothing to protect America from him. Your office, by its very name, is supposed to protect America and you do nothing. The only thing I ever heard of you doing was to [ask the White House to investigate Conway](#). The White House, shockingly, declined and still you do nothing.

Without access to unrestricted information of the free press provides we would have no clue.

OGE DO SOMETHING - the man just made baseless accusations against Obama -- and still you do nothing.

Thank you.  
Very truly yours,

(b)(6) public citizen



**From:** (b)(6) public  
**To:** [Contact OGE](#)  
**Subject:** Ethics Violations  
**Date:** Friday, January 27, 2017 11:40:40 AM

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Dear Officers at the Office of Government Ethics,

I am writing about Executive Order #13490. Is this binding on the current administration? I believe that President Trump is already in violation of the ethics requirements set forth in this Executive Order, including, but certainly not limited to, # 6:

“6. Employment Qualification Commitment. I agree that any hiring or other employment decisions I make will be based on the candidate’s qualifications, competence, and experience.”

President Trump has nominated multiple candidates who lack the qualifications, competence and experience for the cabinet positions. At a minimum, Dr. Ben Carson has absolutely no experience with housing issues, and Mrs. DeVos has no experience, and apparently almost no knowledge about the issues with the public school system (as evidenced by her ignorance during the hearings) and has a conflict of interest in that her family owns and runs multiple private schools. Other nominated persons have CLEAR conflicts of interest in fulfilling the cabinet posts they are named to, such as Mr. Rex Tillerson’s nomination to Secretary of State, when he has plans to develop oil resources in Russia.

Are these issues that the Office of Government Ethics addresses? I am aware that the ACLU will be addressing these issues, but as a citizen am very concerned that my government ensure the highest ethical standards and not make a mockery of governing systems.

Thank you very much for your consideration. I would welcome any comments or thoughts from the office on these issues.

Sincerely,

(b)(6) public citizen  
[Redacted Signature]

## Jennifer Matis

---

**From:** Brandon A. Steele  
**Sent:** Tuesday, February 07, 2017 10:05 AM  
**To:** Wendy G. Pond  
**Subject:** RE: [GRAYMAIL] COGEL (@COGELinfo) retweeted your Tweet!

Yes.

---

**From:** Wendy G. Pond  
**Sent:** Tuesday, February 07, 2017 8:19 AM  
**To:** Brandon A. Steele  
**Subject:** FW: [GRAYMAIL] COGEL (@COGELinfo) retweeted your Tweet!

I see that COGEL retweeted us. Do we follow them on Twitter?

---

**From:** Social Media  
**Sent:** Monday, February 06, 2017 9:19 PM  
**To:** Leigh J. Francis <[ljfranci@oge.gov](mailto:ljfranci@oge.gov)>; Kaneisha T. Cunningham <[ktcunnin@oge.gov](mailto:ktcunnin@oge.gov)>; Nicole Stein <[nstein@oge.gov](mailto:nstein@oge.gov)>; Wendy G. Pond <[wgpond@oge.gov](mailto:wgpond@oge.gov)>; Patrick Shepherd <[pshephe@oge.gov](mailto:pshephe@oge.gov)>; Heidi Moss; Maunda Charles  
**Subject:** FW: [GRAYMAIL] COGEL (@COGELinfo) retweeted your Tweet!

---

**From:** COGEL (via Twitter)  
**Sent:** Monday, February 6, 2017 9:18:43 PM (UTC-05:00) Eastern Time (US & Canada)  
**To:** Social Media  
**Subject:** [GRAYMAIL] COGEL (@COGELinfo) retweeted your Tweet!

@OfficeGovEthics: OGE issues legal advisory on the ethics pledge under Executive Order 13770:



[COGEL](#)  
[retweeted your Tweet.](#)

[View](#)



[U.S. OGE @OfficeGovEthics](#)

=

OGE issues legal advisory on the ethics pledge under Executive Order 13770:  
[bit.ly/2li6ZV1](https://www.oge.gov/oge/ethics/2017/07/20170720-EO13770-ethics-pledge.aspx)

[Settings](#) | [Help](#) | [Opt-out](#) | [Download app](#)

[Twitter, Inc. 1355 Market Street, Suite 900 San Francisco, CA 94103](#)



## Jennifer Matis

---

**From:** Nicole Stein  
**Sent:** Monday, February 06, 2017 5:30 PM  
**To:** DeskOfficers MailGroup  
**Subject:** Pledge Questions - Update

Hi everyone,

I spoke with Seth and I wanted to let you know that a team has been assembled to review each of the questions that has been submitted by the agencies. (b)(5) deliberative

Key takeaway, please continue to seek guidance before answering any question related to the Pledge.

Please continue to create entries in AIMS and add the question to the Nonresponsive. There are now two folders. I moved questions already received to a Pre-LA folder. Anything received going forward please add to the Post LA folder.

*Nicole*

Nicole Stein  
Chief, Agency Assistance Branch  
U.S. Office of Government Ethics  
[nstein@oge.gov](mailto:nstein@oge.gov)  
(202) 482-9255

## Jennifer Matis

---

**From:** Gold, Matea <(b)(6)>  
**Sent:** Tuesday, January 31, 2017 2:18 PM  
**To:** Elizabeth D. Horton  
**Subject:** RE: OGE FOIA FY 17-150

Thank you very much. Yes, I would still like the request to be processed.

Matea

**From:** Elizabeth D. Horton [<mailto:edhorton@oge.gov>]  
**Sent:** Tuesday, January 31, 2017 2:16 PM  
**To:** Gold, Matea  
**Subject:** OGE FOIA FY 17-150

Ms. Gold:

This acknowledges receipt of your January 27, 2017, Freedom of Information Act (FOIA) request for “all communications, including email and texts, between the Office of Government Ethics and campaign and/or transition officials working for President Trump regarding the enforcement and applicability of Executive Order 13490. I am requesting all communications related to the Trump transition/administration’s views on 13490 (“Ethics Pledge”) and whether the executive order would apply to Trump appointees.” Your request, which OGE received on January 27, 2017, and was assigned OGE Tracking Number: OGE FOIA FY 17/150, is being processed.

Please confirm whether or not you would still like this request to be processed in light of the new executive order that was issued after you filed the request.

You may now track the status of your FOIA request online at:

[https://extapps2.oge.gov/FOIAStatus/FOIAInfo.nsf/SearchByFOIANumber?OpenForm\[extapps2.oge.gov\]](https://extapps2.oge.gov/FOIAStatus/FOIAInfo.nsf/SearchByFOIANumber?OpenForm[extapps2.oge.gov]). Please enter the individualized tracking number above for status information, including the estimated date of completion. Status information is updated on an hourly basis.

Thank you.

Elizabeth D. Horton

Assistant Counsel, Legal, External Affairs and Performance Branch

Program Counsel Division

U.S. Office of Government Ethics

(202) 482-9211

[Elizabeth.Horton@oge.gov](mailto:Elizabeth.Horton@oge.gov)

Visit OGE's website: [www.oge.gov](http://www.oge.gov)

Follow OGE on Twitter: @OfficeGovEthics

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## Jennifer Matis

---

**From:** Nicole Stein  
**Sent:** Monday, January 30, 2017 11:13 AM  
**To:** DeskOfficers MailGroup  
**Subject:** RE: New Executive Order - Change in Process

I just spoke with Seth. Instead of sending the questions as referrals, please create the AIMs entry and then save a PDF copy of the entry to this folder - Nonresponsive network info

---

**From:** Kehli Cage  
**Sent:** Monday, January 30, 2017 10:56 AM  
**To:** Nicole Stein ; DeskOfficers MailGroup  
**Subject:** RE: New Executive Order

Hi Nicole,

Where can we obtain a copy of the executive order?

Thank you,

Kehli Cage  
Government Ethics Specialist  
U.S. Office of Government Ethics  
1201 New York Ave NW  
Suite #500  
Washington, D.C. 20005  
Ph: 202-482-9279  
[kehli.cage@oge.gov](mailto:kehli.cage@oge.gov)

Visit OGE's website: [www.oge.gov](http://www.oge.gov)  
Follow OGE on Twitter: @OfficeGovEthics



---

**From:** Nicole Stein  
**Sent:** Monday, January 30, 2017 10:53 AM  
**To:** DeskOfficers MailGroup  
**Subject:** New Executive Order

As you may have saw over the weekend, a new executive order was issued regarding the Pledge.

If you receive questions from your agencies, please refer them. We are working on reviewing the order.

*Nicole*

Nicole Stein  
Chief, Agency Assistance Branch  
U.S. Office of Government Ethics  
[nstein@oge.gov](mailto:nstein@oge.gov)  
(202) 482-9255

**From:** [Nicole Stein](#)  
**To:** [DeskOfficers MailGroup](#)  
**Subject:** New Executive Order  
**Date:** Monday, January 30, 2017 10:53:15 AM

---

As you may have saw over the weekend, a new executive order was issued regarding the Pledge.

If you receive questions from your agencies, please refer them. We are working on reviewing the order.

*Nicole*

Nicole Stein  
Chief, Agency Assistance Branch  
U.S. Office of Government Ethics  
[nstein@oge.gov](mailto:nstein@oge.gov)  
(202) 482-9255

**From:** [Wendy G. Pond](#)  
**To:** [Nicole Stein](#)  
**Subject:** RE: [GRAYMAIL] Help Us Plan for the 2017 COGEL Conference  
**Date:** Tuesday, February 07, 2017 9:48:43 AM

---

Sounds good.

Also, on the COGEL theme. I saw that COGEL re-tweeted our Pledge Tweet. Got me thinking that there may be additional ways to interact with the COGEL crowd. I've got an email into Brandon S. asking whether we follow COGEL on Twitter. (b)(5) deliberative

[REDACTED]

[REDACTED]

[REDACTED]

---

**From:** Nicole Stein  
**Sent:** Tuesday, February 07, 2017 9:28 AM  
**To:** Wendy G. Pond <[wgpond@oge.gov](mailto:wgpond@oge.gov)>  
**Subject:** RE: [GRAYMAIL] Help Us Plan for the 2017 COGEL Conference

Wanted to let you know this is still on my radar. I didn't get a chance to raise it with Diana and Shelley last week. Shelley is back in the office (b)(6) so I have forwarded her and Diana and the email for us to discuss at our next PCD Managers meeting.

---

**From:** Wendy G. Pond  
**Sent:** Wednesday, February 01, 2017 10:23 AM  
**To:** Nicole Stein <[nstein@oge.gov](mailto:nstein@oge.gov)>  
**Subject:** FW: [GRAYMAIL] Help Us Plan for the 2017 COGEL Conference

Nicole – does OGE want to suggest any sessions and/or speakers for the 2017 COGEL conference? We received a request to complete a survey. Survey questions and original email are below.

I'm copying Jen in case she has any thoughts, having attended the most recent conference.

My thoughts: we could suggest (b)(5) deliberative

[REDACTED]

[REDACTED]

1. Do you have any suggestions for sessions for the 2017 COGEL Conference? (Please provide as much information as possible such as a proposed title and session description, as well as potential moderators and speakers)
2. Do you have any suggestions for plenary speakers for the 2017 COGEL Conference?
3. How can we reach you?

---

**From:** [communications@cogel.org](mailto:communications@cogel.org) [<mailto:communications@cogel.org>]

**Sent:** Wednesday, February 01, 2017 10:01 AM

**To:** Wendy G. Pond <[wgpond@oge.gov](mailto:wgpond@oge.gov)>

**Subject:** [GRAYMAIL] Help Us Plan for the 2017 COGEL Conference



Dear Wendy,

Happy New Year!

Building on the success of the 2016 COGEL Conference in New Orleans, we'd love your feedback and support in planning a great conference in Toronto at the Sheraton Centre on December 3 – 6, 2017.

COGEL conferences are unique and excellent in part because of the involvement of so many COGEL members. The Program Committee wants to know what you'd like to learn more about next December.

[Click here to complete a short survey](#) to submit proposals for sessions for next year.

You can also email your ideas to Program Committee co-chairs [Wes Bizzell](#) and/or [Melanie Martin-Griem](#).

**Wesley D. Bizzell, Esq.**

Assistant General Counsel  
Director of Political Law & Ethics Programs  
Altria Client Services Inc.  
101 Constitution Ave. N.W. | Ste. 400W  
Washington | D.C. | 20001  
(b)(6)

**Melanie Martin-Griem**

Director Strategic Services  
Elections Ontario  
51 Rolark Drive | Toronto, ON | M1R 3B1  
(b)(6)

P.O. Box 81237 | Athens, GA 30608 | Tel: (706) 548-7758 | Fax: (706) 548-7079 | <http://www.cogel.org>

This email was sent to 'wgpond@oge.gov' from the Council on Governmental Ethics Laws. If you wish to opt-out of general or group correspondence, you can update your email preferences at: <http://www.cogel.org/members/EmailOptPreferences.aspx?id=19581419&e=wgpond@oge.gov&h=0fe57bd6609da62053456db9bc75072c05678e48>



**From:** [Seth Jaffe](#)  
**To:** [Wendy G. Pond](#)  
**Cc:** [Nicole Stein](#); [Rachel K. Dowell](#); [Monica M. G. Ashar](#); [Leigh J. Francis](#)  
**Subject:** RE: Ethics Pledge - Transition Holdover Question  
**Date:** Thursday, February 09, 2017 9:07:02 AM

---

Wendy,

Per our conversation, pursuant to LA-17-02 our past guidance on who needs to sign the pledge – and by when - is still good going forward.

Thanks,  
Seth

---

**From:** Wendy G. Pond  
**Sent:** Thursday, February 09, 2017 8:38 AM  
**To:** Seth Jaffe  
**Cc:** Nicole Stein  
**Subject:** FW: Ethics Pledge - Transition Holdover Question

Good morning. CPSC had previously asked about (b)(5) deliberative

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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(b)(5) deliberative (email from CSPC ethics official seeking desk officer assistance)

[REDACTED]

(b)(5) deliberative (email from CSPC ethics official seeking desk officer assistance)



**From:** [Nicole Stein](#)  
**To:** [Kehli Cage](#); [DeskOfficers MailGroup](#)  
**Subject:** RE: New Executive Order  
**Date:** Monday, January 30, 2017 10:56:46 AM

---

<https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>

---

**From:** Kehli Cage  
**Sent:** Monday, January 30, 2017 10:56 AM  
**To:** Nicole Stein <nstein@oge.gov>; DeskOfficers MailGroup <DeskOfficersMailGroup@oge.gov>  
**Subject:** RE: New Executive Order

Hi Nicole,

Where can we obtain a copy of the executive order?

Thank you,

Kehli Cage  
Government Ethics Specialist  
U.S. Office of Government Ethics  
1201 New York Ave NW  
Suite #500  
Washington, D.C. 20005  
Ph: 202-482-9279  
[kehli.cage@oge.gov](mailto:kehli.cage@oge.gov)

Visit OGE's website: [www.oge.gov](http://www.oge.gov)  
Follow OGE on Twitter: @OfficeGovEthics



---

**From:** Nicole Stein  
**Sent:** Monday, January 30, 2017 10:53 AM  
**To:** DeskOfficers MailGroup  
**Subject:** New Executive Order

As you may have saw over the weekend, a new executive order was issued regarding the Pledge.

If you receive questions from your agencies, please refer them. We are working on reviewing the

order.

*Nicole*

Nicole Stein  
Chief, Agency Assistance Branch  
U.S. Office of Government Ethics  
[nstein@oge.gov](mailto:nstein@oge.gov)  
(202) 482-9255

**Jennifer Matis**

---

**From:** Steven Corbally  
**Sent:** Monday, January 30, 2017 11:20 AM  
**To:** 'Daniel Stoll'  
**Subject:** New EO from WH

Dan.

Not sure if you saw this over the weekend.

<https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>

Steve

**From:** [Monica M. G. Ashar](#)  
**To:** [Seth Jaffe](#)  
**Subject:** Accepted: re: pledge issues

---

**From:** [Monica M. G. Ashar](#)  
**To:** [Seth Jaffe](#)  
**Cc:** [Rachel K. Dowell](#)  
**Subject:** Draft chart  
**Date:** Monday, January 30, 2017 5:00:23 PM  
**Attachments:** (b)(5) deliberative

---

Attachment withheld in full -  
(b)(5) deliberative

FYI – see attached.

**From:** [Kimberly L. Sikora Panza](#)  
**To:** [Nicole Stein](#)  
**Cc:** [Seth Jaffe](#)  
**Subject:** FW: E.O. question--  
**Date:** Tuesday, January 31, 2017 7:20:27 AM

---

Nicole/Seth,

Not sure who is the best person to ping on this, so I thought I would reach out to both of you. (I would suspect that I am not the only desk officer who might have similar questions)

(b)(5) deliberative  
[Redacted text block]

This is new territory for me, so I want to make sure I'm proceeding appropriately – as a desk officer I take seriously not only determining and providing an accurate substantive response, but also the relationship management piece!

Thanks,  
Kim

(b)(5) del berative (email from DOJ ethics official seeking desk officer assistance)  
[Redacted text block]





**From:** [Seth Jaffe](#)  
**To:** [Monica M. G. Ashar](#)  
**Subject:** FW: Ethics EO  
**Date:** Monday, January 30, 2017 9:04:55 AM  
**Attachments:** (b)(5) deliberative

---

Attachment withheld in full  
- (b)(5) deliberative draft

FYI:

---

**From:** Rachel K. Dowell  
**Sent:** Sunday, January 29, 2017 12:17 PM  
**To:** Seth Jaffe  
**Subject:** Ethics EO

Hi Seth –

As you are probably aware, President Trump signed an ethics executive order yesterday (<https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>) that sets forth a new Ethics Pledge and revokes EO 13490 (b)(5) deliberative

[REDACTED]

I also wanted to volunteer to help implement this EO. Please let me know what I can do to help.

Thanks!  
Rachel

**From:** [Seth Jaffe](#)  
**To:** [Rachel K. Dowell](#)  
**Subject:** Re: Ethics EO  
**Date:** Sunday, January 29, 2017 1:16:55 PM

---

Rachel,

OK, I forgot about your CWS day. We can either check in on this and the (b) (5) AIMS referral on Monday or Tuesday.

Thanks again,  
Seth

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

---

**From:** Rachel K. Dowell  
**Sent:** Sunday, January 29, 2017 12:24 PM  
**To:** Seth Jaffe  
**Subject:** RE: Ethics EO

---

Sounds good – Monday is my CWS but I’m available in the PM if needed (my calls will still be forwarding).

---

**From:** Seth Jaffe  
**Sent:** Sunday, January 29, 2017 12:23 PM  
**To:** Rachel K. Dowell  
**Subject:** Re: Ethics EO

---

Rachel,

Thanks! Let's discuss Monday.

Seth

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

---

**From:** Rachel K. Dowell  
**Sent:** Sunday, January 29, 2017 12:16 PM  
**To:** Seth Jaffe  
**Subject:** Ethics EO

---

Hi Seth –

As you are probably aware, President Trump signed an ethics executive order yesterday (<https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>) that sets forth a new Ethics Pledge and revokes EO 13490 (b)(5) deliberative

[REDACTED]

[REDACTED]

[REDACTED]

(b)(5) deliberative



I also wanted to volunteer to help implement this EO. Please let me know what I can do to help.

Thanks!

Rachel

**From:** [Wendy G. Pond](#)  
**To:** [Nicole Stein](#)  
**Subject:** FW: New Executive Order  
**Date:** Monday, January 30, 2017 11:03:26 AM

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(b)(5) deliberative



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**From:** Kehli Cage  
**Sent:** Monday, January 30, 2017 11:02 AM  
**To:** Nicole Stein <nstein@oge.gov>; DeskOfficers MailGroup <DeskOfficersMailGroup@oge.gov>  
**Subject:** RE: New Executive Order

Thank you!

Kehli Cage  
Government Ethics Specialist  
U.S. Office of Government Ethics  
1201 New York Ave NW  
Suite #500  
Washington, D.C. 20005  
Ph: 202-482-9279  
[kehli.cage@oge.gov](mailto:kehli.cage@oge.gov)

Visit OGE's website: [www.oge.gov](http://www.oge.gov)  
Follow OGE on Twitter: @OfficeGovEthics



---

**From:** Nicole Stein  
**Sent:** Monday, January 30, 2017 10:57 AM  
**To:** Kehli Cage; DeskOfficers MailGroup  
**Subject:** RE: New Executive Order

<https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>

---

**From:** Kehli Cage

**Sent:** Monday, January 30, 2017 10:56 AM

**To:** Nicole Stein <[nstein@oge.gov](mailto:nstein@oge.gov)>; DeskOfficers MailGroup <[DeskOfficersMailGroup@oge.gov](mailto:DeskOfficersMailGroup@oge.gov)>

**Subject:** RE: New Executive Order

Hi Nicole,

Where can we obtain a copy of the executive order?

Thank you,

Kehli Cage  
Government Ethics Specialist  
U.S. Office of Government Ethics  
1201 New York Ave NW  
Suite #500  
Washington, D.C. 20005  
Ph: 202-482-9279  
[kehli.cage@oge.gov](mailto:kehli.cage@oge.gov)

Visit OGE's website: [www.oge.gov](http://www.oge.gov)

Follow OGE on Twitter: @OfficeGovEthics



---

**From:** Nicole Stein

**Sent:** Monday, January 30, 2017 10:53 AM

**To:** DeskOfficers MailGroup

**Subject:** New Executive Order

As you may have saw over the weekend, a new executive order was issued regarding the Pledge.

If you receive questions from your agencies, please refer them. We are working on reviewing the order.

*Nicole*

Nicole Stein  
Chief, Agency Assistance Branch  
U.S. Office of Government Ethics  
[nstein@oge.gov](mailto:nstein@oge.gov)

(202) 482-9255

**From:** [Steven Corbally](#)  
**To:** [Nicole Stein](#)  
**Subject:** FW: Pledge questions  
**Date:** Tuesday, February 07, 2017 6:48:11 AM

---

Nicole,

This is one question that keeps coming in. (b)(5) deliberative



I will put this with all the others.

Thanks.  
Steve

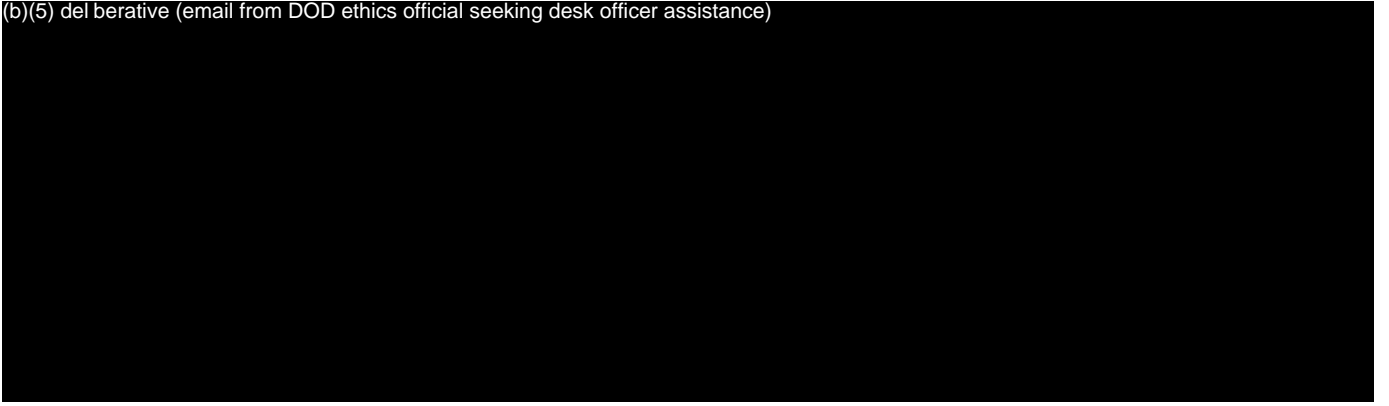
-----Original Message-----

(b)(5) deliberative (email from DOD ethics official seeking desk officer assistance)





(b)(5) del berative (email from DOD ethics official seeking desk officer assistance)



**From:** [Rachel K. Dowell](#)  
**To:** [David J. Apol](#); [Seth Jaffe](#)  
**Subject:** LA & Chart  
**Date:** Thursday, February 23, 2017 5:59:24 PM  
**Attachments:** (b)(5) deliberative [REDACTED]

Attachments withheld in full - (b)(5)  
deliberative drafts

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Thanks!

--

Rachel K. Dowell  
Assistant Counsel  
Office of Government Ethics  
General Counsel & Legal Policy Division  
Ethics Law and Policy Branch  
(202) 482-9267

Visit OGE's website: [www.oge.gov](http://www.oge.gov)  
Follow OGE on Twitter: @OfficeGovEthics

**From:** [Leigh J. Francis](#)  
**To:** [Seth Jaffe](#); [Rachel K. Dowell](#); [Monica M. G. Ashar](#); [David J. Apol](#)  
**Subject:** RE: LA Citations for 13490  
**Date:** Monday, February 13, 2017 10:41:40 AM

---

Thank you, Seth.

---

**From:** Seth Jaffe  
**Sent:** Monday, February 13, 2017 10:27 AM  
**To:** Rachel K. Dowell; Leigh J. Francis; Monica M. G. Ashar; David J. Apol  
**Subject:** LA Citations for 13490

Dear folks,

FYI: This is from Keith's draft of a citation index as it related to EO 13490.

Seth

(b) (5)





**From:** [Seth Jaffe](#)  
**To:** [Monica M. G. Ashar](#); [David J. Apol](#)  
**Subject:** E.O. LA  
**Date:** Tuesday, January 31, 2017 5:50:13 PM

---

Dave and Monica,

FYI: the LA on the new E.O. is with Walter for his review.

Thanks,  
Seth

**From:** [Seth Jaffe](#)  
**To:** [Monica M. G. Ashar](#)  
**Subject:** LA  
**Date:** Tuesday, January 31, 2017 12:43:05 PM

---

Monica,

I gave Dave the draft LA.

Thanks,  
Seth

**From:** [Monica M. G. Ashar](#)  
**To:** [David J. Apol](#); [Seth Jaffe](#)  
**Subject:** LA-17-02  
**Date:** Thursday, February 02, 2017 2:48:07 PM  
**Attachments:** [Exec Order, Ethics Pledge \(2-2-17\).pdf](#)

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Attachment withheld in full  
- (b)(5) deliberative draft

I've proofread the attached legal advisory, and it's ready for your review.

Monica

**From:** [Seth Jaffe](#)  
**To:** [David J. Apol](#)  
**Subject:** FW: LA-17-02  
**Date:** Thursday, February 02, 2017 3:08:13 PM  
**Attachments:** [Exec Order, Ethics Pledge \(2-2-17\).pdf](#)  
[Obama pledge and guidance.pdf](#)

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One attachment withheld in full -  
(b)(5) deliberative draft



## Presidential Documents

### Executive Order 13490 of January 21, 2009

#### Ethics Commitments by Executive Branch Personnel

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and sections 3301 and 7301 of title 5, United States Code, it is hereby ordered as follows:

**Section 1. *Ethics Pledge.*** Every appointee in every executive agency appointed on or after January 20, 2009, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee:

"As a condition, and in consideration, of my employment in the United States Government in a position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:

"1. *Lobbyist Gift Ban.* I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.

"2. *Revolving Door Ban—All Appointees Entering Government.* I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

"3. *Revolving Door Ban—Lobbyists Entering Government.* If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:

(a) participate in any particular matter on which I lobbied within the 2 years before the date of my appointment;

(b) participate in the specific issue area in which that particular matter falls; or

(c) seek or accept employment with any executive agency that I lobbied within the 2 years before the date of my appointment.

"4. *Revolving Door Ban—Appointees Leaving Government.* If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.

"5. *Revolving Door Ban—Appointees Leaving Government to Lobby.* In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

"6. *Employment Qualification Commitment.* I agree that any hiring or other employment decisions I make will be based on the candidate's qualifications, competence, and experience.

"7. *Assent to Enforcement.* I acknowledge that the Executive Order entitled 'Ethics Commitments by Executive Branch Personnel,' issued by the President on January 21, 2009, which I have read before signing this document, defines certain of the terms applicable to the foregoing obligations and sets forth

the methods for enforcing them. I expressly accept the provisions of that Executive Order as a part of this agreement and as binding on me. I understand that the terms of this pledge are in addition to any statutory or other legal restrictions applicable to me by virtue of Federal Government service."

**Sec. 2. Definitions.** As used herein and in the pledge set forth in section 1 of this order:

(a) "Executive agency" shall include each "executive agency" as defined by section 105 of title 5, United States Code, and shall include the Executive Office of the President; provided, however, that for purposes of this order "executive agency" shall include the United States Postal Service and Postal Regulatory Commission, but shall exclude the Government Accountability Office.

(b) "Appointee" shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

(c) "Gift"

(1) shall have the definition set forth in section 2635.203(b) of title 5, Code of Federal Regulations;

(2) shall include gifts that are solicited or accepted indirectly as defined at section 2635.203(f) of title 5, Code of Federal Regulations; and

(3) shall exclude those items excluded by sections 2635.204(b), (c), (e)(1) & (3) and (j)-(l) of title 5, Code of Federal Regulations.

(d) "Covered executive branch official" and "lobbyist" shall have the definitions set forth in section 1602 of title 2, United States Code.

(e) "Registered lobbyist or lobbying organization" shall mean a lobbyist or an organization filing a registration pursuant to section 1603(a) of title 2, United States Code, and in the case of an organization filing such a registration, "registered lobbyist" shall include each of the lobbyists identified therein.

(f) "Lobby" and "lobbied" shall mean to act or have acted as a registered lobbyist.

(g) "Particular matter" shall have the same meaning as set forth in section 207 of title 18, United States Code, and section 2635.402(b)(3) of title 5, Code of Federal Regulations.

(h) "Particular matter involving specific parties" shall have the same meaning as set forth in section 2641.201(h) of title 5, Code of Federal Regulations, except that it shall also include any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties.

(i) "Former employer" is any person for whom the appointee has within the 2 years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner, except that "former employer" does not include any executive agency or other entity of the Federal Government, State or local government, the District of Columbia, Native American tribe, or any United States territory or possession.

(j) "Former client" is any person for whom the appointee served personally as agent, attorney, or consultant within the 2 years prior to the date of his or her appointment, but excluding instances where the service provided was limited to a speech or similar appearance. It does not include clients

of the appointee's former employer to whom the appointee did not personally provide services.

(k) "Directly and substantially related to my former employer or former clients" shall mean matters in which the appointee's former employer or a former client is a party or represents a party.

(l) "Participate" means to participate personally and substantially.

(m) "Post-employment restrictions" shall include the provisions and exceptions in section 207(c) of title 18, United States Code, and the implementing regulations.

(n) "Government official" means any employee of the executive branch.

(o) "Administration" means all terms of office of the incumbent President serving at the time of the appointment of an appointee covered by this order.

(p) "Pledge" means the ethics pledge set forth in section 1 of this order.

(q) All references to provisions of law and regulations shall refer to such provisions as in effect on January 20, 2009.

**Sec. 3. Waiver.** (a) The Director of the Office of Management and Budget, or his or her designee, in consultation with the Counsel to the President or his or her designee, may grant to any current or former appointee a written waiver of any restrictions contained in the pledge signed by such appointee if, and to the extent that, the Director of the Office of Management and Budget, or his or her designee, certifies in writing (i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver. A waiver shall take effect when the certification is signed by the Director of the Office of Management and Budget or his or her designee.

(b) The public interest shall include, but not be limited to, exigent circumstances relating to national security or to the economy. *De minimis* contact with an executive agency shall be cause for a waiver of the restrictions contained in paragraph 3 of the pledge.

**Sec. 4. Administration.** (a) The head of every executive agency shall, in consultation with the Director of the Office of Government Ethics, establish such rules or procedures (conforming as nearly as practicable to the agency's general ethics rules and procedures, including those relating to designated agency ethics officers) as are necessary or appropriate to ensure that every appointee in the agency signs the pledge upon assuming the appointed office or otherwise becoming an appointee; to ensure that compliance with paragraph 3 of the pledge is addressed in a written ethics agreement with each appointee to whom it applies, which agreement shall also be approved by the Counsel to the President or his or her designee prior to the appointee commencing work; to ensure that spousal employment issues and other conflicts not expressly addressed by the pledge are addressed in ethics agreements with appointees or, where no such agreements are required, through ethics counseling; and generally to ensure compliance with this order within the agency.

(b) With respect to the Executive Office of the President, the duties set forth in section 4(a) shall be the responsibility of the Counsel to the President or his or her designee.

(c) The Director of the Office of Government Ethics shall:

(1) ensure that the pledge and a copy of this order are made available for use by agencies in fulfilling their duties under section 4(a) above;

(2) in consultation with the Attorney General or the Counsel to the President or their designees, when appropriate, assist designated agency ethics officers in providing advice to current or former appointees regarding the application of the pledge; and

(3) in consultation with the Attorney General and the Counsel to the President or their designees, adopt such rules or procedures as are necessary or appropriate:

- (i) to carry out the foregoing responsibilities;
  - (ii) to apply the lobbyist gift ban set forth in paragraph 1 of the pledge to all executive branch employees;
  - (iii) to authorize limited exceptions to the lobbyist gift ban for circumstances that do not implicate the purposes of the ban;
  - (iv) to make clear that no person shall have violated the lobbyist gift ban if the person properly disposes of a gift as provided by section 2635.205 of title 5, Code of Federal Regulations;
  - (v) to ensure that existing rules and procedures for Government employees engaged in negotiations for future employment with private businesses that are affected by their official actions do not affect the integrity of the Government's programs and operations;
  - (vi) to ensure, in consultation with the Director of the Office of Personnel Management, that the requirement set forth in paragraph 6 of the pledge is honored by every employee of the executive branch;
- (4) in consultation with the Director of the Office of Management and Budget, report to the President on whether full compliance is being achieved with existing laws and regulations governing executive branch procurement lobbying disclosure and on steps the executive branch can take to expand to the fullest extent practicable disclosure of such executive branch procurement lobbying and of lobbying for presidential pardons, and to include in the report both immediate action the executive branch can take and, if necessary, recommendations for legislation; and
- (5) provide an annual public report on the administration of the pledge and this order.
- (d) The Director of the Office of Government Ethics shall, in consultation with the Attorney General, the Counsel to the President, and the Director of the Office of Personnel Management, or their designees, report to the President on steps the executive branch can take to expand to the fullest extent practicable the revolving door ban set forth in paragraph 5 of the pledge to all executive branch employees who are involved in the procurement process such that they may not for 2 years after leaving Government service lobby any Government official regarding a Government contract that was under their official responsibility in the last 2 years of their Government service; and to include in the report both immediate action the executive branch can take and, if necessary, recommendations for legislation.
- (e) All pledges signed by appointees, and all waiver certifications with respect thereto, shall be filed with the head of the appointee's agency for permanent retention in the appointee's official personnel folder or equivalent folder.

**Sec. 5. Enforcement.** (a) The contractual, fiduciary, and ethical commitments in the pledge provided for herein are solely enforceable by the United States pursuant to this section by any legally available means, including debarment proceedings within any affected executive agency or judicial civil proceedings for declaratory, injunctive, or monetary relief.

(b) Any former appointee who is determined, after notice and hearing, by the duly designated authority within any agency, to have violated his or her pledge may be barred from lobbying any officer or employee of that agency for up to 5 years in addition to the time period covered by the pledge. The head of every executive agency shall, in consultation with the Director of the Office of Government Ethics, establish procedures to implement this subsection, which procedures shall include (but not be limited to) providing for factfinding and investigation of possible violations of this order and for referrals to the Attorney General for his or her consideration pursuant to subsection (c).

(c) The Attorney General or his or her designee is authorized:

(1) upon receiving information regarding the possible breach of any commitment in a signed pledge, to request any appropriate Federal investigative authority to conduct such investigations as may be appropriate; and

(2) upon determining that there is a reasonable basis to believe that a breach of a commitment has occurred or will occur or continue, if not enjoined, to commence a civil action against the former employee in any United States District Court with jurisdiction to consider the matter.

(d) In any such civil action, the Attorney General or his or her designee is authorized to request any and all relief authorized by law, including but not limited to:

(1) such temporary restraining orders and preliminary and permanent injunctions as may be appropriate to restrain future, recurring, or continuing conduct by the former employee in breach of the commitments in the pledge he or she signed; and

(2) establishment of a constructive trust for the benefit of the United States, requiring an accounting and payment to the United States Treasury of all money and other things of value received by, or payable to, the former employee arising out of any breach or attempted breach of the pledge signed by the former employee.

**Sec. 6. General Provisions.** (a) No prior Executive Orders are repealed by this order. To the extent that this order is inconsistent with any provision of any prior Executive Order, this order shall control.

(b) If any provision of this order or the application of such provision is held to be invalid, the remainder of this order and other dissimilar applications of such provision shall not be affected.

(c) Nothing in this order shall be construed to impair or otherwise affect:

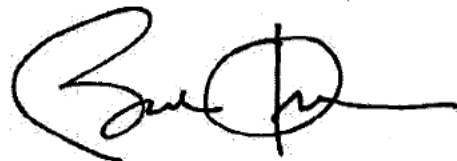
(1) authority granted by law to a department, agency, or the head thereof; or

(2) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(d) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(e) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(f) The definitions set forth in this order are solely applicable to the terms of this order, and are not otherwise intended to impair or affect existing law.

A handwritten signature in black ink, appearing to be "Barack Obama", with a large circular flourish on the right side.

THE WHITE HOUSE,  
*January 21, 2009.*



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

January 22, 2009  
DO-09-003

MEMORANDUM

TO: Agency Heads and Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Executive Order; Ethics Pledge

President Obama signed an Executive Order, "Ethics Commitments by Executive Branch Personnel," on January 21, 2009. Among other things, this Executive Order requires every full-time, political appointee appointed on or after January 20, 2009 to sign an Ethics Pledge. Pursuant to section 4(c)(1) of the Executive Order, the Office of Government Ethics (OGE) is providing you with a link to obtain a copy of the Order, <https://www.whitehouse.gov/the-press-office/ethics-commitments-executive-branch-personnel>, as well as an Ethics Pledge form (attached) to be used for appointees at your agency.

The definition of "appointee" in the Executive Order covers all full-time, political appointees regardless of whether they are appointed by the President, the Vice President, an agency head, or otherwise. Executive Order, sec. 2(a). Unlike certain other ethical requirements (e.g., the restrictions on covered noncareer employees described in 5 C.F.R. part 2636), the Pledge applies without regard to the salary level of the political appointee. Individuals appointed to a career position are not required to sign the Pledge. Similarly, political appointees appointed to a full-time position prior to January 20, 2009 are not presently required to sign the Pledge. This means individuals appointed during the previous administration are not now covered by the Pledge even if they are continuing in their current position or are serving in an acting capacity under the Vacancies Reform Act, 5 U.S.C. § 3345 *et seq.*

Generally, appointees must commit to:

- not accept gifts or gratuities from registered lobbyists or lobbying organizations (subject only to a limited number of the exceptions provided in the OGE Standards of Ethical Conduct, as well as other exceptions that OGE may authorize in the future for situations that do not implicate the purpose of the gift ban)—Pledge, par. 1

- recuse for two years from any particular matter involving specific parties in which a former employer or client is or represents a party, if the appointee served that employer or client during the two years prior to the appointment—Pledge, par. 2
- if the appointee was a registered lobbyist during the prior two years,
  - recuse, for two years after appointment, from any particular matter on which he or she lobbied during the two years prior to appointment (or any particular matter that falls within the same specific issue area)—Pledge, par. 3(a) & (b)
  - not to seek or accept employment with an agency or department that he or she lobbied during the prior two years—Pledge, par. 3(c)

[Note the requirement for a written ethics agreement for incoming lobbyists, described below, and the waiver mechanism as to lobbyists, also described below]

- if the appointee is subject to the senior employee post-employment restriction in 18 U.S.C. § 207(c), to abide by such restriction for two years after termination of the appointment—Pledge, par. 4
- not to lobby any covered executive branch official (as described in the Lobbying Disclosure Act) or any noncareer SES appointee for as long as President Obama is in office—Pledge, par. 5
- agree that any hiring or other employment decisions will be based on the candidate's qualifications, competence and experience—Pledge, par. 6

Section 3 of the Executive Order provides a waiver mechanism for any of the restrictions contained in the Pledge. The waiver must come from the Director of the Office of Management and Budget (or designee), in consultation with the White House Counsel (or designee). The Executive Order also provides for enforcement of the Pledge through civil action by the Attorney General. Executive Order, sec. 5(c). Moreover, the Order provides for agency debarment proceedings against former appointees found to have violated the Pledge, pursuant to debarment procedures established by each agency in consultation with OGE. *Id.*, sec. 5(b).

The Executive Order requires each covered appointee to sign the Pledge "upon becoming an appointee." Sec. 1; see also sec. 4(a). Therefore, Agency Heads and Designated Agency Ethics Officials must work with relevant personnel officials to ensure that all political appointees are identified and provided with Pledge forms to sign. Section 4(a) of the Executive Order provides more detail on the responsibilities of agencies for administering the Pledge requirement. Section 4(a) also requires agencies to address compliance with the restrictions on incoming lobbyists (paragraph 3 of the Pledge) through a written ethics agreement, subject to approval by the White House Counsel (or designee) prior to the appointee commencing work.



Agency Heads and Designated Agency Ethics Officials  
Page 3

OGE, in cooperation with the Office of the White House Counsel, will be providing you with more detailed guidance concerning the Ethics Pledge and other aspects of the Executive Order in the near future. That will also include scheduling a conference in the coming days to discuss these matters. In the meantime, please do not hesitate to contact OGE about any questions you may have concerning this matter.

Attachment:

Ethics Pledge Form

## ETHICS PLEDGE

As a condition, and in consideration, of my employment in the United States Government in a position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:

1. **Lobbyist Gift Ban.** I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.
2. **Revolving Door Ban: All Appointees Entering Government.** I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.
3. **Revolving Door Ban: Lobbyists Entering Government.** If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:
  - (a) participate in any particular matter on which I lobbied within the 2 years before the date of my appointment;
  - (b) participate in the specific issue area in which that particular matter falls; or
  - (c) seek or accept employment with any executive agency that I lobbied within the 2 years before the date of my appointment.
4. **Revolving Door Ban: Appointees Leaving Government.** If, upon my departure from the Government, I am covered by the post employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.
5. **Revolving Door Ban: Appointees Leaving Government to Lobby.** In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.
6. **Employment Qualification Commitment.** I agree that any hiring or other employment decisions I make will be based on the candidate's qualifications, competence, and experience.
7. **Assent to Enforcement.** I acknowledge that the Executive Order entitled "Ethics Commitments by Executive Branch Personnel," issued by the President on January 21, 2009, which I have read before signing this document, defines certain of the terms applicable to the foregoing obligations and sets forth the methods for enforcing them. I expressly accept the provisions of that Executive Order as a part of this agreement and as binding on me. I understand that the terms of this pledge are in addition to any statutory or other legal restrictions applicable to me by virtue of Federal Government service.

\_\_\_\_\_  
Signature

\_\_\_\_\_, 20\_\_\_\_  
Date

\_\_\_\_\_  
Print or type your full name (Last, first, middle)



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

February 10, 2009  
DO-09-005

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Signing the Ethics Pledge

The Office of Government Ethics (OGE) has received several questions about when appointees must sign the Ethics Pledge required under Executive Order 13490. In consultation with the White House Counsel's office, OGE has determined that Pledge forms must be signed:

- in the case of individuals nominated by the President to a position requiring Senate confirmation (PAS), after Senate confirmation but before appointment;
- in the case of non-PAS appointees who have already been appointed, no later than 30 days after the date of their appointment (in recognition of the logistics of bringing new appointees on board during the initial implementation of the Executive Order); and
- in the case of non-PAS appointees who may be appointed in the future, at the time such person is appointed to a position covered by the Executive Order.

In light of the serious nature of the commitments embodied in the Pledge, OGE wants to emphasize that special Government employees (SGEs) are not considered to be full-time, non-career appointees subject to the Pledge requirement. This follows the interpretation of similar language in section 2(a) of Executive Order 12834 and section 102 of Executive Order 12731. See OGE Advisory Memorandum 00 x 1. Note that individuals serving in an agency as temporary advisors or counselors, pending Senate confirmation to a PAS position, are considered SGEs unless and until they are confirmed. See OGE Advisory Memorandum 01 x 2. Such individuals, therefore, must sign the Pledge after their confirmation, but before their appointment to a PAS position.



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

February 11, 2009  
DO-09-007

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Lobbyist Gift Ban Guidance

Section 1 of Executive Order 13490 requires all full-time, non-career appointees, appointed on or after January 20, 2009, to sign an Ethics Pledge. 74 Federal Register 4673 (January 21, 2009). Paragraph 1 of the Pledge, titled "Lobbyist Gift Ban," sets out an appointee's agreement not to "accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee." The purpose of this Memorandum is to provide ethics officials with initial guidance concerning the implementation and interpretation of this gift ban.

Currently the ban applies only to those who meet the definition of "appointee" in the Executive Order.<sup>1</sup> The Order directs the Office of Government Ethics (OGE) to adopt rules or procedures to authorize limited exceptions to the lobbyist gift ban for circumstances that do not implicate the purposes of the ban. Executive Order 13490, sec. 4(c)(3)(iii). The guidance provided in this Memorandum is intended solely to help ethics officials understand the scope of the ban as it applies immediately to full-time, non-career appointees. While the Executive Order directs OGE to adopt rules and procedures to apply the lobbyist gift ban to all executive branch employees, any such rules or procedures will be developed in due course, with ample consideration of the situation of career employees. *See id.*, sec. 4(c)(3)(ii).

What is a "Registered Lobbyist" and a "Registered Lobbying Organization"

The Pledge prohibits gifts from lobbyists and lobbying organizations that are "registered" under the Lobbying Disclosure Act (LDA), 2 U.S.C. § 1601, *et seq.* However, neither ethics officials nor appointees must determine independently whether a particular donor meets the registration requirements of the LDA. Rather, in order to provide notice to appointees, the Executive Order purposely covers only those gifts received from a lobbyist or organization that actually has filed a registration with the Secretary of the Senate and the Clerk of the House of

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<sup>1</sup> See DAEOgram 09-003 (explaining the scope of covered "appointee"), <https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-003:+Executive+Order+13490,+Ethics+Pledge>.

Representatives pursuant to 2 U.S.C. § 1603(a). Executive Order 13490, sec. 2(e). The Secretary and the Clerk maintain searchable registrant databases.<sup>2</sup> These are the only databases upon which appointees and ethics officials may rely to determine whether a given donor is registered, for purposes of compliance with the gift ban. Search results must be reviewed carefully. The databases contain the names of clients as well as lobbyists and lobbying organizations. Also, the databases contain historical information. This may indicate that an individual was a registered lobbyist at some time in the past but is not a lobbyist currently. OGE can assist ethics officials who have questions about the use of the databases.

The ban is not limited to donors that provide lobbying services to others. The phrase "registered lobbyist or lobbying organization" includes any "organization filing a registration," not just lobbying firms. Executive Order 13490, sec. 2(e). In particular, the ban includes any organization that registers because it employs at least one in-house lobbyist on its own behalf. *See* 2 U.S.C. § 1603(a)(2), (3)(A)(ii). For example, an appointee may not accept a bottle of wine from a telecommunications company that is registered under the LDA, even though the company is not a lobbying firm and registers only because it employs a single Governmental affairs officer to represent that company's own interests. Of course, the ban also covers registered lobbying firms, such as a law firm or Governmental relations firm that files registrations for activities on behalf of its clients.

The ban also applies without regard to whether the particular lobbyist or organization has any dealings with the appointee's own agency. As long as the donor is registered under the LDA, it does not matter that the donor's lobbying contacts and activities may be directed solely to another agency--or even solely to the Legislative Branch. As indicated below, the lobbyist gift ban is in addition to the OGE prohibitions on gifts from "prohibited sources" and gifts "given because of the employee's official position."

Furthermore, the ban is intended to prohibit gifts from any employee of a registered lobbyist or lobbying organization. In this regard, the ban applies in the same way as the OGE gift prohibitions, which treat a gift from an employee of an organization as a gift from the organization. *See* 5 C.F.R. § 2635.204(a)(Example 3). Otherwise, a lobbyist or lobbying organization could evade the ban simply by relying on non-lobbyist employees to make gifts. Thus, for example, an appointee could not accept a free dinner at a restaurant from an employee of an oil company that is registered under the LDA, even though that employee is not included among the lobbyists listed in the company's registration. Of course, if the appointee had a personal relationship with the company employee, the gift might be permitted under 5 C.F.R. § 2635.204(b). *Id.*

The lobbyist gift ban does not prohibit gifts from an organization that retains "outside" lobbyists or lobbying firms, as long as the organization itself is not registered under the LDA.

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<sup>2</sup> *See* <http://lobbyingdisclosure.house.gov/>;  
[http://www.senate.gov/pagelayout/legislative/g\\_three\\_sections\\_with\\_teasers/lobbyingdisc.htm](http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm).

Organizations that are merely "clients" but not actually employers of lobbyists do not have to file registrations under the LDA, even though they may be listed as clients in the registrations filed by the lobbyists and lobbying firms they retain. 2 U.S.C. §§ 1602(2); 1603(a)(2). The LDA definition of employee excludes both "independent contractors" and "volunteers who receive no financial or other compensation from the person or entity for their services," so a person who uses only such non-employees for all lobbying services would not be required to register. 2 U.S.C. §§ 1602(5); 1603(a)(2). These exclusions are important to keep in mind because the House and Senate databases (set out in footnote 2 of this DAEOgram) contain the names of many persons and entities that, for example, are clients of lobbying firms but are not themselves registered lobbyists or lobbying organizations.

#### The Lobbyist Gift Ban is in Addition to Existing OGE Gift Rules

The Appointee Pledge refers to certain provisions in the existing OGE gift regulations found in the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) at 5 C.F.R. part 2635, subpart B, including the OGE definition of "gift." Executive Order 13490, sec. 2(c)(1); 5 C.F.R. § 2635.203(b). That definition excludes several items, such as certain modest refreshments, presentation items of little intrinsic value, benefits available to all Government employees, etc. 5 C.F.R. § 2635.203(b)(1)-(9). However, the prohibitions in the Pledge are more comprehensive and provide far fewer exceptions than the existing OGE rules. For example, an appointee may not accept a gift from a lobbyist or lobbying organization even if the donor is not a "prohibited source" and the gift is not given "because of the employee's official position." 5 C.F.R. § 2635.202(a).

The only exceptions to the lobbyist gift ban are ones that do not undermine the purpose of the lobbyist gift ban and are set out below:

- gifts based on a personal relationship, 5 C.F.R. § 2635.204(b);
- discounts and similar benefits, 5 C.F.R. § 2635.204(c);
- gifts resulting from a spouse's business or employment, 5 C.F.R. § 2635.204(e)(1);
- customary gifts/gratuities provided by a prospective employer, 5 CFR § 2635.204(e)(3);
- gifts to the President or Vice President, 5 C.F.R. § 2635.204(j);
- gifts authorized by an OGE-approved agency supplemental regulation, 5 C.F.R. § 2635.204(k); and
- gifts accepted under specific statutory authority, 5 C.F.R. § 2635.204(l).

Because the lobbyist gift ban is very broad, these common sense exceptions are necessary to avoid potentially absurd results. Thus, an appointee may accept a birthday present from his or her spouse who is a registered lobbyist or sign up for a training course sponsored by a registered lobbying organization that provides a discount for Federal Government employees. However, the following exceptions in the OGE gift regulations are not exceptions to the lobbyist gift ban:

- \$20 de minimis value, 5 C.F.R. § 2635.204(a);
- awards and honorary degrees, 5 CFR § 2635.204(d);

- gifts resulting from the employee's own outside business or employment, 5 C.F.R. § 2635.204(e)(2);
- gifts from political organizations in connection with political participation, 5 C.F.R. § 2635.204(f);
- widely attended gatherings (WAG), 5 C.F.R. § 2635.204(g)(2);<sup>3</sup>
- social invitations from non-prohibited sources, 5 C.F.R. § 2635.204(h); and
- food, refreshments and entertainment from persons other than a foreign government in a foreign area.<sup>4</sup>

This means, for example, an appointee may not accept a \$15 lunch from a registered lobbyist or go to a widely attended reception sponsored by a registered lobbying organization.

The Executive Order also expressly provides that the lobbyist gift ban covers gifts that are solicited or accepted "indirectly" within the meaning of section 2635.203(f). Executive Order 13490, sec. 2(c)(2). The OGE gift regulations define an indirect gift as including any gift to an employee's parent, sibling, spouse, child or dependent relative because of that person's relationship to the employee, provided that the employee knows of and acquiesces in the gift. § 2635.203(f)(1). In other words, the lobbyist gift ban cannot be circumvented by extending an invitation or benefit to an appointee's family. An indirect gift also includes any gift given to any other person, including a charitable organization, based on the employee's designation, recommendation or other specification. 5 C.F.R. § 2635.203(f)(2). Thus, for example, if a lobbying organization offered an appointee free tickets to a Broadway show, the appointee could not simply suggest that the tickets be given instead to his favorite charity or even to one of several charities whose names are provided by the appointee. *See* § 2635.203(f)(Example 1).

Finally, appointees will not be deemed to have accepted a gift in violation of the Pledge if the gift is disposed of as provided in 5 C.F.R. § 2635.205. Executive Order 13490, sec. 4(c)(3)(iv). As provided in the OGE gift regulation, proper disposition includes paying the donor the market value or returning a tangible item. In the case of perishable items that cannot

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<sup>3</sup> Appointees still may accept offers of free attendance on the day of an event when they are speaking or presenting information in an official capacity, as described in 5 C.F.R. § 2635.204(g)(1), notwithstanding the lobbyist gift ban. This is not a gift exception, but simply an application of the definition of "gift" in section 2635.203(b): "The employee's participation in the event on that day is viewed as a customary and necessary part of his performance of the assignment and does not involve a gift to him or to the agency." 5 C F R § 2635.204(g)(1).

<sup>4</sup> Note that the Pledge does not prohibit an appointee from accepting "[g]ifts from a foreign government or international or multinational organization, or its representative, when accepted by the employee under the authority of the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342." 5 C.F.R. § 2635.204(l)(2); *see* Executive Order 13490, sec. 2(c)(3). Whether, or under what circumstances, any of these entities referenced in the Foreign Gifts and Decorations Act could be a registered lobbyist or lobbying organization is beyond the scope of this Memorandum.

be returned, the appointee's supervisor or agency ethics official can determine that the gift will be given to an appropriate charity, shared within the appointee's office, or destroyed. Under section 2635.205(c), an appointee who promptly consults an agency ethics official to determine whether an unsolicited gift may be accepted, and promptly complies with that official's instructions, will not be deemed to have accepted a prohibited gift.<sup>5</sup> For example, if an appointee receives an unsolicited item, but is unsure whether the donor is registered under the Lobbying Disclosure Act (see discussion below), the appointee will not be in violation of the ban if he or she promptly contacts an agency ethics official to determine whether the gift may be accepted and follows the instructions of that official.

#### Other Permissible Gifts

Although the lobbyist gift ban is broad, it was not intended to prohibit certain gifts that do not implicate the purposes of the ban. Pending the issuance of final rules or procedures, appointees may rely on the following interim guidance, which OGE developed in consultation with the White House Counsel's Office, to accept certain gifts from 501(c)(3) organizations and media organizations.

Charitable and other not-for-profit organizations that are exempt from taxation under 26 U.S.C. § 501(c)(3) are already restricted as to the amount of lobbying in which they may engage. *See* 26 U.S.C. § 501(c)(3), (h). Consequently, the practices that the Executive Order and Pledge were intended to curb are already less implicated by 501(c)(3) organizations than by other entities that may employ lobbyists. Furthermore, any 501(c)(3) organizations that receive Federal funds are subject to limitations on the use of those funds to lobby for Federal contracts, grants, loans or cooperative agreements. *See* 31 U.S.C. § 1352. Given the kinds of purposes for which 501(c)(3) organizations are granted tax-exempt status (e.g., educational, charitable, scientific), there is little reason to prohibit employees from relying on the usual gift exceptions in the Standards of Conduct, many of which have particular relevance to the activities of such organizations. *See, e.g.,* 5 C.F.R. § 2635.204(g)(2)(permitting attendance at conferences and other widely attended events in the interest of the agency); § 2635.204(d)(permitting certain honorary degrees and awards). This judgment is analogous to policies reflected in the Federal Employees Training Act. *See* 5 U.S.C. § 4111 (permitting employees to accept certain items from 501(c)(3) organizations). Therefore, the gift ban will not apply to a gift from a 501(c)(3) organization, as long as the gift otherwise may be accepted under the Standards of Conduct. However, in keeping with the purposes of the ban, appointees still may not accept a gift if the organization employee who extends the offer is a registered lobbyist him- or herself.

Similar considerations are relevant to gifts from media organizations. The LDA itself reflects solicitude for the unique constitutional role of the press in gathering and disseminating

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<sup>5</sup> *See* OGE Informal Advisory Letter 06 x 4 (employee must take initiative to consult with ethics official and cannot wait until contacted, if ever, by an ethics official before disposing of gift properly).



information. *See* 2 U.S.C. § 1602(8)(B)(ii). Likewise, the lobbyist gift ban is not intended to erect unnecessary barriers to interaction between appointees and journalists. This is consistent with concerns about the application of the OGE gift prohibitions to certain press dinners shortly after the Standards of Conduct became effective. *See* Memorandum from the Counsel to the President to All Agency Heads, December 21, 1993 (suspending enforcement of gift rule with respect to press dinners, pending revision of rule). Therefore, an appointee may accept a gift from an employee of a media organization, as long as the gift is permissible under the OGE gift rules, including any applicable exceptions. The only proviso, as discussed above, is that appointees may not accept a gift if the organization employee who extends the offer is actually a registered lobbyist.

### Conclusion

OGE will continue to provide guidance on the lobbyist gift ban and other aspects of the Executive Order in the future. Ethics officials should consult with OGE if they have any questions concerning these matters.



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

February 23, 2009  
DO-09-008

MEMORANDUM

TO: Agency Heads and Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Authorizations Pursuant to Section 3 of Executive Order 13490, "Ethics Commitments by Executive Branch Personnel"

The purpose of this DAEOgram is to provide guidance to agency heads and Designated Agency Ethics Officials (DAEOs) on the application of section 3 of Executive Order 13490. As you know, section 1 of the Executive Order requires all covered appointees to abide by several commitments in an Ethics Pledge, unless they are granted a waiver under section 3. The Director of the Office of Management and Budget (OMB) has now designated the DAEO of each executive agency to exercise section 3 waiver authority in consultation with the Counsel to the President. This designation and the limitations on waiver authority are addressed below.

DAEOs are Now Designated to Exercise Waiver Authority in Consultation with White House Counsel

Section 3(a) of the Executive Order provides:

The Director of the Office of Management and Budget, or his or her designee, in consultation with the Counsel to the President or his or her designee, may grant to any current or former appointee a written waiver of any restrictions contained in the pledge signed by such appointee if, and to the extent that, the Director of the Office of Management and Budget, or his or her designee, certifies in writing (i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver.

The Director of OMB has, after consultation with Counsel to the President, determined that the most appropriate designee of his authority is the Designated Agency Ethics Official (DAEO) of each executive agency. This designation reflects the high degree of trust and confidence with which the experience and professional judgment of the DAEOs are viewed. The deep agency knowledge of the DAEOs was also an important factor in the Director's decision.

### Limitations on Exercise of Waiver Authority

**It is the President's intention that waivers will be granted sparingly and that their scope will be as limited as possible. All waivers must be in writing.** As specified in the Executive Order, a waiver may be granted only after consultation with the Counsel to the President and only upon the DAEO's certification either that the literal application of the restriction is inconsistent with the purposes of the restriction or that it is in the public interest to grant the waiver. Executive Order 13490, sec. 3(b). For the latter purpose, the public interest includes, but is not limited to, exigent circumstances relating to national security or the economy. Additionally, provisions in paragraph 3 of the Pledge, which pertains to appointees who have been registered lobbyists within two years of appointment, may be waived where the appointee's lobbying activities in connection with an agency, or on a particular matter, or in a specific issue area have been *de minimis*.

Finally, we wish to emphasize that the legal requirement under the Executive Order of advance consultation with the Counsel to the President remains and is to be strictly enforced. Norman Eisen, the Special Counsel to the President, is the point of contact in the Office of the Counsel to the President and can be reached at (202) 456-1214 or [neisen@who.eop.gov](mailto:neisen@who.eop.gov). To ensure that the consultation requirement is met, no waiver should ever be granted until the Special Counsel has provided a written acknowledgement affirmatively stating that the required consultation has occurred and is complete. Your OGE desk officers should also be consulted in advance with respect to all waiver issues.

### Conclusion

OGE will continue to publish additional guidance on the Pledge required by Executive Order 13490 as needed. Questions about the application of the Pledge should be referred to the OGE desk officer responsible for your agency.



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

March 16, 2009  
DO-09-010

**MEMORANDUM**

**TO:** Designated Agency Ethics Officials

**FROM:** Robert I. Cusick  
Director

**SUBJECT:** Who Must Sign the Ethics Pledge?

The Office of Government Ethics (OGE) has received numerous questions concerning which officials must sign the Ethics Pledge required under Executive Order 13490. Therefore, OGE is issuing this guidance to help agency ethics officials determine which officials are subject to the Pledge requirement.

**Definition of Appointee**

Section 1 of the Executive Order states that "[e]very appointee in every executive agency appointed on or after January 20, 2009" shall sign the Ethics Pledge. Executive Order 13490, sec. 1, 74 Federal Register 4673 (January 26, 2009). The Order defines "appointee" as follows:

'Appointee' shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

*Id.*, sec. 2(b).

In broad terms, the Pledge was intended to apply to full-time "political" appointees of all types. *Cf.* OGE Informal Advisory Letter 04 x 10 ("when we identify a position as 'noncareer,' we are typically referring to a political appointment"). The term appointee generally includes, but is not limited to, all appointees to positions described as "covered noncareer" in 5 C.F.R. § 2636.303(a) and all full-time Presidential appointees subject to section 102 of Executive

Order 12371. However, the term is not limited by any salary thresholds, and it covers political employees appointed other than by the President. *See* DAEOgram DO-09-003.

In response to questions from several agencies, OGE wants to emphasize that the term appointee does not include every excepted service employee. Non-career is not synonymous with excepted service. *See* Detailed Explanation, Ethics Reform Act of 1989: Technical Amendments, 136 Cong. Rec. H 1646 (1990) (ethical limitations on "noncareer" appointees do not cover "for example, attorneys hired under Schedule A" of the excepted service). Rather, as the definition of appointee makes clear, the Pledge applies to appointees excepted from the competitive service "by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria)." Executive Order 13490, sec. 2(b); *see* 5 C.F.R. part 213, subpart C (excepted schedules). Again, the essentially political nature of a given appointment is the touchstone. *See* 04 x 10 (discussing the criteria for Schedule C and comparable appointments).

### **Categories of Officials**

OGE has received questions about the coverage of several categories of officials under the Pledge. These categories are discussed briefly below.

#### **1. Special Government Employees**

As explained in DAEOgram DO-09-005, special Government employees (SGEs) are not required to sign the Pledge. SGEs are described at 18 U.S.C. § 202(a), and for most purposes the term refers to employees who are expected to perform temporary duties on no more than 130 days during a period of 365 days. The definition of SGE and the process for determining who is an SGE are discussed in detail in various OGE documents. *E.g.*, OGE Advisory Memoranda 00 x 1; 01 x 2.

#### **2. Foreign Service and Similar Positions**

The definition of appointee excludes persons appointed as members of the Senior Foreign Service, but at the same time it includes "non-career" appointees in any "SES-type system." OGE elsewhere has determined that non-career Senior Foreign Service appointees are an example of what is meant by non-career members of an SES-type system. 5 C.F.R. § 2636.303(a)(2). The Executive Order carries forward this distinction and is intended to cover those Senior Foreign Service members who are considered non-career or political appointees, but not those who are deemed career officers. The same distinction applies with regard to any agency-specific or other categories of foreign service officials: those positions that are filled by political appointees are subject to the Pledge, whereas those positions that are not viewed as political are not subject to the Pledge. Likewise, this distinction will apply to Ambassadors: career Ambassadors (many of whom rotate through multiple Ambassadorial assignments and

other posts throughout their Government careers during successive administrations) will not be subject to the Pledge, but non-career or political Ambassador appointees must sign the Pledge.

### 3. Career Officials Appointed to Confidential Positions

OGE has received questions from several agencies about whether the Pledge applies to career staff who are appointed to serve as confidential assistants to Commissioners and other agency leaders. Some of these questions have come from independent agencies headed by a collegial body comprised of members with staggered, fixed terms. Apparently, it has been a regular practice at certain agencies to appoint regular career staff to serve in confidential positions with a given Commissioner, with the expectation that the confidential assistant will return to a career staff position at the end of the Commissioner's term or earlier. In consultation with the White House Counsel's Office, OGE has determined that the Pledge is not intended to apply to such employees, *provided* that the right of return to a career position is established by statute, regulation, or written agency personnel policy. Under such circumstances, a confidential "rotation" would be viewed as part of an established career pattern, and imposing the exacting requirements of the Pledge could create unintended disincentives for career employees to accept such rotations.

### 4. Career SES Members Given Presidential Appointments

The Pledge requirement does apply, however, to career SES members (or other career SES-equivalent employees) who are appointed to positions requiring Senate confirmation (PAS) or to other Presidentially-appointed positions (PA) that ordinarily are viewed as non-career. Career SES members may elect to retain certain benefits of career SES status, *see* 5 U.S.C. § 3392(c), and they also have certain reinstatement rights upon the completion of a separate Presidential appointment, *see* 5 C.F.R. § 317.703. However, PAS or PA appointments are of a different character and magnitude, and career SES members who accept such appointments become an important part of the political leadership in the administration. Therefore, they must sign the Pledge.

### 5. Schedule C Employees with No Policymaking Role

Certain Schedule C employees who have no policymaking role, such as chauffeurs and private secretaries, have been exempted from public financial disclosure requirements. *See* 5 U.S.C. app. § 101(f)(5); 5 C.F.R. § 2634.203(b). These positions have been excluded from public filing based on OGE's determination "that such exclusion would not affect adversely the integrity of the Government or the public's confidence in the integrity of the Government." 5 C.F.R. § 2634.203(a). For the same reasons, the Pledge is not intended to cover these individuals, *provided* that the agency has followed the procedures prescribed in section 2634.203(c). Apart from appointees under Schedule C and comparable authorities, the same result obtains with respect to employees, appointed under 3 U.S.C. §§ 105-108, who have similar non-policymaking duties, as determined by the White House Counsel's Office.

#### 6. Acting Officials and Detailees

The Pledge requirement does not apply to career officials who are acting temporarily in the absence of an appointee to a non-career position. This includes career officials acting in the absence of a Senate-confirmed Presidential appointee under the Vacancies Reform Act, 5 U.S.C. § 3345 *et seq.* Similarly, a career appointee who is temporarily detailed to a position normally occupied by a non-career appointee is not subject to the Pledge. *Cf.* 68 Federal Register 7844, 7848 (February 18, 2003)(employees detailed to a senior employee position do not become senior employees under 18 U.S.C. § 207(c)).

#### 7. Holdover Appointees

On its face, the Pledge requirement does not apply to individuals appointed prior to January 20, 2009, and the administration will not for 100 days ask anyone held over to complete the Pledge. The administration has not yet determined whether it will extend that 100 day grace period or at what point it will ask holdovers to complete the Pledge. Please bear in mind that in some cases the new administration may ask a holdover to remain in the position, not merely as a caretaker until some other choice for the position can be appointed, but as the President's choice for that position. In the latter situations, the appointees will be asked to sign the Pledge when they agree to remain even though there is not a new appointment.

#### 8. Term Appointees

Presidential appointees to positions with a fixed term of office typically are non-career appointees, even if they are removable only for cause as specified by statute. *See* OGE Informal Advisory Letter 89 x 16. Therefore, non-career term appointees are subject to the Pledge if they are full-time and were appointed on or after January 20, 2009.

Term appointees appointed prior to January 20, 2009 are not required to sign the Pledge. As a practical matter, however, agency ethics officials should counsel such individuals to follow the Pledge to the extent feasible, particularly paragraphs 1, 2, 3 and 6 of the Pledge. Doing so will help to prevent the confusion and questions that could result if these appointees, especially those in visible positions, do not abide by the same gift, recusal, and hiring rules that apply to fellow appointees at the same agency.

A term appointee whose term has expired, but who is permitted by statute to holdover for some period of time, is not subject to the Pledge, provided the appointment preceded January 20, 2009. Where the President has nominated such a term appointee for reappointment for an additional term, the individual must sign the Pledge after Senate Confirmation but prior to reappointment. *See* DAEOgram DO-09-005. Again, as described in the previous paragraph, such term appointees should be counseled to follow the Pledge where practicable.

**Conclusion**

Given the great variety of appointment authorities in the executive branch, it is not possible for OGE to address every possible category of appointee in this Memorandum. OGE, in consultation with the White House Counsel's Office, can assist agency ethics officials as necessary in addressing any questions on a case-by-case basis.



**OFFICE OF GOVERNMENT ETHICS**

**04 x 10**

**Letter to a Deputy Ethics Official  
dated July 20, 2004**

This is in response to your letter of May 28, 2004, in which you requested our opinion as to whether the Executive Director of [your agency] is a "covered noncareer employee" as defined in 5 C.F.R. § 2636.303(a).

In your letter, in which you provided background on the roles and responsibilities of [your agency's Board] and the Executive Director, you indicated that [your agency's Board] consists of five part-time Presidentially appointed members who oversee the agency. This Board appoints an Executive Director to serve as the full-time chief executive of the agency. The Executive Director is responsible for carrying out the policies established by your agency's Board, [administering specific agency programs], and issuing regulations. While the Executive Director is charged with the day-to-day operations of the agency, your agency's Board can order the Executive Director to take a specific action. The Executive Director can serve in the position indefinitely, unless removed from office by your agency's Board for good cause.

The definition of covered noncareer employee in section 2636 focuses on both the employee's pay rate and type of appointment. For purposes of pay, a covered noncareer employee is an employee for whom the rate of basic pay is equal to or greater than 120 percent of the minimum rate of pay payable for GS-15 of the General Schedule, which is currently \$104,927. The Executive Director is paid at the rate of level III of the Executive Schedule, which is currently \$145,600, and thus meets the pay criteria under section 2636.303(a).

For purposes of type of appointment, the regulations at sections 2636.303(a)(1) - 2636.303(a)(4) specify under which appointment authorities employees will be considered covered noncareer employees. You have asked if the Executive Director would be a "covered noncareer employee" under either of two provisions in that regulation, specifically section 2636.303(a)(3), if he were appointed to his position "under an agency-specific statute that establishes appointment criteria essentially the same as those set forth in

section 213.3301 of this title for Schedule C positions;" or section 2636.303(a)(4) if he were appointed to his position under appointment criteria "essentially the same as those for noncareer executive assignment positions."

With regard to section 2636.303(a)(3) you have indicated that the Executive Director position is not a Schedule C position, but question whether he may have been appointed "under criteria essentially the same as that set forth in section 213.3301 of this title for Schedule C positions." The criteria at section 213.3301 focus on positions that are policy-determining or involve a close and confidential working relationship with key appointed officials. After consulting with the Office of Personnel Management, we conclude that the Executive Director is not appointed under criteria similar to a Schedule C position. Since the Executive Director's duties, as stated at 5 U.S.C. § 8474(b)(1), include carrying out the policies that are established by the Board, he does not appear to occupy a policy-determining position. The criteria for determining whether a position involves a close and confidential working relationship with key appointed officials, focuses on whether the individual is appointed by the President, or someone else who is appointed by the President, and whether the individual may be removed from office at the will of the appointing official. As you state in your letter, the agency's Presidentially-appointed Board appoints the Executive Director, who may be removed from office for good cause, 5 U.S.C. § 8472(g)(1)(C). Therefore, while the Executive Director is appointed in a manner consistent with a Schedule C appointment, the conditions for his removal are not the same as the "at will" conditions for removal of a Schedule C appointee.

With regard to section 2636.303(a)(4), we note first that the executive assignment system was abolished by the Federal Employees Pay Comparability Act of 1990 and replaced by the Senior Level system. However, we can still examine the appointment criteria to determine whether the Executive Director position would fall under section 2636.303(a)(4). Former regulations at 5 C.F.R. § 305.601(b) set forth three criteria to consider when determining whether a noncareer executive assignment could be made. These criteria, which include being deeply involved in the advocacy of Administration programs and support of their controversial aspects; participating significantly in the determination of major political policies of the Administration; or serving principally as personal assistant to or advisor of a Presidential appointee or other key figure, do not appear applicable to the Executive Director

position. Moreover, former section 305.601(c) indicated that a position does not qualify to be filled by noncareer executive assignment if its principal responsibility is the internal management of an agency, or if it involves long-standing recognized professional duties and responsibilities resting on a body of knowledge essentially politically neutral in nature. The Executive Director position appears to meet both these factors since he is responsible for the day-to-day operations of the agency and management of [a specific agency program] in accordance with the policies established by the Board.

In addition, when we identify a position as "noncareer," we are typically referring to a political appointment. In this case, while your Executive Director is appointed by the Presidentially-appointed Board, the position is for an indefinite period, not subject to political changes in Administrations. Also, you have indicated through telephone discussions that the Executive Director position demonstrates some characteristics similar to a career employee, such as the accrual of leave and participation in the Federal Employees Retirement System.

Therefore, we conclude that the Executive Director would not be a noncareer employee covered under either of the provisions in section 2636.303(a) about which you inquired. However, we still caution that given the Executive Director's role in your agency, he should remain particularly mindful of 5 C.F.R. §§ 2635.801 - 2635.808 regarding outside activities.

We hope this has been helpful.

Sincerely,

Marilyn L. Glynn  
Acting Director



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

March 26, 2009  
DO-09-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Ethics Pledge: Revolving Door Ban--All Appointees Entering Government

Executive Order 13490 requires any covered "appointee" to sign an Ethics Pledge that includes several commitments. 74 Fed. Reg. 4673 (January 26, 2009). OGE Memorandum DO-09-003 explains the definition of appointee, describes the commitments included in the Pledge, and provides a Pledge Form to be used for appointees.<sup>1</sup> The purpose of the present memorandum is to advise ethics officials on how to implement paragraph 2 of the Pledge, "Revolving Door Ban--All Appointees Entering Government."

Paragraph 2 of the Pledge requires an appointee to commit that he or she will not, for a period of two years following appointment, participate in any particular matter involving specific parties that is directly and substantially related to his or her former employer or former clients, including regulations and contracts. Exec. Order No. 13490 sec. 1(2). To help agencies implement this requirement, OGE is providing the following explanation of the phrases that comprise paragraph 2 of the Pledge and of how paragraph 2 interacts with existing impartiality regulations.

**Understanding the Meaning of the Terms that Comprise Paragraph 2 of the Pledge**

*"Particular matter involving specific parties"*

In order to determine whether an appointee's activities concern any particular matters involving specific parties, ethics officials must follow the definition of that phrase found in section 2(h) of the Executive Order. That definition incorporates the longstanding interpretation of particular matter involving specific parties reflected in 5 C.F.R. § 2641.201(h). However, it also expands the scope of the term to include any meeting or other communication with a former employer or former client relating to the performance of the appointee's official duties, unless

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<sup>1</sup> <https://www.oge.gov/Web/oge.nsf/Resources/DO-09-003:+Executive+Order+13490,+Ethics+Pledge>.

the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. The purpose of this expansion of the traditional definition is to address concerns that former employers and clients may appear to have privileged access, which they may exploit to influence an appointee out of the public view.<sup>2</sup>

The expanded party matter definition has a two-part exception for communications with an appointee's former employer or client, if the communication is: (1) about a particular matter of general applicability and (2) is made at a meeting or other event at which participation is open to all interested parties. Although the exception refers to particular matters of general applicability, it also is intended to cover communications and meetings regarding policies that do not constitute particular matters. An appointee may participate in communications and meetings with a former employer or client about these particular or non-particular matters if the meeting or event is "open to all interested parties." Exec. Order No. 13490 sec. 2(h). Because meeting spaces are typically limited, and time and other practical considerations also may constrain the size of meetings, common sense demands that reasonable limits be placed on what it means to be "open to all interested parties." Such meetings do not have to be open to every comer, but should include a multiplicity of parties. For example, if an agency is holding a meeting with five or more stakeholders regarding a given policy or piece of legislation, an appointee could attend such a meeting even if one of the stakeholders is a former employer or former client; such circumstances do not raise the concerns about special access at which the Executive Order is directed. Additionally, the Pledge is not intended to preclude an appointee from participating in rulemaking under section 553 of the Administrative Procedure Act simply because a former employer or client may have submitted written comments in response to a public notice of proposed rulemaking.<sup>3</sup> In any event, agency ethics officials will have to exercise judgment in determining whether a specific forum qualifies as a meeting or other event that is "open to all interested parties," and OGE is prepared to assist with this analysis.

*"Particular matter involving specific parties...including regulations"*

Because regulations often are cited as examples of particular matters that do not involve specific parties, OGE wants to emphasize that the phrase is not intended to suggest that all rulemakings are covered. Rather, the phrase is intended to serve as a reminder that regulations sometimes may be particular matters involving specific parties, although in rare circumstances. As OGE has observed in connection with 18 U.S.C. § 207, certain rulemakings may be so focused on the rights of specifically identified parties as to be considered a particular matter

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<sup>2</sup> Note, however, that the expanded definition of party matter is not intended to interfere with the ability of appointees to consult with experts at educational institutions and "think tanks" on general policy matters, at least where those entities do not have a financial interest, as opposed to an academic or ideological interest. See Office of Legal Counsel Memorandum, "Financial Interests of Nonprofit Organizations," January 11, 2006 (distinguishing between financial interests and advocacy interests of nonprofits), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v030-p0064.pdf>; cf. 5 C.F.R. § 2635.502(b)(1)(v)(Note)(OGE impartiality rule does not require recusal because of employee's political, religious or moral views).

<sup>3</sup> For other reasons discussed below, however, rulemaking sometimes may constitute a particular matter involving specific parties, albeit rarely

involving specific parties.<sup>4</sup> Such rulemakings likewise are covered by paragraph 2.

*“Directly and substantially related to”*

The phrase “directly and substantially related to,” as defined in section 2(k) of the Executive Order, means only that the former employer or client is a party or represents a party to the matter. Ethics officials should be familiar with this concept from 5 C.F.R. § 2635.502(a).

*“Former employer or former client”*

In order to determine who qualifies as an appointee’s former employer or former client, ethics officials must follow the definitions of each phrase found in section 2(i) and 2(j), respectively, of the Executive Order. In effect, the Executive Order splits the treatment of former employer found in the impartiality regulations into two discrete categories, “former employer” and “former client,” and removes contractor from the definition of either term. See 5 C.F.R. §§ 2635.502(b)(1)(iv), 2635.503(b)(2).

Former Employer

For purposes of the Pledge, a former employer is any person for whom the appointee has, within the two years prior to the date of his or her appointment, served as an employee, officer, director, trustee, or general partner, unless that person is an agency or entity of the Federal Government, a state or local government, the District of Columbia, a Native American tribe, or any United States territory or possession. Exec. Order No. 13490, sec. 2(i). While the terms employee, officer, director, trustee, or general partner generally follow existing ethics laws and guidance, OGE has received questions about the scope of the exclusion for government entities from the definition of former employer, specifically with regard to public colleges and universities. The exclusion for state or local government entities does extend to a state or local college or university.<sup>5</sup>

OGE also has received several questions about whether the definition of former employer includes nonprofit organizations. Consistent with the interpretation of similar terms in other ethics rules and statutes, the definition of former employer in the Executive Order covers

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<sup>4</sup> See, e.g., 73 Fed. Reg. 36168, 36176 (June 25, 2008); see also OGE Informal Advisory Letter 96 x 7, n.1.

<sup>5</sup> See OGE Informal Advisory Opinion 93 x 29 n.1 where OGE held that for purposes of applying the supplementation of salary restrictions in 18 U.S.C. § 209, the exception for payments from the treasury of any state, county, or municipality included a state university. OGE cautions, however, that the exclusion for state and local entities may not extend to all entities affiliated with a state or local college or university. OGE notes that some colleges and universities may create mixed public/private entities in partnership with commercial enterprises. Such entities should not automatically be considered as falling within the exclusion, but rather should be examined on a case-by-case basis to determine whether they should be viewed as instrumentalities of state or local government for the purposes of the Executive Order.

nonprofit organizations.<sup>6</sup> Moreover, it includes nonprofit organizations in which an appointee served without compensation, provided of course that the appointee actually served as an employee, officer, director, trustee, or general partner of the organization. Thus, for example, the recusal obligations of Pledge paragraph 2 would apply to an appointee who had served without pay on the board of directors or trustees of a charity, provided that the position involved the fiduciary duties normally associated with directors and trustees under state nonprofit organization law. This does not include, however, purely honorific positions, such as "honorary trustee" of a nonprofit organization. It also does not include unpaid positions as a member of an advisory board or committee of a nonprofit organization, unless the position involved fiduciary duties of the kind exercised by officers, directors or trustees, or involved sufficient supervision by the organization to create a common law employee-employer relationship (which is not typical, in OGE's experience).

#### Former Client

For purposes of the Pledge, a former client means any person for whom the appointee served personally as an agent, attorney, or consultant within two years prior to date of appointment. Exec. Order No. 13490 sec. 2(j). A former client does not include a client of the appointee's former employer to whom the appointee did not personally provide services. Therefore, although an appointee's former law firm provided legal services to a corporation, the corporation is not a former client of the appointee for purposes of the Pledge if the appointee did not personally render legal services to the corporation. Moreover, based on discussions with the White House Counsel's office, OGE has determined that the definition of former client is intended to exclude the same governmental entities as those excluded from the definition of former employer. Thus, for example, an appointee who had provided legal services to the Department of Energy would not be prohibited from participating personally in particular matters in which the Department is a party.

In addition, the term former client includes nonprofit organizations. However, a former client relationship is not created by service to a nonprofit organization in which an appointee participated solely as an unpaid advisory committee or advisory board member with no fiduciary duties. Although a former client includes any person whom the appointee served as a "consultant," OGE has not construed the term consultant, as used in analogous provisions of the Ethics in Government Act and the Standards of Ethical Conduct, to include unpaid, non-fiduciary advisory committee members of a nonprofit organization. See 5 U.S.C. app. § 102(a)(6)(A)(disclosure of consultant positions); 5 C.F.R. § 2635.502(b)(1)(iv)(covered relationship as former consultant). Likewise, former client does not include a nonprofit organization in which an appointee served solely in an honorific capacity.

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<sup>6</sup> For similar reasons, Federally-funded research and development centers (FFRDCs), whether nonprofit or for profit, are intended to be included in the definitions of former employer and former client for purposes of paragraph 2 of the Pledge.

The definition of former client specifically excludes “instances where the service provided was limited to a speech or similar appearance.” Exec. Order No. 13490, sec. 2(j). In addition to excluding all activities that consist merely of speaking engagements, this provision is intended to exclude other kinds of discrete, short-term engagements, including certain de minimis consulting activities. Essentially, the Pledge is not intended to require a two-year recusal based on activities so insubstantial that they are not likely to engender the kind of lingering affinity and mixed loyalties at which the Executive Order is directed. The exclusion for speaking and similar engagements was added to emphasize that the provision focuses on services that involved a significant working relationship with a former client. Therefore, the exclusion is not limited to speeches and speech-like activities (such as serving on a seminar panel or discussion forum), but includes other activities that similarly involve a brief, one-time service with little or no ongoing attachment or obligation. In order to determine whether any services were de minimis, ethics officials will need to consider the totality of the circumstances, including the following factors:

- the amount of time devoted;
- the presence or absence of an ongoing contractual relationship or agreement;
- the nature of the services (e.g., whether they involved any representational services or other fiduciary duties); and
- the nature of compensation (e.g., one-time fee versus a retainer fee).

For example, the recusal obligation of Pledge paragraph 2 would not apply to an appointee who had provided consulting services on a technical or scientific issue, for three hours on a single day, pursuant to an informal oral agreement, with no representational or fiduciary relationship.<sup>7</sup> On the other hand, an appointee who had an ongoing contractual relationship to provide similar services as needed over the course of several months would be covered. In closer cases, OGE believes ethics officials should err on the side of coverage, with the understanding that waivers, under section 3 of the Order, remain an option in appropriate cases.

### **The Relationship of Paragraph 2 of the Pledge to the Existing Impartiality Regulations**

Paragraph 2 of the Pledge is not merely an extension of the existing impartiality requirements of subpart E of the Standards of Ethical Conduct, although in some circumstances the restrictions of the Pledge and the existing impartiality restrictions could align. The effect of any overlap is that all of the relevant restrictions apply to the appointee and should be acknowledged in the appointee’s ethics agreement and considered when granting a waiver or authorization under either set of restrictions.

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<sup>7</sup> Note that appointees still will have a covered relationship for one year after they provided any consulting services, under the OGE impartiality rule, 5 C.F.R. § 2635.502(b)(1)(iv). Therefore, the OGE rule may require an appointee to recuse from certain matters (or obtain an authorization, as appropriate), even if the Pledge does not extend the recusal for an additional year. Indeed, the presence of the OGE rule as a “fall-back” was a factor in the decision to exclude certain de minimis consulting services from the Pledge in the first place.



*Paragraph 2 of the Pledge and Impartiality Regulations Differ and Overlap*

An appointee's commitments under paragraph 2 of the Pledge both overlap and diverge from the existing impartiality regulations in important ways depending upon the facts of each appointee's circumstances. The following highlights some of the key areas in which paragraph 2 of the Pledge and the existing impartiality restrictions differ. In addition, OGE has developed a chart as a quick reference tool to identify the key differences among the existing impartiality regulations and paragraph 2 of the Pledge. *See Attachment 1.*

Paragraph 2 of the Pledge is at once more expansive and more limited than the existing impartiality restrictions found at 5 C.F.R. §§ 2635.502, 2635.503. For example, an appointee is subject to impartiality restrictions based on his covered relationships with a much broader array of persons<sup>8</sup> than to the restrictions of paragraph 2, which are limited to the appointee's former employer and former clients. Thus, for instance, if the appointee has served as a contractor, but not in any of the roles described in the definitions of former employer or former client in the Executive Order, then the appointee may have recusal obligations under 5 C.F.R. §§ 2635.502 and 2635.503, but not under Pledge paragraph 2. Conversely, Pledge paragraph 2 is more expansive than the definition of covered relationship in section 2635.502 because the Pledge provision looks back two years to define a former employer or former client and it imposes a two-year recusal obligation after appointment, both of which are considerably broader than the one-year focus of section 2635.502(b)(1)(iv). Pledge paragraph 2 also is more expansive in that the recusal obligation may apply to certain communications and meetings that do not constitute particular matters involving specific parties as that phrase is used in sections 2635.502 and 2635.503.<sup>9</sup>

On the subject of recusal periods alone, ethics officials will need to be especially attentive to the possible variations, as it may be possible for as many as three periods to overlap. For example, an appointee could have: a one-year recusal, under 5 C.F.R. § 2635.502, from the date she last served a former employer; a two-year recusal, under section 2635.503, from the date she received an extraordinary payment from that same former employer; and a two-year recusal with respect to that former employer, under Pledge paragraph 2, from the date of her appointment.

*Specific Recusals under Paragraph 2 of the Pledge are Not Required to be Memorialized in an Appointee's Ethics Agreement.*

Executive Order 13490 does not require recusals under paragraph 2 of the Pledge to be addressed specifically in an appointee's ethics agreement, unlike recusals under paragraph 3 of

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<sup>8</sup> See definition of "covered relationship" at 5 C.F.R. § 2635.502(b)(1).

<sup>9</sup> Compare Exec. Order No. 13490, sec. 2(h)(definition broader than post-employment regulation); with 5 C.F.R. § 2635.502(b)(3)(defining particular matter involving specific parties solely by reference to post-employment regulations).

the Pledge. *See* Exec. Order No. 13490 sec. 4(a).<sup>10</sup> However, if an appointee will have a written ethics agreement addressing other commitments, OGE requires that the following language be inserted in that written ethics agreement in order to ensure that the appointee is aware of her commitments and restrictions under both her ethics agreement and the Pledge.

Finally, I understand that as an appointee I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this and any other ethics agreement.

Written ethics agreements will continue to address section 2635.502 and 2635.503 issues separately using the model provisions from OGE's "Guide to Drafting Ethics Agreements for PAS Nominees." Thus, regardless of paragraph 2 of the Pledge, the one-year "covered relationship" under the OGE impartiality rule remains in effect and may require an appointee to recuse from certain matters, even if the Pledge does not extend the recusal for an additional year. *See* 5 C.F.R. § 2635.502(b)(1)(iv).

#### *The Pledge and Impartiality Regulations Waiver Provisions*

Designated Agency Ethics Officials have been designated to exercise the waiver authority for the Ethics Pledge, under section 3 of Executive Order 13490, in addition to their existing role in the issuance of impartiality waivers and authorizations. DAEOgram DO-09-008; 5 C.F.R. §§ 2635.502(d), 2635.503(c). Generally, it is expected that waivers of the various requirements of the Pledge will be granted sparingly. *See* OGE DAEOgram DO-09-008. Although paragraph 2 clearly adds new limits on the revolving door, those limits are not intended to bar the use of qualified appointees who have relevant private sector experience in their fields of expertise. Therefore, at least where the lobbyist restrictions of paragraph 3 of the Pledge are not implicated, OGE expects that DAEOs will exercise the waiver authority for paragraph 2 in a manner that reasonably meets the needs of their agencies. In this regard, DAEOs already have significant experience in determining whether authorizations under 5 C.F.R. § 2635.502(d) are justified, and DAEOs should use similar good judgment in decisions about whether to waive paragraph 2 of the Pledge. Of course, any such waiver decisions still must be made in consultation with the Counsel to the President. Exec. Order No. 13490, sec. 3. Additional details on the standards for issuing a waiver of provisions of Pledge paragraph 2, as well as on issues related to the interaction of the waiver provisions of the impartiality regulations and relevant paragraphs of the Pledge, are reserved for future guidance.

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<sup>10</sup> An ethics agreement is defined as "any oral or written promise by a reporting individual to undertake specific actions in order to alleviate an actual or apparent conflict of interest," such as recusal from participation in a particular matter, divestiture of a financial interest, resignation from a position, or procurement of a waiver. 5 C.F.R. § 2634.802.

## ATTACHMENT 1

OGE developed the following table as a quick reference tool to highlight the main differences between paragraph 2 of the Pledge and existing impartiality regulations. It is not intended to be a substitute for thorough analysis, but we hope you find it useful.

		<b>5 C.F.R. § 2635.502</b>	<b>5 C.F.R. § 2635.503</b>	<b>Paragraph 2 of the Pledge</b>
<b>Relationship:</b>	Former Employer	Any person which the employee served, within the last year, as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; no exclusion for governmental entities (other than Federal)	Any person which the employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; no exclusion for governmental entities (other than Federal)	Two years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner; contractor and consultant omitted from list (although consultant added below under former client); is not a former employer if governmental entity
	Former Client	Clients of attorney, agent, consultant, or contractor covered same way as former employer, under 5 C.F.R. § 2635.502(b)(1)(iv)	Clients of attorney, agent, consultant, or contractor covered same way as former employer, under 5 C.F.R. § 2635.503(b)(2)	Two years prior to date of appointment served as an agent, attorney, or consultant. Is not former client if: <ul style="list-style-type: none"> <li>• Only provided speech/similar appearance (including de minimis consulting)</li> <li>• Only provided contracting services other than as agent, attorney, or consultant</li> <li>• Served governmental entity</li> </ul>
	Business and Personal/ Covered Relationship	In addition to former employers/ clients discussed above, includes various <u>current</u> business and personal relationships, as listed in 5 C.F.R. § 2635.502(b)(1)	No equivalent concept	No equivalent concept
<b>Prohibition:</b>	May not participate in particular matter involving specific parties if:	Reasonable person with knowledge of facts would question impartiality	Extraordinary payment from former employer	Includes communication by former employer or former client unless matter of general applicability or non-particular matter and open to all interested parties
<b>Length of recusal:</b>		1 year from the end of service	2 years from date of receipt of payment	2 years from date of appointment



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

April 28, 2009  
DO-09-014

MEMORANDUM

TO: Agency Heads and Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Holdover Appointees and the Ethics Pledge

We have received numerous questions regarding whether appointees temporarily holding over from the previous Administration pending the appointment of a successor need to sign the Ethics Pledge promulgated by Executive Order 13490 of January 21, 2009. We previously advised that holdover appointees would be given a 100-day grace period before being required to sign the pledge. As you know, April 29<sup>th</sup> will be the 100<sup>th</sup> day of the Administration. Accordingly, if you have not done so already, please ask all your holdover appointees to sign the ethics pledge within the coming days. The pledge form may be found at:

<https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-003:+Executive+Order+13490,+Ethics+Pledge>

Persons who are not prepared to sign the pledge should transition out within 30 days, by May 29<sup>th</sup>.

Please note that limited extensions of the deadline may be granted in situations where a holdover declines to sign and his or her continued service is determined by the head of the agency to be mission critical and essential for continuity. In those instances, DAEOs should submit a written extension request to the Special Counsel to the President for Ethics and Government Reform explaining why the requesting holdover meets those criteria. Limited extensions may be granted to address those concerns in an appropriate manner that both respects the circumstances of the individual appointee's current status as well as the President's commitment to the principles contained in the ethics pledge. No mission critical holdover appointee should be asked to leave until this consultation has taken place.



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

May 26, 2009  
DO-09-020

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Ethics Pledge Issues: Speeches and Pledge Paragraph 2; Intergovernmental  
Personnel Act Detailees

The Office of Government Ethics (OGE) continues to work with the White House Counsel's Office to identify and answer various questions concerning Executive Order 13490 and the Ethics Pledge for non-career appointees. OGE thought it would be useful to advise agency ethics officials of the resolution of two questions that recently arose at several agencies. The first question concerns how to apply paragraph 2 of the Pledge to an appointee who gives an official speech at an event sponsored by a former employer or client. The second question is whether the Pledge applies to non-Federal personnel detailed to an agency under the Intergovernmental Personnel Act. The answers to these questions are set out below.

Speeches and the Effect of Pledge Paragraph 2

OGE and the White House have received numerous questions about whether paragraph 2 of the Ethics Pledge prohibits an appointee from giving an official speech at an event sponsored by a former employer or client. Paragraph 2 prohibits appointees from participating, for two years after their appointment, in any particular matter involving specific parties that is directly and substantially related to a former employer or client. (Paragraph 2 is discussed in more detail in DO-09-011, [https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-011:+Revolving+Door+Ban+of+the+Ethics+Pledge+\(Ban+on+All+Appointees+Entering+Government\)](https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-011:+Revolving+Door+Ban+of+the+Ethics+Pledge+(Ban+on+All+Appointees+Entering+Government)).) With regard to speeches and presentations made in an official capacity OGE, in consultation with the White House Counsel's Office, has determined that the Pledge is not intended to prohibit an appointee from participating in an official speech unless the speech would have a demonstrable financial effect on the former employer or client.<sup>1</sup>

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<sup>1</sup> It is important to note that the Pledge does not apply to speeches given in an appointee's personal capacity. Presentations given in one's personal capacity may be subject to other ethics provisions, including 5 C.F.R. § 2635.807, 5 C.F.R. § 2635.808(c), and 5 C.F.R. part 2636.

By way of background, OGE has addressed the application of 18 U.S.C. § 208 and 5 C.F.R. § 2635.502 to official speeches on several occasions. *See, e.g.*, OGE Informal Advisory Letters 98 x 14; 96 x 2; 94 x 14. For purposes of section 208, OGE generally has viewed the decision to give an official speech as a particular matter. 96 x 2 (Ed. Note); *cf.* OGE, *Report to the President and to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment* 8 (January 2006)(application of 18 U.S.C. § 205 to request for Government speaker). An employee is prohibited from giving an official speech to an organization whose interests are imputed to the employee under section 208, if the speech would have a direct and predictable effect on the organization's financial interest. In OGE's experience, usually the sponsor of an event will have a financial interest in an official speech only if an admission fee is charged, the event is a fundraiser, or the event is some kind of business development activity (such as a seminar for current or prospective clients).

For purposes of 5 C.F.R. § 2635.502, OGE also generally has viewed the decision to give an official speech as a particular matter involving the event sponsor as a specific party. OGE 98 x 14; OGE 94 x 14. If an employee has a covered relationship with the sponsor--for example, the sponsor is a former employer under section 2635.502(b)(1)(iv)--the employee should not participate in an official speech if a reasonable person would question his or her impartiality, absent an authorization under section 2635.502(d). OGE 94 x 14. Nevertheless, OGE certainly is aware of cases in which agencies have determined either that the circumstances surrounding the speech really did not raise any reasonable impartiality concerns or that any such concerns were outweighed by the need for the employee's services. *See* 5 C.F.R. § 2635.502(c), (d). In such cases, agency ethics officials often still will emphasize that the employee should not use the same organization as a preferred forum for repeated speeches when other comparable forums are available.

Pledge paragraph 2, of course, is similar in many respects to section 2635.502, including the focus on particular matters involving specific parties. *See* DO-09-011. Consistent with how speeches have been treated for purposes of 18 U.S.C. § 208 and 5 C.F.R. § 2635.502, the Pledge was not intended to sweep every official speech to a former employer or client under the bar of Pledge paragraph 2. The Executive order elsewhere recognizes that making a speech does not necessarily reflect a close affinity with the event sponsor. *See* Exec. Order 13490, sec. 2(j)(definition of former client excludes services limited to speech or similar appearance). While paragraph 2 does not include the same "reasonable person" clause as section 2635.502, the Pledge provision was not intended to bar speeches that do not implicate the underlying concerns about special access to Government decisionmakers who can bestow regulatory and financial benefits on former associates. *Cf. U.S. v. Sun-Diamond Growers*, 526 U.S. 398, 407 (1999)(dicta)(official speech to farmers about USDA policy should not be viewed as official act implicating illegal gratuities statute). In many cases, the sponsor will have an academic or policy interest in the subject matter of the speech but no direct pecuniary interest in hosting the speech itself.

This does not mean that paragraph 2 is wholly inapplicable to official speeches. Where the decision to give an official speech actually would affect the financial interests of the sponsor,

the concerns under the Pledge about special access are relevant. Thus, if the former employer or client charges an admission fee or organizes the event for the purpose of fundraising or business development, the appointee will be barred from giving an official speech, absent a waiver under section 3 of the Executive Order. Even where Pledge paragraph 2 is inapplicable, ethics officials are reminded to analyze any official speaking engagements under 18 U.S.C. § 208 and 5 C.F.R. § 2635.502, as discussed above.

Detailees under the Intergovernmental Personnel Act Are Not Subject to the Pledge

Several agencies have asked whether detailees under the Intergovernmental Personnel Act (IPA) are required to sign the Pledge. The short answer is no.

The IPA provides for the temporary assignment of personnel from certain non-Federal entities to Federal agencies. 5 U.S.C. § 3372; *see generally* DO-06-031, [https://www.oge.gov/Web/OGE.nsf/Resources/DO-06-031:+Intergovernmental+Personnel+Act+\(IPA\)+Summary](https://www.oge.gov/Web/OGE.nsf/Resources/DO-06-031:+Intergovernmental+Personnel+Act+(IPA)+Summary). The IPA clearly distinguishes between those who actually are appointed by an agency and those who are merely detailed from a non-Federal entity to an agency. 5 U.S.C. § 3374(a)(1),(2). IPA detailees from academia, State and local government, and non-profit entities may serve in executive branch agencies for two years with the possibility of a two year extension. While working in the executive branch, detailees remain employed by their institution or organization and return to their employer when the detail is over. Simply put, IPA detailees are not appointees at all. Therefore, they are not subject to the Pledge, which applies to "every *appointee* in every executive agency *appointed* on or after January 20, 2009." Exec. Order 13490, sec. 1 (emphasis added); *see also id.*, sec. 2(b).

This analysis would not apply to any personnel who actually receive an appointment under the IPA. However, as a general matter, OGE rarely encounters questions about IPA appointees. Agency ethics officials should contact OGE if they have any question about whether a particular IPA appointee should be considered a non-career appointee subject to the Pledge. *See generally* DO-09-010 (discussing criteria for appointments subject to Pledge).



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

February 18, 2010  
DO-10-003

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Attendance by Staff Accompanying Official Speakers

In OGE DAEOgram DO-09-007 dated February 11, 2009, the United States Office of Government Ethics (OGE) addressed implementation of the lobbyist gift ban imposed by section 1 of Executive Order 13490.<sup>1</sup> The lobbyist gift ban is one part of the President's efforts to curb undue influence by special interests, but as stated in that DAEOgram, the lobbyist gift ban was not intended to prohibit Executive Branch officials from communicating official views to audiences comprised in part of registered lobbyists or at events that may be sponsored by organizations that employ registered lobbyists. Such events may have a registration fee or include a luncheon. Consequently, DAEOgram DO-09-007 concluded in part:

Appointees still may accept offers of free attendance on the day of an event when they are speaking or presenting information in an official capacity, as described in 5 C.F.R. § 2635.204(g)(1), notwithstanding the lobbyist gift ban. This is not a gift exception, but simply an application of the definition of "gift" in section 2635.203(b).

In short, free attendance for official Executive Branch speakers in such circumstances, consistent with long-standing rules, falls outside the meaning of "gift." It has come to OGE's attention that there may be some inconsistencies in how agency ethics officials are applying these rules with regard to employees who must accompany official agency speakers to such events. The purpose of this memorandum is to provide guidance on such personnel, who have no speaking role themselves but may provide essential support to an official speaker.

The OGE gift rules have always been clear on the treatment of free attendance for official speakers at an outside event. Employees may accept offers of free attendance on the day of an event when they are speaking or presenting information in an official capacity, notwithstanding the gift restrictions in 5 C.F.R. § 2635.202(a). The rationale is that "the employee's participation in the event on that day is viewed as a customary and necessary part of his performance of the assignment and does not involve a gift to him or to the agency." 5 C.F.R. § 2635.204(g)(1).



This guidance also applies to agency personnel whose presence at the event is deemed essential under agency procedures to the speaker's participation at the event. Examples could include members of security details, a representative of the agency's public affairs division, or an aide to assist with a presentation. The number and types of personnel necessary, if any, to the speaker's participation will vary depending upon who the speaker is and the nature of the event. There are obviously different considerations for the Secretary of Defense addressing several thousand people at a convention center as compared to a Federal Communications Commissioner speaking to a luncheon attended by several dozen communications lawyers. OGE does not view having essential personnel either remain outside the room where the event is taking place or refraining from food that is offered with the event as necessary to comply with the gift rules. Such an interpretation would not only be impractical to enforce, but it would ignore the reality that some aspects of attendance may be difficult or impossible to avoid. See 5 C.F.R. § 2635.204(g)(4) (definition of free attendance includes more than food).

It must be emphasized, however, that this is not an expansion of the categories of persons who may attend such events free of charge. Rather, it is recognition that attendance by particular personnel whose presence is truly essential to the performance of the speaker's official duties at a specific event does not violate either OGE's long-standing gift rules or the Executive Order 13490 lobbyist gift ban.

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<sup>1</sup> See <https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-007:+Lobbyist+Gift+Ban+Guidance>.



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

February 22, 2010  
DO-10-004

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Post-Employment Under the Ethics Pledge: FAQs

As you know, non-career appointees appointed on or after January 20, 2009, must sign an Ethics Pledge that contains a number of commitments. Exec. Order 13490, sec. 1. Several of these commitments pertain to the conduct of appointees while they are still in Government, but two of the commitments concern post-employment activities. Specifically, paragraphs 4 and 5 of the Pledge impose significant new post-employment restrictions on appointees. Paragraph 4 largely tracks the provisions of 18 U.S.C. § 207(c), with which most ethics officials are familiar. Paragraph 5, by contrast, introduces a number of concepts derived from the Lobbying Disclosure Act (LDA), with which ethics officials may be less familiar.

The Office of Government Ethics (OGE) has received questions about both paragraphs 4 and 5 of the Pledge. Therefore, OGE has compiled the following list of frequently asked questions and answers about these new post-employment restrictions. As always, OGE is ready to assist agency ethics officials with any other questions about the post-employment provisions or any other requirements of the Pledge.

**A. Paragraph 4: Post-Employment Cooling-Off Period**

Paragraph 4 of the Pledge provides:

If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.

**1. What is the relationship between paragraph 4 of the Pledge and 18 U.S.C. § 207(c)?**

For the most part, paragraph 4 of the Pledge extends the cooling-off period from one to two years for appointees who are senior employees under 18 U.S.C. § 207(c). The Pledge does not extend criminal penalties to conduct beyond the one-year period in section 207(c)--which only Congress can do--but the Executive Order does specify other enforcement mechanisms, including civil proceedings and agency debarment, for violations of the two-year restriction of paragraph 4. See Exec. Order 13490, sec. 5. (Note, however, that the trigger for the two-year period under paragraph 4 might not always coincide with the one-year cooling-off period of section 207(c), as illustrated in the answer to Question 6 below.)

**2. Which appointees are subject to the two-year restriction of paragraph 4?**

Like the existing restriction in 18 U.S.C. § 207(c), paragraph 4 of the Pledge is intended to cover any appointees who are "senior employees," which reflects the judgment that it is appropriate to impose a two-year cooling-off period on higher level appointees who are likely to have the most influence within their agencies. The categories of senior employees are described in 18 U.S.C. § 207(c)(2) and 5 C.F.R. § 2641.104. The restriction of paragraph 4 applies if the appointee is restricted by section 207(c) at the time of his or her departure from Government.

*Example: A non-career Senior Executive Service appointee, whose rate of basic pay meets the salary threshold for being a senior employee, leaves the Department of Energy to work for a private law firm. Sixteen months later, she is asked to represent a disappointed bidder in a bid protest suit against the Department in the Court of Federal Claims. Paragraph 4 of the Pledge would prohibit her from doing so. However, if she had only been a GS-14, Schedule C appointee, she could engage in this representation without violating paragraph 4 of the Pledge because she would never have been a senior employee under 18 U.S.C. § 207(c). Nevertheless, if she had participated personally and substantially as an employee in the contract award that led to the bid protest, she would be permanently prohibited from representing any other person in the matter, under 18 U.S.C. § 207(a)(1).*

**3. How does paragraph 4 affect "very senior employees?"**

Very senior employees, as described in 18 U.S.C. § 207(d)(1) and 5 C.F.R. § 2641.104, are not covered by 18 U.S.C. § 207(c), and therefore they are not subject to the two-year restriction in paragraph 4 of the Pledge. However, these very senior employees are already subject to a similar two-year cooling-off period under section 207(d) itself (as well as additional restrictions on contacting Executive Schedule officials even in agencies in which they did not serve).

**4. Which officials may not be contacted under paragraph 4 of the Pledge?**

Unlike paragraph 5 of the Pledge (discussed below), which augments the requirements of 18 U.S.C. § 207(c), paragraph 4 in this respect tracks 18 U.S.C. § 207(c), which bars representational contacts with any official of any agency in which a senior employee served in any capacity during the one-year period prior to terminating from a senior position. The scope of 18 U.S.C. § 207(c) is explained at length in OGE's post-employment regulations. See 5 C.F.R. § 2641.204.

**5. If post-employment activities are permitted by an exception to 18 U.S.C. § 207(c), are they likewise permitted under paragraph 4 of the Pledge?**

Yes. Paragraph 4 of the Pledge incorporates the exceptions and other provisions applicable to 18 U.S.C. § 207(c), as well as the relevant OGE post-employment regulations in 5 C.F.R. part 2641. See Exec. Order 13490, sec. 2(m).

*Example: An appointee leaves his senior position at the Department of Justice to become an employee of the State of New York. He wants to represent New York in a meeting with DOJ officials in a meeting about drug enforcement policy. This activity is permissible under 18 U.S.C. § 207, because it falls within the exception at 18 U.S.C. § 207(j)(2)(A) for carrying out official duties as an employee of a state or local government. Therefore, the activity also is permissible under paragraph 4 of the Pledge. However, if the former appointee does not actually become an employee of the State, but simply provides consulting or legal services as a contractor, he may not rely on this exception. See 5 C.F.R. § 2641.301(c)(2) and Example 3.*

**6. How does paragraph 4 of the Pledge apply to non-career appointees who later are appointed or reinstated to career positions?**

The two-year period specified in paragraph 4 runs from the end of the appointee's non-career appointment, not from the end of any separate career appointment the individual may have. In other words, the two-year clock begins to run as soon as a non-career appointee moves to a position that is not subject to the Pledge. (By contrast, the one-year cooling-off period of 18 U.S.C. § 207(c) commences when an individual ceases to be a senior employee, whether career or non-career. 5 C.F.R. § 2641.204(c).) Of course, in most cases, non-career appointees will leave Government when their non-career service is concluded.

*Example: A career member of the SES is given a non-career Presidential appointment, at which time she signs the Ethics Pledge. After the conclusion of her Presidential appointment, she is reinstated as a career SES appointee, pursuant to 5 C.F.R. § 317.703. After serving five more*

*years in a career SES position, she retires from Government. Although she is a senior employee subject to 18 U.S.C. § 207(c) when she retires, she is not restricted by paragraph 4 of the Pledge because more than two years already have elapsed since the end of her non-career appointment.*

**B. Paragraph 5: Post-Employment Lobbying Ban**

Paragraph 5 of the Pledge provides:

In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

**1. What is the relationship of the lobbying ban in paragraph 5 to the post-employment restrictions in paragraph 4 of the Pledge or 18 U.S.C. § 207?**

The restrictions of paragraph 5 are in addition to the restrictions of paragraph 4, 18 U.S.C. § 207, or any other provision of law (e.g., the Procurement Integrity Act, 41 U.S.C. § 423(d)).

**2. Does the lobbying ban in paragraph 5 apply to appointees who are not "senior employees?"**

Yes. The lobbying ban applies to all appointees who sign the Pledge, unlike the restriction in paragraph 4. Note, however, that certain Schedule C and other appointees are not required to sign the Pledge, i.e., those with no policymaking duties (such as chauffeurs and secretaries) who have been exempted for that reason from public financial disclosure requirements. See DO-09-010, [http://www.usoge.gov/ethics\\_guidance/daeograms/dgr\\_files/2009/do09010.pdf](http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2009/do09010.pdf).

*Example: A non-career SES appointee is paid below the basic pay threshold to be considered a senior employee, under 18 U.S.C. § 207(c)(2)(A)(ii). Although he is not subject to the two-year restriction in paragraph 4 of the Pledge, he is subject to the lobbying ban in paragraph 5.*

**3. Does the lobbying ban extend beyond the agency where the former appointee served?**

Yes. Paragraph 5, unlike paragraph 4 or 18 U.S.C. § 207(c), restricts a former appointee from lobbying certain officials throughout the entire Executive Branch, not just officials of the agency where the former appointee actually served. (What it means to "lobby," including the concepts of "lobbying contact" and "acting as a registered lobbyist," is discussed in questions 6 through 10 below.)

*Example: A former appointee at the Department of Transportation may not, as a registered lobbyist, make a lobbying contact with the Secretary of Health and Human Services. This would be prohibited even though she never served at HHS in any capacity and the subject matter of the lobbying is unrelated to her former Government position.*

#### **4. Which officials may not be contacted by former appointees under paragraph 5?**

The ban extends to lobbying contacts with specified Executive Branch personnel. The officials who may not be contacted are: any "covered executive branch official," defined in the LDA as the President, the Vice President, any official in the Executive Office of the President, any Executive Schedule official (EL I-V), any uniformed officer at pay grade 0-7 or above, and any Schedule C employee, 2 U.S.C. § 1602(3); and any non-career SES member, even though the latter are not covered under the LDA definition. For purposes of simplicity, the discussion below will refer to all Executive Branch officials who may not be contacted as "covered officials." Paragraph 5 of the Pledge does not prohibit former appointees from contacting other Executive Branch personnel besides these covered officials. Nor does it prohibit former appointees from contacting "covered legislative branch officials," within the meaning of the LDA, 2 U.S.C. § 1602(4).

*Example: A former appointee of the Environmental Protection Agency has become a registered lobbyist. She may not, on behalf of one of her lobbying clients, contact a non-career SES official at the Department of Agriculture. However, she may contact a career SES official at the Department, and she also may contact Legislative Branch officials.*

#### **5. How long does the lobbying ban last?**

The ban lasts for the "remainder of the Administration." This means the duration of all terms of the President who was in office at the time the appointee received an appointment covered by the Executive Order. Executive Order 13490, sec. 2(o)(definition of "Administration"). In some cases, holdover officials appointed during a prior Administration have signed the Pledge as a condition of continued employment. Such holdover officials are bound by their commitment under paragraph 5 for the same duration as appointees who actually were appointed during the current Administration.

#### **6. What does it mean to "lobby?"**

For purposes of the Pledge, to lobby is "to act . . . as a registered lobbyist." Exec. Order 13490, sec. 2(f). A registered lobbyist, in turn, is a person listed in required filings as a lobbyist for a particular client by a registrant under the LDA, 2 U.S.C. § 1603(a), because of the person's actual or anticipated lobbying activities and contacts. Executive Order 13490, sec. 2(e); see 2 U.S.C. §§ 1602(10)(definition of lobbyist). **In a nutshell: if a former appointee is a registered**

**lobbyist for a particular client, he or she is prohibited by paragraph 5 of the Pledge from making any lobbying contact with a covered official on behalf of that client.** The LDA definition of lobbying contact is broad, including oral or written communications made on behalf of a client with regard to Federal legislation (such as legislative proposals), executive branch programs and policies (such as rulemaking or contracts), and the nomination/confirmation of persons for PAS positions. 2 U.S.C. § 1602(8)(A). However, the definition also enumerates certain exceptions, which should be consulted to determine if a former appointee would be engaging in prohibited lobbying under the Pledge. 2 U.S.C. § 1602(8)(B).

*Example: An appointee recently left the Treasury Department to join XYZ Associates, a consulting firm. The firm is helping one of its clients to obtain Federal funding to develop an innovative telecommunications security product. XYZ Associates is registered for this client under the LDA, and it listed the former appointee as one of three lobbyists in its latest quarterly report of lobbying activity filed under the LDA. Under paragraph 5 of the Pledge, the former appointee may not meet with the Secretary of Homeland Security to seek support for funding of the client's research.*

*Example: An appointee leaves Government to become Chancellor of a large university. In her new job, she has occasion to make contacts with various covered officials about a range of issues of concern to her university, such as education policy, taxation, and Federal grants. The university itself is registered under the LDA, because it employs an in-house lobbyist in its governmental affairs office and it meets the monetary threshold for registration under 2 U.S.C. § 1603(a)(3)(A)(ii). However, the university has never listed its Chancellor as a lobbyist and is not required to do so under the LDA, because the Chancellor's lobbying contacts and other lobbying activities constitute a small fraction (far less than 20%) of the total time she devotes to university services during any 3-month period. See 2 U.S.C. § 1602(10)(definition of lobbyist). Therefore, the former appointee does not act as a registered lobbyist when she contacts the covered officials, and she does not violate paragraph 5 of the Pledge.*

**7. How does a former appointee know if she would be making a lobbying contact "as a registered lobbyist"?**

The most obvious way that a former appointee would know if she is acting as a registered lobbyist is if she is already listed as a lobbyist in a registration statement (LD-1 form) or quarterly report (LD-2 form), based on actual or expected lobbying for a particular client. These forms are filed by the lobbyist's employer with the Secretary of the Senate and the Clerk of the House. Additionally, even if the former appointee is not already listed as a lobbyist in an LDA filing, she will be acting as a registered lobbyist if she is engaging in lobbying that is expected to be reported in a subsequent LDA filing that will list her as a lobbyist. This interpretation recognizes that permitting former appointees a "grace period" during which they may freely

lobby covered officials, when they reasonably anticipate reporting those activities in a subsequent LDA filing, would be inconsistent with the purposes of the Pledge.

*Example: A former appointee has been retained by a client expressly for the purpose of making several lobbying contacts, and the former appointee's employer has determined that the LDA registration requirement has been triggered, under 2 U.S.C. § 1603(a). However, the employer has until 45 days after the former appointee is retained to file the initial registration statement that would list the individual as a lobbyist. 2 U.S.C. § 1603(a)(1). If the former appointee makes any lobbying contact with a covered official during that 45 day period, she will be deemed to have acted as a registered lobbyist during that time period, for purposes of the Pledge. This is because the registration statement that is eventually filed will list this individual "as an employee of the registrant who has acted . . . as a lobbyist on behalf the client." 2 U.S.C. § 1603(b)(6)(emphasis added).*

**8. Does this mean that ethics officials have to opine about what circumstances will trigger registration under the LDA?**

Ethics officials will need some familiarity with the LDA registration system in order to counsel appointees about their post-employment activities under paragraph 5 of the Pledge. However, neither OGE nor DAEOs can give definitive advice about LDA registration requirements. Appointees and former appointees should be advised to consult with their prospective employers and/or private counsel about whether their anticipated activities will trigger registration and reporting requirements under the LDA. Former appointees and their employers also may contact the Secretary of the Senate and the Clerk of the House of Representatives for guidance concerning registration and reporting requirements.

**9. Are there any circumstances under which a former appointee may become a registered lobbyist?**

There are relatively narrow circumstances in which a former appointee may become a registered lobbyist. Paragraph 5 of the Pledge is intended to minimize the potential for unfair advantage or undue influence resulting from an appointee's service in the Executive Branch. Consequently, for the remainder of the Administration, a former appointee cannot become a registered lobbyist if this will involve making any lobbying contact with a covered official in the Executive Branch. However, the Pledge does not restrict former appointees from registering and making contacts with Legislative Branch officials, as this would not implicate the same concerns about exploiting the access and influence obtained as a result of prior Executive Branch service.

*Example: A former Commerce Department appointee is retained by a utility company to lobby on a legislative proposal to create tax incentives for installing new emissions control technology. After being retained, the former appointee is*



*listed as a lobbyist in an LDA registration statement for this activity. As long as he makes no lobbying contacts with covered officials in the Executive Branch on behalf of this client and confines all his lobbying contacts to Legislative Branch officials, he will not violate paragraph 5 of the Pledge.*

***Example:** In the scenario above, the client asks the former appointee to attend a meeting with the Assistant Secretary for Tax Policy at the Treasury Department to discuss how the legislative proposal would be consistent with the Administration's agenda. He may not do so, because this would be a prohibited lobbying contact with a covered official in the Executive Branch.*

**10. If a former appointee is registered as a lobbyist on behalf of one client, is he prohibited from making contacts on behalf of another client for which he is not required to register?**

No. The registration and quarterly reporting requirements of the LDA are client-specific, as is the definition of "lobbyist." See 2 U.S.C. §§ 1603(a)(2)(single registration for each client); 1604(a)(separate quarterly report for each client); 1602(10)(lobbyist is individual employed or retained by client for certain amount of lobbying contacts and activities on behalf of that client). Therefore, a former appointee does not "lobby" a covered official, in violation of paragraph 5 of the Pledge, unless he does so on behalf of a specific client for which he is a registered lobbyist.

***Example:** A former appointee works for a law firm that does some lobbying. His firm has registered him as a lobbyist for Blue Corporation, a client which he represents in lobbying contacts with Legislative Branch officials. He also has another client, Green Corporation, for which he has provided only non-lobbying services. Green Corporation now asks him to make a lobbying contact with the Department of Transportation. His firm decides it will not be necessary to register him for Green Corporation. (The firm might determine, for example, that he does not meet the definition of lobbyist for Green Corporation, under 2 U.S.C. § 1602(10), or that the firm itself does not meet the monetary threshold to register for Green Corporation, under 2 U.S.C. § 1603(a)(3)(A)(i).) He would be prohibited, however, from making even a single lobbying contact with DOT on behalf of Blue Corporation, because he is a registered lobbyist for Blue Corporation, even though his other lobbying contacts for that client have been exclusively with the Legislative Branch.*

**11. Is there any exception to the requirements of paragraph 5 for former appointees who signed the Pledge but served only a brief time in the Administration?**

Neither paragraph 5 nor any other part of the Executive Order makes any exception for appointees who signed the Pledge but served only a short time.

**From:** [Rachel K. Dowell](#)  
**To:** [David J. Apol](#)  
**Subject:** (b)(5)  
**Date:** Friday, February 24, 2017 1:53:07 PM  
**Attachments:** (b)(5)

---

Attachment withheld in full  
- (b)(5) deliberative draft

Draft from 2009

**From:** [Rachel K. Dowell](#)  
**To:** [Leigh J. Francis](#); [Monica M. G. Ashar](#)  
**Subject:** Pledge  
**Date:** Wednesday, February 08, 2017 12:06:19 PM  
**Attachments:** [CHART - Agency Questions on Pledge \(2.7.17\).docx](#)

---

Attachment withheld in full -  
(b)(5) deliberative draft

Attached are draft answers to the agency questions. Is everyone available to meet this PM to go through these and figure out how to divide work up for (b)(5) deliberative

?

**From:** [Monica M. G. Ashar](#)  
**To:** [Rachel K. Dowell](#); [Leigh J. Francis](#)  
**Subject:** RE: Pledge  
**Date:** Wednesday, February 08, 2017 12:06:57 PM

---

I'm free this afternoon before 5.

---

**From:** Rachel K. Dowell  
**Sent:** Wednesday, February 08, 2017 12:06 PM  
**To:** Leigh J. Francis; Monica M. G. Ashar  
**Subject:** Pledge

Attached are draft answers to the agency questions. Is everyone available to meet this PM to go through these and figure out how to divide work up for (b)(5) deliberative [REDACTED] [REDACTED]?

(b)(5) deliberative (email from VA ethics official seeking desk officer assistance)



---

**From:** Jennifer Matis [mailto:jmatis@oge.gov]  
**Sent:** Monday, February 06, 2017 5:33 PM  
**To:** Gurland, Jonathan I.  
**Subject:** [EXTERNAL] RE: Any word?

All pledge questions are being referred to the Ethics Law and Policy Branch. I will submit and they might follow up with you directly.

Thanks,

*Jen*

Jennifer Matis  
Assistant Counsel  
Legal, External Affairs and Performance Branch  
U.S. Office of Government Ethics  
202-482-9216  
[jennifer.matis@oge.gov](mailto:jennifer.matis@oge.gov)

Visit OGE's website: [www.oge.gov](http://www.oge.gov)

Follow OGE on Twitter: [@OfficeGovEthics](https://twitter.com/OfficeGovEthics)

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(b)(5) deliberative (email from VA ethics official seeking desk officer assistance)



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**From:** [Wendy G. Pond](#)  
**To:** [Rachel K. Dowell](#); [Monica M. G. Ashar](#); [Leigh J. Francis](#)  
**Subject:** RE: Ethics Pledge - Transition Holdover Question  
**Date:** Thursday, February 09, 2017 12:30:53 PM

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If you're interested, here's the write up I did in AIMS:

Nonresponsive network info

[REDACTED]

---

**From:** Seth Jaffe  
**Sent:** Thursday, February 09, 2017 9:07 AM  
**To:** Wendy G. Pond <wgpond@oge.gov>  
**Cc:** Nicole Stein <nstein@oge.gov>; Rachel K. Dowell <rkdownell@oge.gov>; Monica M. G. Ashar <mmgashar@oge.gov>; Leigh J. Francis <ljfranci@oge.gov>  
**Subject:** RE: Ethics Pledge - Transition Holdover Question

Wendy,

Per our conversation, pursuant to LA-17-02 our past guidance on who needs to sign the pledge – and by when - is still good going forward.

Thanks,  
Seth

---

**From:** Wendy G. Pond  
**Sent:** Thursday, February 09, 2017 8:38 AM  
**To:** Seth Jaffe  
**Cc:** Nicole Stein  
**Subject:** FW: Ethics Pledge - Transition Holdover Question

Good morning. CPSC had previously asked about (b)(5) deliberative

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(b)(5) del berative (email from CPSC ethics official seeking desk officer assistance)

[REDACTED]

(b)(5) deliberative (email from CPSC ethics official seeking desk officer assistance)





**From:** [Rachel K. Dowell](#)  
**To:** [Seth Jaffe](#)  
**Cc:** [Leigh J. Francis](#)  
**Subject:** RE: IG Class PPT  
**Date:** Monday, January 30, 2017 5:13:02 PM  
**Attachments:** [IG Class - PowerPoint \(updated 1.30.17\).pptx](#)

---

Seth,

I updated the PowerPoint, attached. The new EO now fades in over EO 13490 on slide 9. It is saved at Nonresponsive network info

Thanks!  
Rachel

---

**From:** Seth Jaffe  
**Sent:** Monday, January 30, 2017 8:59 AM  
**To:** Rachel K. Dowell  
**Cc:** Leigh J. Francis  
**Subject:** FW: IG Class PPT

Rachel,

When you have a chance tomorrow could you please add a fade in of the new E.O. over E.O. 13490 for slide #9? I think that will take care of it.

Thanks!  
Seth

---

**From:** Seth Jaffe  
**Sent:** Tuesday, January 24, 2017 11:05 AM  
**To:** Rachel K. Dowell  
**Cc:** Leigh J. Francis  
**Subject:** IG Class PPT

Rachel,

I have attached a slightly modified version of the IG Class PPT. I fixed a few slides where the words were blocked by a graphic or where words ran out of the box on the slide. I also put my contact info on the last slide since I will be teaching the first class this year.

(b)(5) deliberative

I hope to be able to send the materials by the end of the month.

Thanks,  
Seth

UNITED STATES OFFICE OF  
**GOVERNMENT ETHICS**



Preventing Conflicts of Interest  
in the Executive Branch

# Conflicts of Interests:

**OGE WANTS TO HELP YOU AND  
YOUR INVESTIGATIONS**

# OGE



## Who We Are & How We Can Help

1. Focus of Presentation
2. OGE in General
3. Primary Prevention Role

# How OGE Helps Investigators



OGE FORM 202, PART 1

## NOTIFICATION OF CONFLICT OF INTEREST REFERRAL PART 1: INITIAL NOTIFICATION

*(to be filed by the referring office)*

File Part 1 of this form with the U.S. Office of Government Ethics (OGE) upon any referral made to the U.S. Department of Justice (DOJ), pursuant to 28 U.S.C. § 535, involving:

- (1) A possible violation under section 203, 205, 207, 208, and/or 209 of title 18, United States Code;
- (2) A civil or criminal matter related to the filing or non-filing of a financial disclosure report under applicable legal authorities (*e.g.*, 5 U.S.C. app. § 104 or 18 U.S.C. § 1001); or
- (3) A civil matter involving outside earned income under 5 U.S.C. app. § 501 or outside activities under 5 U.S.C. app. § 502.

Submit this form via email to [referrals@oge.gov](mailto:referrals@oge.gov). OGE will confirm receipt and notify the referring office of the OGE tracking number assigned.

1. Federal office referring the matter to the Department of Justice:

2. Date of referral:

3. Point of contact at the referring office:

Name:

Title:

Telephone:

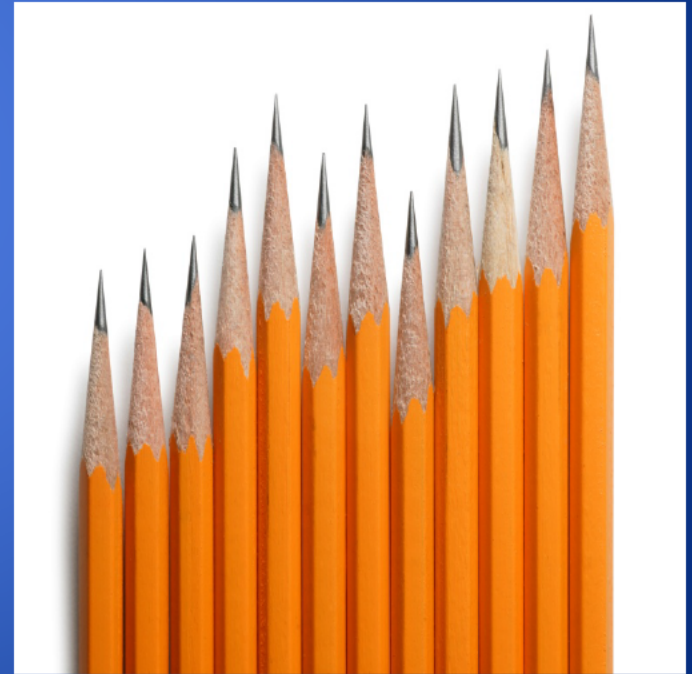
Email:

# How OGE Helps Investigators



## Assistance in Understanding:

- Criminal COI Laws
- Non-Criminal COI Laws
- Standards of Conduct
- Ethics Documents



# Ethics Documents To Know



- Public Financial Disclosure Reports (OGE 278)
- Confidential Financial Disclosure Reports (OGE 450, alternatives)
- Ethics Agreements
- Ethics Pledge
- Outside Activity Prior Approval Forms
- Conflict of Interest Waivers
- Training Files
- Advice Files & Opinion Letters

# Ethics Documents



## Public Financial Disclosure Reports (OGE 278)

New Entrant Report | U.S. Office of Government Ethics; 5 C.F.R. part 2634 | Form Approved: OMB No. (3209-0001) (March 2014)

### Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e)

#### Filer's Information

---

Doe, John Q.

Deputy Assistant Secretary, Department of Technology

Date of Appointment: 02/22/2015

---

Other Federal Government Positions Held During the Preceding 12 Months:

Senior Technology Specialist (8/2007 – 2/2015)

---

Electronic Signature - I certify that the statements I have made in this form are true, complete and correct to the best of my knowledge.

/s/ Doe, John Q [electronically signed on 2/27/15 by Doe, John Q in Integrity.gov]

---

Agency Ethics Official's Opinion - On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments below).

/s/ Smith, Jane Q, Certifying Official [electronically signed on 2/27/15 by Smith, Jane Q in Integrity.gov]



# Ethics Documents



## Confidential Financial Disclosure Reports (OGE 450)

OGE Form 450, 5 CFR Part 2634, Subpart I  
U.S. Office of Government Ethics (June 2008)  
(Replaces January 2007 edition)

Form Approved  
OMB No. 3209-0006

Date Received by Agency

Page Number

### CONFIDENTIAL FINANCIAL DISCLOSURE REPORT Executive Branch

Employee's Name ( <i>Print last, first, middle initial</i> )		E-mail Address	
Position/Title		Grade	
Agency	Branch/Unit and Address		
Work Phone	Reporting Status New Entrant <input type="checkbox"/> Annual <input type="checkbox"/>	If New Entrant, Date of Appointment to Position ( <i>mm/dd/yy</i> )	
Check box if Special Government Employee (SGE) <input type="checkbox"/>	An SGE is an executive branch officer or employee who is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period.		
If an SGE, Mailing Address ( <i>Number, Street, City, State, ZIP Code</i> )			



# Ethics Documents



## Ethics Agreements

### MODEL ETHICS AGREEMENT

(Date)

John H. Burns  
Designated Agency Ethics Official  
Department of XXX  
Washington, DC XXXXX

Dear Mr. Burns:

The purpose of this letter is to describe the steps that I intend to take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Deputy Secretary, Department of XXX.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter that has a

# Ethics Documents



## Ethics Pledge

### **Executive Order: ETHICS COMMITMENTS BY EXECUTIVE BRANCH APPOINTEES**

EXECUTIVE ORDER

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#### ETHICS COMMITMENTS BY EXECUTIVE BRANCH APPOINTEES

By the authority vested in me as President of the United States by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and sections 3301 and 7301 of title 5, United States Code, it is hereby ordered as follows:

Section 1. Ethics Pledge. Every appointee in every executive agency appointed on or after January 20, 2017, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee:

# Ethics Documents



## Outside Activity Prior Approval Forms

REQUEST FOR APPROVAL OF OUTSIDE ACTIVITY		
USDA Supplemental Standards of Conduct <a href="#">(5 CFR 8301.101-102)</a>		
<input type="radio"/> Initial Request <input type="radio"/> Revised Request		DATE <input type="text"/>
<b>Part I - EMPLOYEE INFORMATION</b>		
1. EMPLOYEE'S NAME (Last, First, MI) <input type="text"/>		
2. AGENCY/PROGRAM (Address) <input type="text"/>	TELEPHONE, FAX & E-MAIL Phone: <input type="text"/> Fax: <input type="text"/> E-Mail: <input type="text"/>	
3. TITLE OF POSITION <input type="text"/>	4. GRADE/STEP <input type="text"/>	5. SALARY \$ <input type="text"/>
6. FINANCIAL DISCLOSURE FILING STATUS <input type="radio"/> Public (SF 278) <input type="radio"/> Confidential (OGE 450) <input type="radio"/> Other <input type="text"/>		
7. NAME OF IMMEDIATE SUPERVISOR <input type="text"/>	SUPERVISOR'S TELEPHONE, FAX & E-MAIL Phone: <input type="text"/> Fax: <input type="text"/> E-Mail: <input type="text"/>	

# Ethics Documents



## Conflict of Interest Waivers

SAMPLE 208(B)(1) WAIVER  
OUTSIDE ORGANIZATIONS: SERVICE AS OFFICER  
OR DIRECTOR IN OFFICIAL CAPACITY

[Date]

MEMORANDUM

TO: [Official with Waiver Authority]

FROM: [Deputy Ethics Counselor]

SUBJECT: Conflict of Interest Waiver for [Employee]

The purpose of this memorandum is to request that you grant **[name of employee]** a waiver of the criminal conflict of interest provisions that may apply to **[his or her]** service in an official capacity as **[an officer or a member of the board of directors, or other position]** of an outside non-profit organization. The need for a waiver is discussed below.

The criminal conflict of interest statute, 18 U.S.C. § 208(a), requires that an employee refrain from participating personally and substantially in an official capacity in any particular matter that will have a direct and predictable effect on the financial interests of any organization in which the individual serves as an officer, director, trustee, or employee.

# Ethics Documents



## Training Files



# Ethics Documents



## Advice Files





# EXERCISES



## Three Fact Patterns

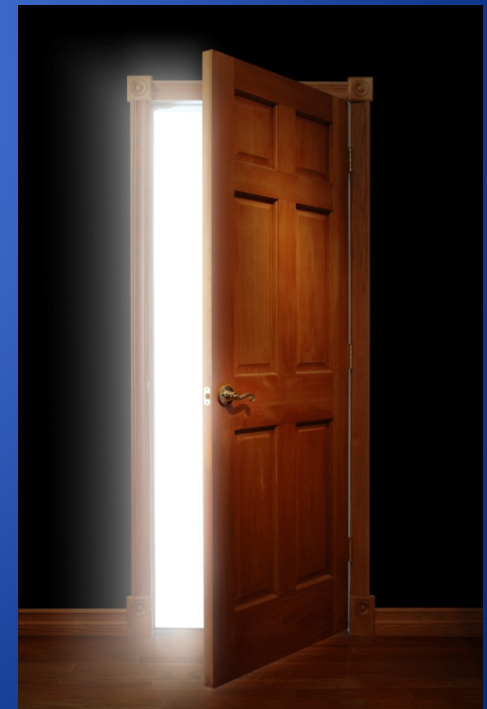
### 1. Entering Government



### 2. During Government Service



### 3. Post-Government Employment



# 18 U.S.C. 208



An officer or employee may not participate personally and substantially in a particular matter in which, to his knowledge, he has a financial interest\*



\*Including those imputed to him.



# FACT PATTERN #1



- What else would I like to know?
- What information can I get from ethics officials?
- What ethics documents might be helpful?
- Where can I get these documents?
- Possible crimes?
- Possible ethics violations?
- Consult with OGE?

# 18 U.S.C. 209



Prohibits an employee from getting paid from a source outside the Government for doing his or her Government job



# 18 U.S.C. 208



An officer or employee may not participate personally and substantially in a particular matter in which, to his knowledge, he has a financial interest\*



\*Including those imputed to him.

# FACT PATTERN #2



- What else would I like to know?
- What information can I get from ethics officials?
- What ethics documents might be helpful?
- Where can I get these documents?
- Possible crimes?
- Possible ethics violations?
- Consult with OGE?

# 18 U.S.C. 203 & 205



**Prohibitions against  
representing third  
parties before the  
Government  
with or without  
compensation**



# 18 U.S.C. 203



Generally employees are **prohibited** from directly or indirectly:

- Demanding, seeking, receiving, accepting or agreeing to receive any compensation
- for any representational services
- rendered by the employee or someone else,
- before any department, agency, court, or certain other entities
- in connection with any particular matter in which the United States is a party or has an interest
- if any part of the representation occurs while a Government employee

# 18 U.S.C. 205



**(a)(1)** generally prohibits an employee from:

- acting as agent or attorney
- for prosecuting any claim against the United States
- or receiving any gratuity, or any share of or interest in any such claim, in consideration of assistance in the prosecution of such claim



# 18 U.S.C. 205 (cont.)



**(a)(2)** generally prohibits an employee from:

- acting as an agent or attorney for, or otherwise representing, someone else
- before any department, agency, court, or certain other entities
- concerning any matter in which the United States is a party or has a direct and substantial interest



# 18 U.S.C. 207



## Three primary post-Government employment prohibitions

1. 207(a)(1)—Lifetime bar
2. 207(a)(2)—2 year bar
3. 207(c)—1 year bar



# 18 U.S.C. 207(a)(1)



## Lifetime Bar

Applies to a former employee and prohibits:

- any communication or appearance
- made with intent to influence
- to or before an officer or employee of the US
- in connection with any specific party matter
- in which the employee participated personally and substantially while a Government employee

# 18 U.S.C. 207(a)(2)



## Two-Year Bar

Essentially the same as the (a)(1) restriction except:

Applies only to specific party matters that were pending under the employee's official responsibility during his last year of Government service



# 18 U.S.C. 207(c)



## One-Year Bar

Prohibits a former “**senior employee**” from:

- making a communication or appearance with the intent to influence
- to or before an officer or employee of the agency where he served within one year prior to his termination as a senior employee
- on behalf of any other person
- in connection with any matter in which he seeks official action



# FACT PATTERN #3



- What else would I like to know?
- What information can I get from ethics officials?
- What ethics documents might be helpful?
- Where can I get these documents?
- Possible crimes?
- Possible ethics violations?
- Consult with OGE?

UNITED STATES OFFICE OF  
**GOVERNMENT ETHICS**



Preventing Conflicts of Interest  
in the Executive Branch

Seth Jaffe  
Chief, Ethics Law & Policy Branch  
(202) 482-9303

OGE Website:  
[www.oge.gov](http://www.oge.gov)

**From:** [Sherman, Donald \(HSGAC\)](#)  
**To:** [Diana Veilleux](#)  
**Subject:** RE: Legal Advisory on EO No. 13770  
**Date:** Tuesday, February 07, 2017 5:44:57 PM

---

thanks very much! Also, if possible, please let me know if OGE releases any follow-up or additional clarifying guidance.

Best,

Donald

---

**From:** Diana Veilleux [mailto:[djveille@oge.gov](mailto:djveille@oge.gov)]  
**Sent:** Tuesday, February 07, 2017 5:38 PM  
**To:** Sherman, Donald (HSGAC)  
**Subject:** Legal Advisory on EO No. 13770

Good Afternoon

As discussed, here is a link for the legal advisory issued and posted on OGE's website yesterday concerning the President's Executive Order on Ethics Commitments By Executive Branch Appointees (EO 13770):

[https://www.oge.gov/web/oge.nsf/All+Advisories/F5470156962CE0E6852580BF00752A17/\\$FILE/LA-17-02%20\(final\).pdf?open](https://www.oge.gov/web/oge.nsf/All+Advisories/F5470156962CE0E6852580BF00752A17/$FILE/LA-17-02%20(final).pdf?open).

Best regards,

*Diana J. Veilleux*

Diana J. Veilleux

Chief

Legal, External Affairs and Performance Branch

Program Counsel Division

Office of Government Ethics

(202) 482-9203

[Diana.veilleux@oge.gov](mailto:Diana.veilleux@oge.gov)

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**From:** [Steven Corbally](#)  
**To:** [Nicole Stein](#)  
**Subject:** RE: New Executive Order  
**Date:** Monday, January 30, 2017 11:53:11 AM

---

Last question; (b)(5) deliberative

---

**From:** Nicole Stein  
**Sent:** Monday, January 30, 2017 11:52 AM  
**To:** Steven Corbally  
**Subject:** RE: New Executive Order

I would imagine so but I don't have any information on timing.

---

**From:** Steven Corbally  
**Sent:** Monday, January 30, 2017 11:52 AM  
**To:** Nicole Stein <[nstein@oge.gov](mailto:nstein@oge.gov)>  
**Subject:** RE: New Executive Order  
Are we going to be issuing an advisory on this?

---

**From:** Nicole Stein  
**Sent:** Monday, January 30, 2017 10:55 AM  
**To:** Steven Corbally  
**Subject:** RE: New Executive Order  
<https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>

---

**From:** Steven Corbally  
**Sent:** Monday, January 30, 2017 10:54 AM  
**To:** Nicole Stein <[nstein@oge.gov](mailto:nstein@oge.gov)>  
**Subject:** RE: New Executive Order  
Is there a copy of the EO available anywhere?

---

**From:** Nicole Stein  
**Sent:** Monday, January 30, 2017 10:53 AM  
**To:** DeskOfficers MailGroup  
**Subject:** New Executive Order  
As you may have saw over the weekend, a new executive order was issued regarding the Pledge. If you receive questions from your agencies, please refer them. We are working on reviewing the order.

*Nicole*

Nicole Stein  
Chief, Agency Assistance Branch  
U.S. Office of Government Ethics  
[nstein@oge.gov](mailto:nstein@oge.gov)  
(202) 482-9255

**From:** [David J. Apol](#)  
**To:** [Walter M. Shaub](#)  
**Cc:** [Seth Jaffe](#); [Heather A. Jones](#)  
**Subject:** Re: New Pledge  
**Date:** Sunday, January 29, 2017 7:02:22 PM

---

Interesting!

Stefan would like to talk tomorrow about guidance and it's application to one nominee. Seth is looking over past guidance to see (b)(5) deliberative [REDACTED]  
[REDACTED]. I'm out in the morning so I'd like to have the call in the afternoon.

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

---

**From:** Walter M. Shaub  
**Sent:** Saturday, January 28, 2017 8:25 PM  
**To:** David J. Apol; Shelley K. Finlayson  
**Subject:** New Pledge

---

The news media are reporting there's a new executive order replacing EO 13490. I found it online, (b)(5) deliberative [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Let's plan to study it more closely on Monday.

Walt

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

**From:** [Walter M. Shaub](#)  
**To:** [David J. Apol](#); [Shelley K. Finlayson](#)  
**Subject:** New Pledge  
**Date:** Saturday, January 28, 2017 8:25:51 PM

---

The news media are reporting there's a new executive order replacing EO 13490. I found it online, (b)(5) deliberative [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Let's plan to study it more closely on Monday.

Walt

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

**From:** [Passantino, Stefan C. EOP/WHO](#)  
**To:** [Heather A. Jones](#)  
**Cc:** [Schultz, James D. EOP/WHO](#); [Deborah J. Bortot](#); [Gast, Scott F. EOP/WHO](#); [David J. Apol](#)  
**Subject:** Re: Nominee issue  
**Date:** Sunday, January 29, 2017 2:45:17 PM

---

I was hoping to set up a call anyway to discuss (b) (5) [REDACTED]  
[REDACTED]. I would like to set it up for Monday morning if possible.

Stefan C. Passantino  
Deputy Counsel to the President  
Office of the White House Counsel

On Jan 29, 2017, at 2:05 PM, Heather A. Jones <[hajones@oge.gov](mailto:hajones@oge.gov)> wrote:

We would like to have a call to discuss a nominee pledge issue. We have  
(b)(5) & (b)(6) [REDACTED] Just let us know what time works for you.

Thanks,  
Heather

Heather Jones  
(202) 482-9316  
Office of Government Ethics

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**From:** [Jennifer Matis](#)  
**To:** ["Britt, Christopher"](#)  
**Subject:** RE: OGE Issues Legal Advisory on Executive Order 13770, "Ethics Commitments by Executive Branch Appointees"  
**Date:** Wednesday, February 08, 2017 4:10:37 PM

---

Hi Chris,

All pledge questions are being referred to ELPB. One of them will respond, but it might be several days.

Thanks,

*Jen*

Jennifer Matis  
Assistant Counsel  
Legal, External Affairs and Performance Branch  
U.S. Office of Government Ethics  
202-482-9216  
[jennifer.matis@oge.gov](mailto:jennifer.matis@oge.gov)

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Follow OGE on Twitter: [@OfficeGovEthics](https://twitter.com/OfficeGovEthics)

(b)(5) deliberative (email from VA ethics official seeking desk officer assistance)



---

**From:** News and Info for Ethics Officials [<mailto:oge-ethicsinfo@LISTSERV.GSA.GOV>] **On Behalf Of** Ethics Mailinglist  
**Sent:** Monday, February 06, 2017 3:45 PM  
**To:** [OGE-ETHICSINFO@LISTSERV.GSA.GOV](mailto:OGE-ETHICSINFO@LISTSERV.GSA.GOV)  
**Subject:** [EXTERNAL] OGE Issues Legal Advisory on Executive Order 13770, "Ethics Commitments by Executive Branch Appointees"

**OGE Issues Legal Advisory on Executive Order 13770, "Ethics Commitments by Executive Branch Appointees"**

On February 6, 2017, OGE issued a legal advisory on Executive Order 13770, "Ethics Commitments by Executive Branch Appointees." In this advisory, OGE is making available for agency use a copy of the Executive Order and the Ethics Pledge form. Further, OGE explains the extent to which its legal advisories applicable to Executive Order 13490 may be read as being applicable to Executive Order 13770.

The legal advisory is available on OGE's website at:

[https://www.oge.gov/web/oge.nsf/All+Advisories/F5470156962CE0E6852580BF00752A17/\\$FILE/LA-17-02%20\(final\).pdf?open](https://www.oge.gov/web/oge.nsf/All+Advisories/F5470156962CE0E6852580BF00752A17/$FILE/LA-17-02%20(final).pdf?open)

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**From:** [Diana Veilleux](#)  
**To:** "Nassif, Marybeth"  
**Cc:** [Shelley K. Finlayson](#)  
**Subject:** Follow Up on Executive Order No. 13770  
**Date:** Tuesday, February 07, 2017 1:15:20 PM

---

Hi Marybeth

As requested, we are alerting you that OGE has posted on its website a new legal advisory about the President's Executive Order on Ethics Commitments by Executive Branch Appointees (No. 13770). It can be reached here:

[https://www.oge.gov/web/oge.nsf/All+Advisories/F5470156962CE0E6852580BF00752A17/\\$FILE/LA-17-02%20\(final\).pdf?open](https://www.oge.gov/web/oge.nsf/All+Advisories/F5470156962CE0E6852580BF00752A17/$FILE/LA-17-02%20(final).pdf?open). As noted in the legal advisory, we are still evaluating the effect of the EO and expect to be issuing additional guidance about it in the near future.

We are already feeling the impact of the EO on our resources. We have received a lot of inquiries about the EO from agency ethics officials, with approximately 30% of the questions received by desk officers being about the EO since its issuance. We also expect the development of guidance and training on the EO to affect available staff resources. In the meantime, we have determined that publishing a new proposed regulation on the lobbyist gift, as required by the EO, will cost approximately \$20,000 in unbudgeted publication costs, in addition to taking staff resources to draft the proposed regulation, consult about it with agency ethics officials prepublication, and respond to public comments on the proposed regulation once it is published.

We will continue to keep you apprised of our activities regarding the EO and ethics pledge and the resource implications of those activities.

Best regards,

*Diana*

Diana J. Veilleux  
Chief  
Legal, External Affairs and Performance Branch  
Program Counsel Division  
Office of Government Ethics  
(202) 482-9203  
[Diana.veilleux@oge.gov](mailto:Diana.veilleux@oge.gov)

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**From:** [Diana Veilleux](#)  
**To:** ["Nassif, Marybeth"](#)  
**Cc:** [Shelley K. Finlayson](#)  
**Subject:** RE: Statement on the Ethics EO  
**Date:** Thursday, February 02, 2017 5:25:52 PM

---

Hi Marybeth

We are circling back with you on the status of OGE's actions regarding the President's recent Executive Order on Ethics Commitments by Executive Branch Appointees. As required by the EO, we will shortly be issuing a Legal Advisory for agency ethics officials linking to the EO and providing an Ethics Pledge form for agencies to use for officials required to sign it incident to their appointments. We will let you know when that is issued and posted on our website. We are still evaluating the anticipated increase in OGE's work such as advice, training, and desk officer services that will result from the EO; however, we do know that it will require OGE to promulgate a regulation the publication of which was not anticipated and therefore not included in OGE's budget request. We expect to be able to provide you an estimate of those costs next week.

Best regards,

*Diana*

Diana J. Veilleux  
Chief  
Legal, External Affairs and Performance Branch  
Program Counsel Division  
Office of Government Ethics  
(202) 482-9203  
[Diana.veilleux@oge.gov](mailto:Diana.veilleux@oge.gov)

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---

**From:** Shelley K. Finlayson  
**Sent:** Monday, January 30, 2017 5:57 PM  
**To:** 'Nassif, Marybeth'; Diana Veilleux  
**Subject:** RE: Statement on the Ethics EO

Hi Marybeth –

We are still in the process of evaluating the impact of the Executive Order on OGE. We will reach out to you as soon as we have a better sense of the potential effects.

Thanks,  
Shelley

---

**From:** Nassif, Marybeth [[mailto:](#)(b)(6)]  
**Sent:** Monday, January 30, 2017 5:19 PM  
**To:** Shelley K. Finlayson; Diana Veilleux  
**Subject:** Statement on the Ethics EO

Hi Shelly and Diana,

Will the new EO on ethics, **Executive Order** on January 28, 2017

[Executive Order: ETHICS COMMITMENTS BY EXECUTIVE  
BRANCH APPOINTEES](#)

have any impact on your organization? Was wondering if there has been any coordination with your agency on this and any additional work you all might have.

Thanks

**Marybeth Nassif**

Subcommittee on Financial Services and General Government

Committee on Appropriations

U.S. House of Representatives

(b)(6)

**From:** [Shelley K. Finlayson](#)  
**To:** ["Nassif, Marybeth"; Diana Veilleux](#)  
**Subject:** RE: Statement on the Ethics EO  
**Date:** Monday, January 30, 2017 5:57:02 PM

---

Hi Marybeth –

We are still in the process of evaluating the impact of the Executive Order on OGE. We will reach out to you as soon as we have a better sense of the potential effects.

Thanks,  
Shelley

---

**From:** Nassif, Marybeth [mailto:(b)(6)]  
**Sent:** Monday, January 30, 2017 5:19 PM  
**To:** Shelley K. Finlayson; Diana Veilleux  
**Subject:** Statement on the Ethics EO

Hi Shelly and Diana,

Will the new EO on ethics, **Executive Order** on January 28, 2017

## [Executive Order: ETHICS COMMITMENTS BY EXECUTIVE BRANCH APPOINTEES](#)

have any impact on your organization? Was wondering if there has been any coordination with your agency on this and any additional work you all might have.

Thanks

**Marybeth Nassif**

Subcommittee on Financial Services and General Government  
Committee on Appropriations  
U.S. House of Representatives

(b)(6)

**From:** [Nassif, Marybeth](#)  
**To:** [Diana Veilleux](#)  
**Subject:** RE: Statement on the Ethics EO  
**Date:** Monday, February 06, 2017 12:21:00 PM

---

Thanks Diana.

When available, please send the link to the legal advisory with the ethics pledge or notification when posted to the website.

Marybeth

---

**From:** Diana Veilleux [mailto:djveille@oge.gov]  
**Sent:** Thursday, February 02, 2017 5:26 PM  
**To:** Nassif, Marybeth <(b)(6)>  
**Cc:** Shelley K. Finlayson <skfinlay@oge.gov>  
**Subject:** RE: Statement on the Ethics EO

Hi Marybeth

We are circling back with you on the status of OGE's actions regarding the President's recent Executive Order on Ethics Commitments by Executive Branch Appointees. As required by the EO, we will shortly be issuing a Legal Advisory for agency ethics officials linking to the EO and providing an Ethics Pledge form for agencies to use for officials required to sign it incident to their appointments. We will let you know when that is issued and posted on our website. We are still evaluating the anticipated increase in OGE's work such as advice, training, and desk officer services that will result from the EO; however, we do know that it will require OGE to promulgate a regulation the publication of which was not anticipated and therefore not included in OGE's budget request. We expect to be able to provide you an estimate of those costs next week.

Best regards,

*Diana*

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---

**From:** Shelley K. Finlayson  
**Sent:** Monday, January 30, 2017 5:57 PM

**To:** 'Nassif, Marybeth'; Diana Veilleux  
**Subject:** RE: Statement on the Ethics EO

Hi Marybeth –

We are still in the process of evaluating the impact of the Executive Order on OGE. We will reach out to you as soon as we have a better sense of the potential effects.

Thanks,  
Shelley

---

**From:** Nassif, Marybeth [[mailto:\(b\)\(6\)](#)]  
**Sent:** Monday, January 30, 2017 5:19 PM  
**To:** Shelley K. Finlayson; Diana Veilleux  
**Subject:** Statement on the Ethics EO

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## [Executive Order: ETHICS COMMITMENTS BY EXECUTIVE BRANCH APPOINTEES](#)

have any impact on your organization? Was wondering if there has been any coordination with your agency on this and any additional work you all might have.

Thanks

**Marybeth Nassif**

Subcommittee on Financial Services and General Government  
Committee on Appropriations  
U.S. House of Representatives  
(b)(6)

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**From:** [Sherman, Donald \(HSGAC\)](#)  
**To:** [Shelley K. Finlayson](#)  
**Subject:** FW: Letter from Ranking Member McCaskill to McGahn re Ethics Pledge  
**Date:** Thursday, March 02, 2017 11:24:30 AM  
**Attachments:** [2017-03-01 Letter to White House Counsel Re Exec Order-Ethics Commitments....pdf](#)

---

Hello Shelley:

Please find attached a letter that Senator McCaskill sent yesterday to WH Counsel Donald McGahn regarding the Trump Administration ethics pledge. Please let me know if you have any questions or receive a response from the White House. Thanks!

Donald Sherman

Donald K. Sherman

Senior Counsel

Senate Homeland Security and

Governmental Affairs Committee

Ranking Member Claire McCaskill

(b)(6)

---

**From:** Sherman, Donald (HSGAC)  
**Sent:** Wednesday, March 01, 2017 6:23 PM  
**To:** (b)(6) James Carrol  
**Cc:** Trosen, Amanda (HSGAC); Brewer, David (HSGAC)  
**Subject:** Letter from Ranking Member McCaskill to McGahn re Ethics Pledge

Hello:

Please find attached a letter from Ranking Member McCaskill to White House Counsel Donald McGahn regarding the development and implementation of the Trump Administration's ethics pledge. Please note that the letter requests a response not later than COB on March 15, 2017. Thanks very much for your prompt attention to this inquiry.

Best,

Donald

Donald K. Sherman

Senior Counsel

Senate Homeland Security and

Governmental Affairs Committee

Ranking Member Claire McCaskill

(b)(6)

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

March 1, 2017

Donald F. McGahn  
White House Counsel  
Eisenhower Executive Office Building  
1650 Pennsylvania Avenue, NW  
Washington, DC 20501

Dear Mr. McGahn:

I write to express my concern and request information regarding President Trump's Executive Order and ethics pledge for executive branch appointees including White House personnel. President Trump's decisions to significantly weaken the ethics pledge and to limit transparency regarding its implementation raise serious questions regarding how the Trump Administration plans to ensure that its political appointees behave in an ethical manner.

On January 28, 2017, President Trump signed an Executive Order entitled "Ethics Commitments by Executive Branch Appointees" which applies to "every appointee in every executive agency appointed on or after January 20, 2017" including White House personnel.<sup>1</sup> The Executive Order states that Trump Administration appointees must sign the outlined ethics pledge as a condition, and in consideration, of their employment in the United States Government.<sup>2</sup> President Trump's Executive Order supersedes and revoked President Obama's Executive Order 13490 (Ethics Commitments by Executive Branch Personnel), signed on January 21, 2009, President Obama's first full day in office.<sup>3</sup>

In discussing this Executive Order, the Trump Administration highlighted those portions that tightened restrictions on appointees' work when they leave government. For example, President Trump's ethics pledge extends the period that certain departing

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<sup>1</sup> The White House, *Executive Order: ETHICS COMMITMENTS BY EXECUTIVE BRANCH APPOINTEES* (Jan. 28, 2017) (online <https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>) (hereinafter "Trump Executive Order on Ethics").

<sup>2</sup> *Id.* at Section 1.

<sup>3</sup> Exec. Order 13490, 74 FR 4673 (Jan. 21, 2009) (hereinafter "Obama Executive Order on Ethics").

political appointees must not “engage in lobbying activities” related to their agency to five years. In addition, departing appointees are barred from engaging in lobbying, legal or public relations work on behalf of a foreign entity subject to disclosure under the Foreign Agents Registration Act as amended.<sup>4</sup> While these additions are noteworthy, in several other areas President Trump’s Executive Order removes or weakens provisions related to the ethical responsibilities for executive branch appointees.

President Trump’s decision to omit key portions of President Obama’s “Executive Order on Ethics Commitments by Executive Branch Personnel” in crafting his ethics pledge and Executive Order is consistent with a troubling practice of ignoring best practices to promote ethics in government. Last month, Walter M. Shaub, Jr., Director of the Office of Government Ethics, noted that President Trump’s decision not to divest from his business stood in stark contrast to the tradition of our Presidents over the past 40 years.<sup>5</sup> According to *Politico*, President Trump’s transition team had, at one point, considered issuing a more robust ethics pledge prepared by Norman Eisen and Richard Painter, former White House ethics officials of both Democratic and Republican administrations, but then reversed course.<sup>6</sup> These developments raise serious concerns that the Trump Administration is creating an environment where its appointees do not need to meet the highest ethical standards in conducting government business.

## **I. The Trump Administration’s Substantially Weakened Ethics Pledge**

While in many places, President Trump’s ethics pledge for administration appointees exactly mirrors the directives included in the Obama Administration ethics pledge, there remain numerous other areas where President Trump’s Executive Order diverges from the Obama ethics pledge by substantially weakening ethical responsibilities for and oversight of executive branch appointees.

### **A. Narrowing the Restrictions on Lobbyists Entering Government**

President Trump’s Executive Order governing ethics commitments for administration appointees removes a critical provision that limited the “revolving door” between lobbying and the federal government. While both the Trump and Obama ethics pledges restrict former lobbyists entering the government from working on any particular matter on which they lobbied in the two years preceding their government service, under

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<sup>4</sup> Trump Executive Order on Ethics at Section 1.

<sup>5</sup> U.S. Office of Government Ethics, Remarks as Prepared for Delivery of Walter M. Shaub, Jr., Director, U.S. Office of Government Ethics at the Brookings Institution (Jan. 11, 2017).

<sup>6</sup> *Trump Lobbying Ban Weakens Obama Rules*, *Politico* (Jan. 28, 2017) (online [www.politico.com/story/2017/01/trump-lobbying-ban-weakens-obama-ethics-rules-234318](http://www.politico.com/story/2017/01/trump-lobbying-ban-weakens-obama-ethics-rules-234318)).



President Obama's ethics pledge, these individuals were also banned from working or seeking employment at an agency they lobbied within two years of their appointment.<sup>7</sup>

By contrast, President Trump's ethics pledge omits any restriction on former lobbyists working at agencies that they lobbied in the two years prior to their appointment. President Trump's ethics pledge simply restricts appointees from working on certain matters. It requires the appointee to certify that the appointee will not "participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls."<sup>8</sup> Ethics watchdogs have expressed concern that President Trump's actions create a loophole that "represents a step backward from the previous administration's restrictions" and will enable "special interest baggage" to gain a greater foothold in federal agencies.<sup>9</sup>

At least one Trump Administration official reportedly was hired to serve at the Department of Labor after spending nearly a decade "as the chief lobbyist for a powerful construction industry trade group."<sup>10</sup> Prior to joining the administration, this official worked for the Associated Builders and Contractors and lobbied the Department regarding numerous regulations including those opposing wage standards for federal construction contracts. According to a Labor Department spokesperson, the former lobbyist "has signed the Ethics Pledge and received a full ethics briefing on his first full day at the Department." Despite these representations, Craig Holman of the government watchdog group Public Citizen stated, "This is a grave problem for the public because the agency may well represent the special interest rather than the public interest."<sup>11</sup>

Ethics lawyers have also raised concerns that the lobbying provision of the Trump executive order has ambiguous language with a significant legal error. The Trump Executive Order does not ban lobbyists from working at federal agencies that they lobbied, but instead limits what these officials can work on, after joining an agency they lobbied.<sup>12</sup> The ethics pledge states that the official cannot "participate in any particular matter on which I lobbied ... or participate in the specific issue area in which that particular matter falls." The Trump Executive Order indicates that the phrase "particular

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<sup>7</sup> Obama Executive Order on Ethics at Section 1.

<sup>8</sup> Trump Executive Order on Ethics at Section 1.

<sup>9</sup> *Trump's Lobbying Ban May Not Curb K Street Influence*, Roll Call (Jan. 31, 2017) (online [www.rollcall.com/news/politics/trumps-lobbying-ban-may-not-curb-k-street-influence#sthash.JCSNorui.dpuf](http://www.rollcall.com/news/politics/trumps-lobbying-ban-may-not-curb-k-street-influence#sthash.JCSNorui.dpuf)).

<sup>10</sup> *Trump's Watered-Down Ethics Rules Let a Lobbyist Help Run an Agency He Lobbied*, ProPublica (Feb. 10, 2017) (online <https://www.propublica.org/article/trump-watered-down-ethics-rules-let-lobbyist-help-run-agency-he-lobbied#>).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

matter” has the “same meaning as set forth in section 207 of title 28, United States Code” which is a provision that can’t be found in the U.S. Code.<sup>13</sup> Despite public reporting on this error, it remains in the Executive Order posted on the White House website.

### **B. No Criteria for Waivers**

In addition to removing hurdles for recent lobbyists seeking to work in government, President Trump’s Executive Order weakens both the standard and the process for administration employees to receive a waiver from provisions of the ethics pledge. President Obama’s 2009 Executive Order regarding ethics commitments allowed the Director of the Office of Management and Budget (OMB) or his or her designee the authority to waive certain provisions of the ethics pledge only where doing so was in the “public interest” and even then, only if specific procedures were followed. The Obama Executive Order requires OMB to certify “in writing (i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver.” The Executive Order defined the “public interest” to be “exigent circumstances relating to national security or to the economy.”<sup>14</sup>

The Trump Executive Order provides that the President or his designee have the authority to grant waivers from provisions of the ethics pledge, but provides no criteria for how those decisions will be made. It simply reads: “The President or his designee may grant to any person a waiver of any restrictions contained in the pledge signed by such person.”<sup>15</sup> This language gives no direction to Trump Administration officials or the American public as to how political appointees can request a waiver from provisions of the ethics pledge or what factors President Trump or his designee will consider in determining whether to grant such a request. Unlike President Obama’s Executive Order, this provision also fails to include any requirement to consult with the Office of White House Counsel before making a waiver decision. An ethics pledge has no effect if its provisions can simply be waived based on the personal prerogative of the President or his designee without consultation with ethics experts.

### **C. Reporting of Ethics Pledge Compliance to the President**

One of the most notable changes in President Trump’s Executive Order regarding ethics commitments by executive branch appointees is the removal of reporting requirements designed to allow the President to monitor compliance. President Obama’s 2009 Executive Order required that the Office of Government Ethics provide him with reports on political appointees’ compliance with ethics requirements and other ways that the administration could promote ethical conduct within the administration.<sup>16</sup>

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<sup>13</sup> Trump Executive Order on Ethics at Section 2(r).

<sup>14</sup> Obama Executive Order on Ethics at Section 3.

<sup>15</sup> Trump Executive Order on Ethics at Section 3(a).

<sup>16</sup> Obama Executive Order on Ethics Section 4(c)(4).

President Trump's Executive Order does not include any provision requiring the reporting of compliance with the ethics pledge to President Trump or his designee. It is unclear how President Trump intends to ensure accountability with his own ethics pledge by stripping OGE's reporting requirement from this Executive Order.

#### **D. Reporting of Ethics Pledge Compliance to the Public**

President Trump's Executive Order also undermines transparency by removing a provision requiring public reporting of the administration's compliance with the ethics pledge. President Obama's 2009 Executive Order explicitly required OGE to make yearly public reports regarding implementation of the ethics pledge.<sup>17</sup> On May 26, 2016, OGE published its seventh annual report pursuant to President Obama's Executive Order 13490 on its public website. The report "provides information about the efforts of the U.S. Office of Government Ethics to ensure that agency officials implemented the [Obama] Ethics Pledge appropriately."<sup>18</sup> In addition to the annual reports, OGE published copies of the "limited waivers" granted to appointees throughout the executive branch agencies who were subject to President Obama's Executive Order.<sup>19</sup> The Obama White House also posted waivers issued by the White House and the Office of the Vice President on the Obama White House website.

President Trump's Executive Order, which supersedes its predecessor, does not include any provision requiring public reporting on compliance with his ethics pledge or public disclosure of waivers granted to appointees by the President or his designee.

#### **E. Provisions for Spousal Employment and Other Conflicts**

President Trump's Executive Order related to ethics also removes language from President Obama's Executive Order addressing spousal employment and other conflicts not specifically addressed in the ethics pledge. President Obama's Executive Order requires agencies to work with OGE to establish rules and procedures as necessary "to ensure that spousal employment issues and other conflicts not expressly addressed by the pledge are addressed in ethics agreements with appointees or, where no such agreements

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<sup>17</sup> Obama Executive Order on Ethics Section 4(c)(5).

<sup>18</sup> U.S. Office of Government Ethics, Annual Report on Executive Order 13490 (Ethics Pledge) (online [https://www2.oge.gov/web/oge.nsf/Annual+Report+on+Executive%20Order%2013490%20\(Ethics%20Pledge\)\)](https://www2.oge.gov/web/oge.nsf/Annual+Report+on+Executive%20Order%2013490%20(Ethics%20Pledge)))).

<sup>19</sup> U.S. Office of Government Ethics, Presidential Appointee & Nominee Records (online at <https://www2.oge.gov/Web/OGE.nsf/Presidential+Appointee+&+Nominee+Records>).

are required, through ethics counseling; and generally to ensure compliance with this order within the agency.”<sup>20</sup>

President Trump’s Executive Order nullifies the requirements in the Obama Executive Order and contains no provisions addressing spousal employment or requiring that other conflicts not addressed in the ethics pledge be similarly addressed in written ethics agreements.

## **II. Requests for Information**

In order to fully understand how the administration is implementing President Trump’s ethics pledge and other components of his January 28, 2017 Executive Order “Ethics Commitments by Executive Branch Appointees” across the federal government, please provide the following information to my office not later than March 15, 2017:

1. Copies of all signed ethics pledge documents for all Presidentially appointed, Senate confirmed officials confirmed on or after January 20, 2017;
2. A list of executive branch appointees, including White House personnel, whose appointment began on January 20, 2017 that have and have not signed the ethics pledge, and the status of their employment;
3. A list of any individuals accepting employment with any executive agency, including the White House, that have lobbied that agency within the two years before the date of their appointment;
4. Any and all documents or communications related to any requested or approved waiver from provisions of the Trump Administration ethics pledge from January 20, 2017 to present;
5. Copies of all waivers from provisions of the ethics pledge approved by the President or his designee from January 20, 2017, to the present;
6. Copies of any correspondence between White House personnel and the Office of Government Ethics regarding development or implementation of the ethics pledge and Executive Order;
7. Copies of any additional written guidance provided by the White House to executive branch appointees, including White House personnel, regarding compliance with the ethics pledge from January 20, 2017 to present; and
8. A list of any and all substantive changes that the White House intends to make to the Ethics Pledge.

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<sup>20</sup> Obama Executive Order on Ethics Section 4(a).

Donald F. McGahn  
March 1, 2017  
Page 7

Should you have any questions regarding this inquiry, please contact Donald Sherman on my staff at [Donald\\_Sherman@hsgac.senate.gov](mailto:Donald_Sherman@hsgac.senate.gov) or by phone at (202) 224-2627. Thank you in advance for your prompt attention to this request.

Sincerely,

A handwritten signature in blue ink, appearing to read "Claire McCaskill". The signature is fluid and cursive, with the first name "Claire" and last name "McCaskill" clearly distinguishable.

Claire McCaskill  
Ranking Member

cc: Ron Johnson  
Chairman

The Honorable Walter M. Shaub, Jr.  
Director  
U.S. Office of Government Ethics

**From:** [Elizabeth D. Horton](#)  
**To:** [Director of OGE](#); [Shelley K. Finlayson](#); [David J. Apol](#); [Diana Veilleux](#); [Seth Jaffe](#); [Dale A. Christopher](#); [Deborah J. Bortot](#); [Heather A. Jones](#); [Emory A. Rounds III](#); [Keith Labedz](#)  
**Cc:** [Matthew A. Marinec](#)  
**Subject:** OGE FOIA FY 17-150  
**Date:** Tuesday, January 31, 2017 1:59:26 PM

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Good afternoon.

OGE has received a FOIA request seeking “all communications, including email and texts, between the Office of Government Ethics and campaign and/or transition officials working for President Trump regarding the enforcement and applicability of Executive Order 13490. I am requesting all communications related to the Trump transition/administration’s views on 13490 (“Ethics Pledge”) and whether the executive order would apply to Trump appointees.”

Please search your email account, desktop, “HOME” drives, and paper records in your personal office space for any records responsive to this request and provide any responsive records by COB February 7, 2017.

If you do not have any responsive records for this FOIA request, please reply with a “no records” response.

Please let me know if you have any questions. Thank you.



Elizabeth D. Horton  
Assistant Counsel, Legal, External Affairs and Performance Branch  
Program Counsel Division  
U.S. Office of Government Ethics  
(202) 482-9211  
[Elizabeth.Horton@oge.gov](mailto:Elizabeth.Horton@oge.gov)

Visit OGE’s website: [www.oge.gov](http://www.oge.gov)  
Follow OGE on Twitter: @OfficeGovEthics

**From:** [Monica M. G. Ashar](#)  
**To:** [Seth Jaffe](#)  
**Subject:** Chart  
**Date:** Monday, January 30, 2017 3:17:33 PM  
**Attachments:** (b)(5) deliberative

---

Attachment withheld in full -  
(b)(5) deliberative draft

**From:** [Seth Jaffe](#)  
**To:** [Shelley K. Finlayson](#)  
**Cc:** [Diana Veilleux](#)  
**Subject:** FW: Pledge Language Amendment Process  
**Date:** Thursday, February 02, 2017 1:48:49 PM

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FYI:

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**From:** Teresa L. Williamson  
**Sent:** Thursday, February 02, 2017 11:36 AM  
**To:** Deborah J. Bortot; GCLPD MailGroup  
**Subject:** RE: Pledge Language Amendment Process

Just a quick follow-up. Please reach out to the agency if you haven't received the documents regarding the pledge language. We want to expedite this process as we'd like to get these sent to the Senate as soon as possible.

---

**From:** Teresa L. Williamson  
**Sent:** Thursday, February 02, 2017 10:55 AM  
**To:** Deborah J. Bortot; GCLPD MailGroup  
**Subject:** Pledge Language Amendment Process  
**Importance:** High

Good Morning,

Please follow the steps below for forwarding your nominee's pledge language amendment to the Senate.

A new folder for each nominee has been saved to N: drive located at Nonresponsive network info. Save all of the files associated with the pledge language amendment to this folder.

When you receive the two letters from the agency please name the files as shown below and save to the nominee's amendment folder.

- For the agency letter to OGE name the file "Last Name, First Name finalagencyltr"
- For the nominee EA supplement letter to the agency name the file "Last Name, First Name finalEAsupplement"

Prepare a routing slip using the attached routing slip template. Note, several of the fields will not be applicable to the amendment, just enter as much of the information as you have that is applicable.

Using the applicable template letter located at Nonresponsive network info prepare the transmittal letter to the Senate. I will add the applicable committee information to the letter when I convert it for digital signature.

**For the following nominees use the letter template "Senate Ltr for Second Submission to Cmte FINAL.docx"**



Filer	Reviewer
Chao, Elaine L.	Sandy
DeVos, Elisabeth (Betsy) (P.)	Megan
Haley, Nikki	Stephanie
Mattis, James N.	Monica
McMahon, Linda E.	Rachel
Mnuchin, Steven T.	Lorna
Mulvaney, John Michael "Mick"	Jim
Perry, James R.	Jim
Pompeo, Michael R.	Lorna
Price, Thomas E.	Patrick
Pruitt, Edward Scott	Stephanie
Ross, Wilbur L.	Keith
Shulkin, David J.	Lorna
Tillerson, Rex W.	Leigh
Zinke, Ryan	Lorna

**For the following nominees use the Senate transmittal letter “Senate Ltr for Third Submission to Cmte FINAL.docx”**

Filer	Reviewer
Carson, Ben	Monica
Kelly, John F.	Stephanie

Sessions, Jefferson B.	Jack
------------------------	------

To forward the amendment for certification, please attach to the top of the blue folder the below items and drop off the folder in Sandy's office. If you don't have the blue folder let me know.

- Routing Slip
- Printed version of the transmittal letter to the Senate
- Printed version of the agency letter
- Printed version of the nominee's EA supplement letter

No action is required in FDTS or Integrity for the amendment. If you have any questions, please contact Jack, Sandy or myself.

Thanks!

Teresa

-

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**From:** Deborah J. Bortot  
**Sent:** Monday, January 30, 2017 5:55 PM  
**To:** GCLPD MailGroup  
**Subject:** Pledge Language

I've attached ethics agreement language to address the Executive Order dated January 28, 2017 ("Ethics Commitments by Executive Branch Appointees").

The attachment to this email labeled "EA Pledge language" provides the language that needs to be included in ethics agreements for nominees covered by the Executive Order. Use the language in this attachment, **NOT** the language in the Guide on our website.

The attachment to this email labeled "Sample EA amendment for Pledge" provides sample language for supplements to ethics agreements that have already been sent to the Senate.

**Reports not sent to Senate yet:**

If you are assigned a report that has not been sent to the Senate yet, please use the language in "A.1.1 – language regarding the Executive Order for a new PAS nominee" in the "EA Pledge language," attached to this email.

**Reports that have already been sent to the Senate:**

If you worked on a report that has been sent to the Senate, please create a letter for the filer and a letter for the agency using the attached "Sample EA amendment for Pledge." Please insert the necessary information in each letter and show me a copy of each letter before providing it to the ethics official. Once I approve the letter for the filer and the letter for the agency, please contact the agency and work quickly to get the signed letters.

Thanks,  
Deb

## Jennifer Matis

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**Subject:** re: pledge issues

**Location:** Seth's office

**Start:** Mon 1/30/2017 4:00 PM

**End:** Mon 1/30/2017 4:30 PM

**Show Time As:** Tentative

**Recurrence:** (none)

**Meeting Status:** Not yet responded

**Organizer:** Seth Jaffe

**Required Attendees:** Monica M. G. Ashar

**From:** [Passantino, Stefan C. EOP/WHO](#)  
**To:** [David J. Apol](#)  
**Cc:** [Director of OGE](#)  
**Subject:** Re: Pledge disucssion  
**Date:** Monday, January 30, 2017 3:27:41 PM

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Sorry, still in another meeting. Is 4:00 still an option?

Stefan C. Passantino  
Deputy Counsel to the President  
Office of the White House Counsel

On Jan 30, 2017, at 3:00 PM, David J. Apol <[djapol@oge.gov](mailto:djapol@oge.gov)> wrote:

[Either works for us. Let's say 3:30.](#)

---

**From:** Passantino, Stefan C. EOP/WHO [<mailto:>(b)(6)]

**Sent:** Monday, January 30, 2017 2:48 PM

**To:** David J. Apol

**Cc:** Director of OGE

**Subject:** Re: Pledge disucssion

How's 3:30 or 4:00?

Stefan C. Passantino  
Deputy Counsel to the President  
Office of the White House Counsel

On Jan 30, 2017, at 2:26 PM, David J. Apol <[djapol@oge.gov](mailto:djapol@oge.gov)> wrote:

Hi Stefan,  
Sorry I missed your call. Would you be available to talk with us this afternoon? We are available at any time. 3:00?

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**From:** [Walter M. Shaub](#)  
**To:** ["Passantino, Stefan C. EOP/WHO"](#)  
**Cc:** [David J. Apol](#); [Seth Jaffe](#)  
**Subject:** RE: Quick Call  
**Date:** Thursday, February 02, 2017 6:51:07 PM  
**Attachments:** (b)(5) deliberative [REDACTED]

Two attachments  
withheld in full - (b)(5)  
deliberative drafts

Hi Stefan,

Thanks for the call earlier today. As we discussed, I would like to get your thoughts on the attached Legal Advisory regarding the new ethics pledge. (b)(5) deliberative [REDACTED]

We're getting calls about the ethics pledge, so I think this needs to go out Monday, but I would like to touch base again before we issue it if you have any time on Friday or Monday.

Walt

Walter M. Shaub, Jr.  
Director  
U.S. Office of Government Ethics  
1201 New York Avenue, NW, Suite 500  
Washington, DC 20005-3917

Telephone: 202.482.9292  
Email: [walter.shaub@oge.gov](mailto:walter.shaub@oge.gov)

-----Original Message-----

From: Passantino, Stefan C. EOP/WHO [[mailto:\(b\)\(6\)](#)]  
Sent: Thursday, February 02, 2017 12:24 PM  
To: Walter M. Shaub  
Cc: David J. Apol  
Subject: Quick Call

Walt, just following up on my voicemail, I was hoping to catch up with you sometime today or tomorrow to discuss some procedural issues and to ensure we are working together smoothly. Just let me know of a good time to speak. Stefan.

STEFAN C. PASSANTINO  
Deputy Counsel to the President, Compliance & Ethics Office of the White House Counsel  
(b)(6) [REDACTED]

**From:** [Craig Holman](#)  
**To:** [Walter M. Shaub](#)  
**Subject:** RE: Trump ethics executive order: "Ethics commitments by executive branch appointees"  
**Date:** Tuesday, February 21, 2017 12:40:57 PM

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Got it! That is great news, and once again your prompt response is most appreciated.

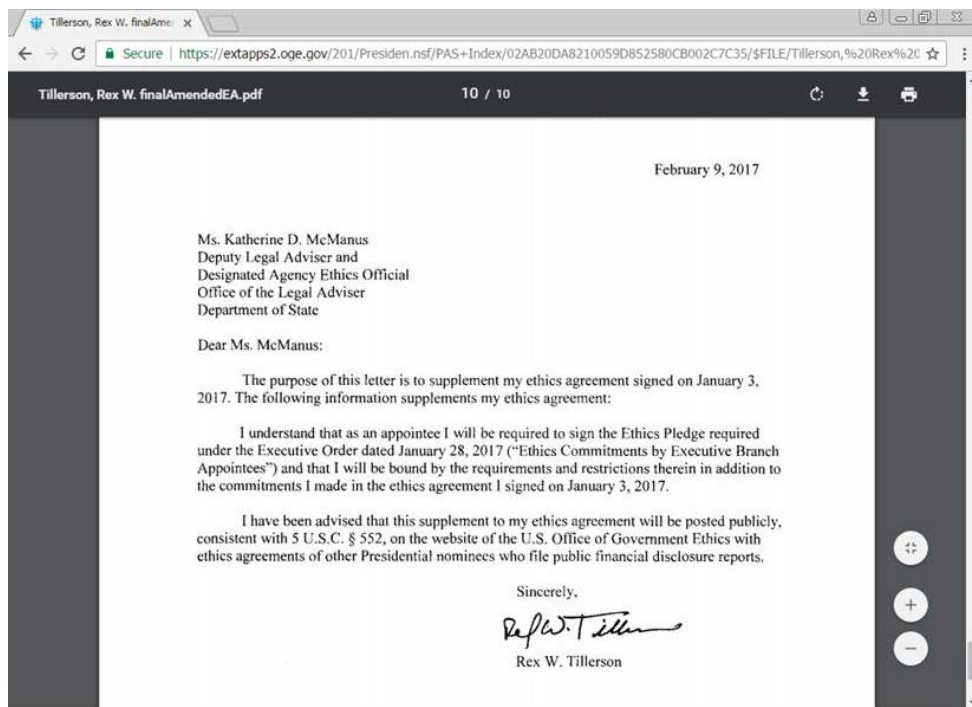
Craig Holman, Ph.D.

(b)(6)

**From:** Walter M. Shaub [mailto:wmshaub@oge.gov]  
**Sent:** Tuesday, February 21, 2017 12:38 PM  
**To:** Craig Holman  
**Subject:** RE: Trump ethics executive order: "Ethics commitments by executive branch appointees"

Hi Craig,

Yes, we've been going back and getting them to sign supplemental ethics agreements that include basically the same language as we used in ethics agreements under President Obama. If you go to our website, you can pull up an ethics agreement, then scroll down to see the supplemental ethics agreement at the bottom. Here's a screenshot of the supplement for Tillerson, for example. I've also provided a hyperlink below.



[https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/02AB20DA8210059D852580CB002C7C35/\\$FILE/Tillerson,%20Rex%20W.%20%20finalAmendedEA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/02AB20DA8210059D852580CB002C7C35/$FILE/Tillerson,%20Rex%20W.%20%20finalAmendedEA.pdf)

I hope this is helpful.

Walt

Walter M. Shaub, Jr.

Director

U.S. Office of Government Ethics

1201 New York Avenue, NW, Suite 500

Washington, DC 20005-3917

Telephone: 202.482.9292

Email: [walter.shaub@oge.gov](mailto:walter.shaub@oge.gov)

**From:** Craig Holman [mailto:(b)(6)]  
**Sent:** Tuesday, February 21, 2017 12:34 PM  
**To:** Walter M. Shaub  
**Subject:** Trump ethics executive order: "Ethics commitments by executive branch appointees"

Hello Walter:

I have noticed that the ethics agreements signed so far by presidential nominees and appointees do not include the elements of Trump's ethics executive order, "Ethics Commitments by Executive Branch Appointees," issued on January 28. I understand this executive order was issued after many of the nominees have already signed ethics agreements, but are all nominees and appointees going to sign new ethics agreements that include these provisions?

As you may know, I am most concerned about preserving Obama's "reverse revolving door" agreement, in which all presidential appointees agree to recuse themselves from taking official actions that directly and substantially affect their former employers and clients of the last two years. Much to my surprise this provision is preserved in Trump's ethics executive order. However, if no one is signing onto this latest ethics agreement, I am worried that it may not be implemented or enforceable.

Craig Holman, Ph.D.

Government affairs lobbyist

Public Citizen

215 Pennsylvania Avenue SE

Washington, D.C. 20003

(b)(6)

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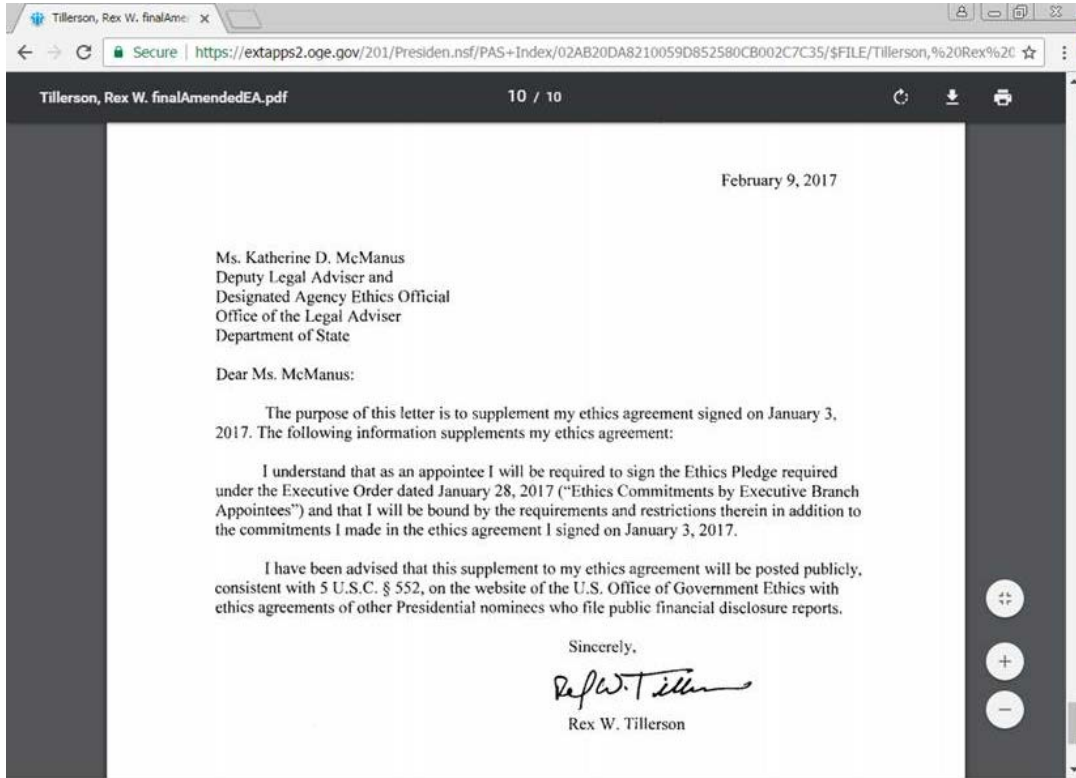


**From:** [Walter M. Shaub](#)  
**To:** ["Craig Holman"](#)  
**Subject:** RE: Trump ethics executive order: "Ethics commitments by executive branch appointees"  
**Date:** Tuesday, February 21, 2017 12:38:22 PM

---

Hi Craig,

Yes, we've been going back and getting them to sign supplemental ethics agreements that include basically the same language as we used in ethics agreements under President Obama. If you go to our website, you can pull up an ethics agreement, then scroll down to see the supplemental ethics agreement at the bottom. Here's a screenshot of the supplement for Tillerson, for example. I've also provided a hyperlink below.



[https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/02AB20DA8210059D852580CB002C7C35/\\$FILE/Tillerson,%20Rex%20W.%20%20finalAmendedEA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/02AB20DA8210059D852580CB002C7C35/$FILE/Tillerson,%20Rex%20W.%20%20finalAmendedEA.pdf)

I hope this is helpful.

Walt

Walter M. Shaub, Jr.  
Director  
U.S. Office of Government Ethics  
1201 New York Avenue, NW, Suite 500  
Washington, DC 20005-3917  
Telephone: 202.482.9292  
Email: [walter.schaub@oge.gov](mailto:walter.schaub@oge.gov)

---

**From:** Craig Holman [mailto:(b)(6)]  
**Sent:** Tuesday, February 21, 2017 12:34 PM  
**To:** Walter M. Shaub  
**Subject:** Trump ethics executive order: "Ethics commitments by executive branch appointees"

Hello Walter:

I have noticed that the ethics agreements signed so far by presidential nominees and appointees do not include the elements of Trump's ethics executive order, "Ethics Commitments by Executive Branch Appointees," issued on January 28. I understand this executive order was issued after many of the nominees have already signed ethics agreements, but are all nominees and appointees going to sign new ethics agreements that include these provisions?

As you may know, I am most concerned about preserving Obama's "reverse revolving door" agreement, in which all presidential appointees agree to recuse themselves from taking official actions that directly and substantially affect their former employers and clients of the last two years.

Much to my surprise this provision is preserved in Trump's ethics executive order. However, if no one is signing onto this latest ethics agreement, I am worried that it may not be implemented or enforceable.

Craig Holman, Ph.D.  
Government affairs lobbyist  
Public Citizen  
215 Pennsylvania Avenue SE  
Washington, D.C. 20003

(b)(6)

**From:** [David J. Apol](#)  
**To:** [Seth Jaffe](#); [Director of OGE](#); [Monica M. G. Ashar](#)  
**Subject:** Prior Pledge guidance  
**Date:** Tuesday, January 31, 2017 12:49:41 PM  
**Attachments:** [Obama pledge and guidance.pdf](#)

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Here is a searchable copy of the Obama EO and all the pledge guidance we gave on it. I will forward to Jim shortly.

## Presidential Documents

### Executive Order 13490 of January 21, 2009

#### Ethics Commitments by Executive Branch Personnel

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and sections 3301 and 7301 of title 5, United States Code, it is hereby ordered as follows:

**Section 1. *Ethics Pledge.*** Every appointee in every executive agency appointed on or after January 20, 2009, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee:

“As a condition, and in consideration, of my employment in the United States Government in a position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:

“1. *Lobbyist Gift Ban.* I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.

“2. *Revolving Door Ban—All Appointees Entering Government.* I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

“3. *Revolving Door Ban—Lobbyists Entering Government.* If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:

(a) participate in any particular matter on which I lobbied within the 2 years before the date of my appointment;

(b) participate in the specific issue area in which that particular matter falls; or

(c) seek or accept employment with any executive agency that I lobbied within the 2 years before the date of my appointment.

“4. *Revolving Door Ban—Appointees Leaving Government.* If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.

“5. *Revolving Door Ban—Appointees Leaving Government to Lobby.* In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

“6. *Employment Qualification Commitment.* I agree that any hiring or other employment decisions I make will be based on the candidate’s qualifications, competence, and experience.

“7. *Assent to Enforcement.* I acknowledge that the Executive Order entitled ‘Ethics Commitments by Executive Branch Personnel,’ issued by the President on January 21, 2009, which I have read before signing this document, defines certain of the terms applicable to the foregoing obligations and sets forth

the methods for enforcing them. I expressly accept the provisions of that Executive Order as a part of this agreement and as binding on me. I understand that the terms of this pledge are in addition to any statutory or other legal restrictions applicable to me by virtue of Federal Government service."

**Sec. 2. Definitions.** As used herein and in the pledge set forth in section 1 of this order:

(a) "Executive agency" shall include each "executive agency" as defined by section 105 of title 5, United States Code, and shall include the Executive Office of the President; provided, however, that for purposes of this order "executive agency" shall include the United States Postal Service and Postal Regulatory Commission, but shall exclude the Government Accountability Office.

(b) "Appointee" shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

(c) "Gift"

(1) shall have the definition set forth in section 2635.203(b) of title 5, Code of Federal Regulations;

(2) shall include gifts that are solicited or accepted indirectly as defined at section 2635.203(f) of title 5, Code of Federal Regulations; and

(3) shall exclude those items excluded by sections 2635.204(b), (c), (e)(1) & (3) and (j)-(l) of title 5, Code of Federal Regulations.

(d) "Covered executive branch official" and "lobbyist" shall have the definitions set forth in section 1602 of title 2, United States Code.

(e) "Registered lobbyist or lobbying organization" shall mean a lobbyist or an organization filing a registration pursuant to section 1603(a) of title 2, United States Code, and in the case of an organization filing such a registration, "registered lobbyist" shall include each of the lobbyists identified therein.

(f) "Lobby" and "lobbied" shall mean to act or have acted as a registered lobbyist.

(g) "Particular matter" shall have the same meaning as set forth in section 207 of title 18, United States Code, and section 2635.402(b)(3) of title 5, Code of Federal Regulations.

(h) "Particular matter involving specific parties" shall have the same meaning as set forth in section 2641.201(h) of title 5, Code of Federal Regulations, except that it shall also include any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties.

(i) "Former employer" is any person for whom the appointee has within the 2 years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner, except that "former employer" does not include any executive agency or other entity of the Federal Government, State or local government, the District of Columbia, Native American tribe, or any United States territory or possession.

(j) "Former client" is any person for whom the appointee served personally as agent, attorney, or consultant within the 2 years prior to the date of his or her appointment, but excluding instances where the service provided was limited to a speech or similar appearance. It does not include clients

of the appointee's former employer to whom the appointee did not personally provide services.

(k) "Directly and substantially related to my former employer or former clients" shall mean matters in which the appointee's former employer or a former client is a party or represents a party.

(l) "Participate" means to participate personally and substantially.

(m) "Post-employment restrictions" shall include the provisions and exceptions in section 207(c) of title 18, United States Code, and the implementing regulations.

(n) "Government official" means any employee of the executive branch.

(o) "Administration" means all terms of office of the incumbent President serving at the time of the appointment of an appointee covered by this order.

(p) "Pledge" means the ethics pledge set forth in section 1 of this order.

(q) All references to provisions of law and regulations shall refer to such provisions as in effect on January 20, 2009.

**Sec. 3. Waiver.** (a) The Director of the Office of Management and Budget, or his or her designee, in consultation with the Counsel to the President or his or her designee, may grant to any current or former appointee a written waiver of any restrictions contained in the pledge signed by such appointee if, and to the extent that, the Director of the Office of Management and Budget, or his or her designee, certifies in writing (i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver. A waiver shall take effect when the certification is signed by the Director of the Office of Management and Budget or his or her designee.

(b) The public interest shall include, but not be limited to, exigent circumstances relating to national security or to the economy. *De minimis* contact with an executive agency shall be cause for a waiver of the restrictions contained in paragraph 3 of the pledge.

**Sec. 4. Administration.** (a) The head of every executive agency shall, in consultation with the Director of the Office of Government Ethics, establish such rules or procedures (conforming as nearly as practicable to the agency's general ethics rules and procedures, including those relating to designated agency ethics officers) as are necessary or appropriate to ensure that every appointee in the agency signs the pledge upon assuming the appointed office or otherwise becoming an appointee; to ensure that compliance with paragraph 3 of the pledge is addressed in a written ethics agreement with each appointee to whom it applies, which agreement shall also be approved by the Counsel to the President or his or her designee prior to the appointee commencing work; to ensure that spousal employment issues and other conflicts not expressly addressed by the pledge are addressed in ethics agreements with appointees or, where no such agreements are required, through ethics counseling; and generally to ensure compliance with this order within the agency.

(b) With respect to the Executive Office of the President, the duties set forth in section 4(a) shall be the responsibility of the Counsel to the President or his or her designee.

(c) The Director of the Office of Government Ethics shall:

(1) ensure that the pledge and a copy of this order are made available for use by agencies in fulfilling their duties under section 4(a) above;

(2) in consultation with the Attorney General or the Counsel to the President or their designees, when appropriate, assist designated agency ethics officers in providing advice to current or former appointees regarding the application of the pledge; and

(3) in consultation with the Attorney General and the Counsel to the President or their designees, adopt such rules or procedures as are necessary or appropriate:

(i) to carry out the foregoing responsibilities;

(ii) to apply the lobbyist gift ban set forth in paragraph 1 of the pledge to all executive branch employees;

(iii) to authorize limited exceptions to the lobbyist gift ban for circumstances that do not implicate the purposes of the ban;

(iv) to make clear that no person shall have violated the lobbyist gift ban if the person properly disposes of a gift as provided by section 2635.205 of title 5, Code of Federal Regulations;

(v) to ensure that existing rules and procedures for Government employees engaged in negotiations for future employment with private businesses that are affected by their official actions do not affect the integrity of the Government's programs and operations;

(vi) to ensure, in consultation with the Director of the Office of Personnel Management, that the requirement set forth in paragraph 6 of the pledge is honored by every employee of the executive branch;

(4) in consultation with the Director of the Office of Management and Budget, report to the President on whether full compliance is being achieved with existing laws and regulations governing executive branch procurement lobbying disclosure and on steps the executive branch can take to expand to the fullest extent practicable disclosure of such executive branch procurement lobbying and of lobbying for presidential pardons, and to include in the report both immediate action the executive branch can take and, if necessary, recommendations for legislation; and

(5) provide an annual public report on the administration of the pledge and this order.

(d) The Director of the Office of Government Ethics shall, in consultation with the Attorney General, the Counsel to the President, and the Director of the Office of Personnel Management, or their designees, report to the President on steps the executive branch can take to expand to the fullest extent practicable the revolving door ban set forth in paragraph 5 of the pledge to all executive branch employees who are involved in the procurement process such that they may not for 2 years after leaving Government service lobby any Government official regarding a Government contract that was under their official responsibility in the last 2 years of their Government service; and to include in the report both immediate action the executive branch can take and, if necessary, recommendations for legislation.

(e) All pledges signed by appointees, and all waiver certifications with respect thereto, shall be filed with the head of the appointee's agency for permanent retention in the appointee's official personnel folder or equivalent folder.

**Sec. 5. Enforcement.** (a) The contractual, fiduciary, and ethical commitments in the pledge provided for herein are solely enforceable by the United States pursuant to this section by any legally available means, including debarment proceedings within any affected executive agency or judicial civil proceedings for declaratory, injunctive, or monetary relief.

(b) Any former appointee who is determined, after notice and hearing, by the duly designated authority within any agency, to have violated his or her pledge may be barred from lobbying any officer or employee of that agency for up to 5 years in addition to the time period covered by the pledge. The head of every executive agency shall, in consultation with the Director of the Office of Government Ethics, establish procedures to implement this subsection, which procedures shall include (but not be limited to) providing for factfinding and investigation of possible violations of this order and for referrals to the Attorney General for his or her consideration pursuant to subsection (c).

(c) The Attorney General or his or her designee is authorized:

(1) upon receiving information regarding the possible breach of any commitment in a signed pledge, to request any appropriate Federal investigative authority to conduct such investigations as may be appropriate; and

(2) upon determining that there is a reasonable basis to believe that a breach of a commitment has occurred or will occur or continue, if not enjoined, to commence a civil action against the former employee in any United States District Court with jurisdiction to consider the matter.

(d) In any such civil action, the Attorney General or his or her designee is authorized to request any and all relief authorized by law, including but not limited to:

(1) such temporary restraining orders and preliminary and permanent injunctions as may be appropriate to restrain future, recurring, or continuing conduct by the former employee in breach of the commitments in the pledge he or she signed; and

(2) establishment of a constructive trust for the benefit of the United States, requiring an accounting and payment to the United States Treasury of all money and other things of value received by, or payable to, the former employee arising out of any breach or attempted breach of the pledge signed by the former employee.

**Sec. 6. General Provisions.** (a) No prior Executive Orders are repealed by this order. To the extent that this order is inconsistent with any provision of any prior Executive Order, this order shall control.

(b) If any provision of this order or the application of such provision is held to be invalid, the remainder of this order and other dissimilar applications of such provision shall not be affected.

(c) Nothing in this order shall be construed to impair or otherwise affect:

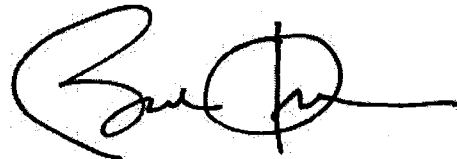
(1) authority granted by law to a department, agency, or the head thereof; or

(2) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(d) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(e) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(f) The definitions set forth in this order are solely applicable to the terms of this order, and are not otherwise intended to impair or affect existing law.

A handwritten signature in black ink, appearing to be "Barack Obama", with a large circular flourish on the right side.

THE WHITE HOUSE,  
*January 21, 2009.*

[FR Doc. E9-1719

Filed 1-23-09; 8:45 am]

Billing code 3195-W9-P





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

January 22, 2009  
DO-09-003

MEMORANDUM

TO: Agency Heads and Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Executive Order; Ethics Pledge

President Obama signed an Executive Order, "Ethics Commitments by Executive Branch Personnel," on January 21, 2009. Among other things, this Executive Order requires every full-time, political appointee appointed on or after January 20, 2009 to sign an Ethics Pledge. Pursuant to section 4(c)(1) of the Executive Order, the Office of Government Ethics (OGE) is providing you with a link to obtain a copy of the Order, <https://www.whitehouse.gov/the-press-office/ethics-commitments-executive-branch-personnel>, as well as an Ethics Pledge form (attached) to be used for appointees at your agency.

The definition of "appointee" in the Executive Order covers all full-time, political appointees regardless of whether they are appointed by the President, the Vice President, an agency head, or otherwise. Executive Order, sec. 2(a). Unlike certain other ethical requirements (e.g., the restrictions on covered noncareer employees described in 5 C.F.R. part 2636), the Pledge applies without regard to the salary level of the political appointee. Individuals appointed to a career position are not required to sign the Pledge. Similarly, political appointees appointed to a full-time position prior to January 20, 2009 are not presently required to sign the Pledge. This means individuals appointed during the previous administration are not now covered by the Pledge even if they are continuing in their current position or are serving in an acting capacity under the Vacancies Reform Act, 5 U.S.C. § 3345 *et seq.*

Generally, appointees must commit to:

- not accept gifts or gratuities from registered lobbyists or lobbying organizations (subject only to a limited number of the exceptions provided in the OGE Standards of Ethical Conduct, as well as other exceptions that OGE may authorize in the future for situations that do not implicate the purpose of the gift ban)—Pledge, par. 1

- recuse for two years from any particular matter involving specific parties in which a former employer or client is or represents a party, if the appointee served that employer or client during the two years prior to the appointment—Pledge, par. 2
- if the appointee was a registered lobbyist during the prior two years,
  - recuse, for two years after appointment, from any particular matter on which he or she lobbied during the two years prior to appointment (or any particular matter that falls within the same specific issue area)—Pledge, par. 3(a) & (b)
  - not to seek or accept employment with an agency or department that he or she lobbied during the prior two years—Pledge, par. 3(c)

[Note the requirement for a written ethics agreement for incoming lobbyists, described below, and the waiver mechanism as to lobbyists, also described below]

- if the appointee is subject to the senior employee post-employment restriction in 18 U.S.C. § 207(c), to abide by such restriction for two years after termination of the appointment—Pledge, par. 4
- not to lobby any covered executive branch official (as described in the Lobbying Disclosure Act) or any noncareer SES appointee for as long as President Obama is in office—Pledge, par. 5
- agree that any hiring or other employment decisions will be based on the candidate's qualifications, competence and experience—Pledge, par. 6

Section 3 of the Executive Order provides a waiver mechanism for any of the restrictions contained in the Pledge. The waiver must come from the Director of the Office of Management and Budget (or designee), in consultation with the White House Counsel (or designee). The Executive Order also provides for enforcement of the Pledge through civil action by the Attorney General. Executive Order, sec. 5(c). Moreover, the Order provides for agency debarment proceedings against former appointees found to have violated the Pledge, pursuant to debarment procedures established by each agency in consultation with OGE. *Id.*, sec. 5(b).

The Executive Order requires each covered appointee to sign the Pledge "upon becoming an appointee." Sec. 1; see also sec. 4(a). Therefore, Agency Heads and Designated Agency Ethics Officials must work with relevant personnel officials to ensure that all political appointees are identified and provided with Pledge forms to sign. Section 4(a) of the Executive Order provides more detail on the responsibilities of agencies for administering the Pledge requirement. Section 4(a) also requires agencies to address compliance with the restrictions on incoming lobbyists (paragraph 3 of the Pledge) through a written ethics agreement, subject to approval by the White House Counsel (or designee) prior to the appointee commencing work.

Agency Heads and Designated Agency Ethics Officials  
Page 3

OGE, in cooperation with the Office of the White House Counsel, will be providing you with more detailed guidance concerning the Ethics Pledge and other aspects of the Executive Order in the near future. That will also include scheduling a conference in the coming days to discuss these matters. In the meantime, please do not hesitate to contact OGE about any questions you may have concerning this matter.

Attachment:

Ethics Pledge Form

## ETHICS PLEDGE

As a condition, and in consideration, of my employment in the United States Government in a position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:

1. **Lobbyist Gift Ban.** I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.
2. **Revolving Door Ban: All Appointees Entering Government.** I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.
3. **Revolving Door Ban: Lobbyists Entering Government.** If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:
  - (a) participate in any particular matter on which I lobbied within the 2 years before the date of my appointment;
  - (b) participate in the specific issue area in which that particular matter falls; or
  - (c) seek or accept employment with any executive agency that I lobbied within the 2 years before the date of my appointment.
4. **Revolving Door Ban: Appointees Leaving Government.** If, upon my departure from the Government, I am covered by the post employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.
5. **Revolving Door Ban: Appointees Leaving Government to Lobby.** In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.
6. **Employment Qualification Commitment.** I agree that any hiring or other employment decisions I make will be based on the candidate's qualifications, competence, and experience.
7. **Assent to Enforcement.** I acknowledge that the Executive Order entitled "Ethics Commitments by Executive Branch Personnel," issued by the President on January 21, 2009, which I have read before signing this document, defines certain of the terms applicable to the foregoing obligations and sets forth the methods for enforcing them. I expressly accept the provisions of that Executive Order as a part of this agreement and as binding on me. I understand that the terms of this pledge are in addition to any statutory or other legal restrictions applicable to me by virtue of Federal Government service.

\_\_\_\_\_  
Signature

\_\_\_\_\_, 20\_\_\_\_  
Date

\_\_\_\_\_  
Print or type your full name (Last, first, middle)



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

February 10, 2009  
DO-09-005

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Signing the Ethics Pledge

The Office of Government Ethics (OGE) has received several questions about when appointees must sign the Ethics Pledge required under Executive Order 13490. In consultation with the White House Counsel's office, OGE has determined that Pledge forms must be signed:

- in the case of individuals nominated by the President to a position requiring Senate confirmation (PAS), after Senate confirmation but before appointment;
- in the case of non-PAS appointees who have already been appointed, no later than 30 days after the date of their appointment (in recognition of the logistics of bringing new appointees on board during the initial implementation of the Executive Order); and
- in the case of non-PAS appointees who may be appointed in the future, at the time such person is appointed to a position covered by the Executive Order.

In light of the serious nature of the commitments embodied in the Pledge, OGE wants to emphasize that special Government employees (SGEs) are not considered to be full-time, non-career appointees subject to the Pledge requirement. This follows the interpretation of similar language in section 2(a) of Executive Order 12834 and section 102 of Executive Order 12731. See OGE Advisory Memorandum 00 x 1. Note that individuals serving in an agency as temporary advisors or counselors, pending Senate confirmation to a PAS position, are considered SGEs unless and until they are confirmed. See OGE Advisory Memorandum 01 x 2. Such individuals, therefore, must sign the Pledge after their confirmation, but before their appointment to a PAS position.



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

February 11, 2009  
DO-09-007

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Lobbyist Gift Ban Guidance

Section 1 of Executive Order 13490 requires all full-time, non-career appointees, appointed on or after January 20, 2009, to sign an Ethics Pledge. 74 Federal Register 4673 (January 21, 2009). Paragraph 1 of the Pledge, titled "Lobbyist Gift Ban," sets out an appointee's agreement not to "accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee." The purpose of this Memorandum is to provide ethics officials with initial guidance concerning the implementation and interpretation of this gift ban.

Currently the ban applies only to those who meet the definition of "appointee" in the Executive Order.<sup>1</sup> The Order directs the Office of Government Ethics (OGE) to adopt rules or procedures to authorize limited exceptions to the lobbyist gift ban for circumstances that do not implicate the purposes of the ban. Executive Order 13490, sec. 4(c)(3)(iii). The guidance provided in this Memorandum is intended solely to help ethics officials understand the scope of the ban as it applies immediately to full-time, non-career appointees. While the Executive Order directs OGE to adopt rules and procedures to apply the lobbyist gift ban to all executive branch employees, any such rules or procedures will be developed in due course, with ample consideration of the situation of career employees. *See id.*, sec. 4(c)(3)(ii).

What is a "Registered Lobbyist" and a "Registered Lobbying Organization"

The Pledge prohibits gifts from lobbyists and lobbying organizations that are "registered" under the Lobbying Disclosure Act (LDA), 2 U.S.C. § 1601, *et seq.* However, neither ethics officials nor appointees must determine independently whether a particular donor meets the registration requirements of the LDA. Rather, in order to provide notice to appointees, the Executive Order purposely covers only those gifts received from a lobbyist or organization that actually has filed a registration with the Secretary of the Senate and the Clerk of the House of

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<sup>1</sup> See DAEOgram 09-003 (explaining the scope of covered "appointee"), <https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-003:+Executive+Order+13490,+Ethics+Pledge>.

Representatives pursuant to 2 U.S.C. § 1603(a). Executive Order 13490, sec. 2(e). The Secretary and the Clerk maintain searchable registrant databases.<sup>2</sup> These are the only databases upon which appointees and ethics officials may rely to determine whether a given donor is registered, for purposes of compliance with the gift ban. Search results must be reviewed carefully. The databases contain the names of clients as well as lobbyists and lobbying organizations. Also, the databases contain historical information. This may indicate that an individual was a registered lobbyist at some time in the past but is not a lobbyist currently. OGE can assist ethics officials who have questions about the use of the databases.

The ban is not limited to donors that provide lobbying services to others. The phrase "registered lobbyist or lobbying organization" includes any "organization filing a registration," not just lobbying firms. Executive Order 13490, sec. 2(e). In particular, the ban includes any organization that registers because it employs at least one in-house lobbyist on its own behalf. *See* 2 U.S.C. § 1603(a)(2), (3)(A)(ii). For example, an appointee may not accept a bottle of wine from a telecommunications company that is registered under the LDA, even though the company is not a lobbying firm and registers only because it employs a single Governmental affairs officer to represent that company's own interests. Of course, the ban also covers registered lobbying firms, such as a law firm or Governmental relations firm that files registrations for activities on behalf of its clients.

The ban also applies without regard to whether the particular lobbyist or organization has any dealings with the appointee's own agency. As long as the donor is registered under the LDA, it does not matter that the donor's lobbying contacts and activities may be directed solely to another agency--or even solely to the Legislative Branch. As indicated below, the lobbyist gift ban is in addition to the OGE prohibitions on gifts from "prohibited sources" and gifts "given because of the employee's official position."

Furthermore, the ban is intended to prohibit gifts from any employee of a registered lobbyist or lobbying organization. In this regard, the ban applies in the same way as the OGE gift prohibitions, which treat a gift from an employee of an organization as a gift from the organization. *See* 5 C.F.R. § 2635.204(a)(Example 3). Otherwise, a lobbyist or lobbying organization could evade the ban simply by relying on non-lobbyist employees to make gifts. Thus, for example, an appointee could not accept a free dinner at a restaurant from an employee of an oil company that is registered under the LDA, even though that employee is not included among the lobbyists listed in the company's registration. Of course, if the appointee had a personal relationship with the company employee, the gift might be permitted under 5 C.F.R. § 2635.204(b). *Id.*

The lobbyist gift ban does not prohibit gifts from an organization that retains "outside" lobbyists or lobbying firms, as long as the organization itself is not registered under the LDA.

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<sup>2</sup> *See* <http://lobbyingdisclosure.house.gov/>;  
[http://www.senate.gov/pagelayout/legislative/g\\_three\\_sections\\_with\\_teasers/lobbyingdisc.htm](http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm).

Organizations that are merely "clients" but not actually employers of lobbyists do not have to file registrations under the LDA, even though they may be listed as clients in the registrations filed by the lobbyists and lobbying firms they retain. 2 U.S.C. §§ 1602(2); 1603(a)(2). The LDA definition of employee excludes both "independent contractors" and "volunteers who receive no financial or other compensation from the person or entity for their services," so a person who uses only such non-employees for all lobbying services would not be required to register. 2 U.S.C. §§ 1602(5); 1603(a)(2). These exclusions are important to keep in mind because the House and Senate databases (set out in footnote 2 of this DAEOgram) contain the names of many persons and entities that, for example, are clients of lobbying firms but are not themselves registered lobbyists or lobbying organizations.

#### The Lobbyist Gift Ban is in Addition to Existing OGE Gift Rules

The Appointee Pledge refers to certain provisions in the existing OGE gift regulations found in the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) at 5 C.F.R. part 2635, subpart B, including the OGE definition of "gift." Executive Order 13490, sec. 2(c)(1); 5 C.F.R. § 2635.203(b). That definition excludes several items, such as certain modest refreshments, presentation items of little intrinsic value, benefits available to all Government employees, etc. 5 C.F.R. § 2635.203(b)(1)-(9). However, the prohibitions in the Pledge are more comprehensive and provide far fewer exceptions than the existing OGE rules. For example, an appointee may not accept a gift from a lobbyist or lobbying organization even if the donor is not a "prohibited source" and the gift is not given "because of the employee's official position." 5 C.F.R. § 2635.202(a).

The only exceptions to the lobbyist gift ban are ones that do not undermine the purpose of the lobbyist gift ban and are set out below:

- gifts based on a personal relationship, 5 C.F.R. § 2635.204(b);
- discounts and similar benefits, 5 C.F.R. § 2635.204(c);
- gifts resulting from a spouse's business or employment, 5 C.F.R. § 2635.204(e)(1);
- customary gifts/gratuities provided by a prospective employer, 5 CFR § 2635.204(e)(3);
- gifts to the President or Vice President, 5 C.F.R. § 2635.204(j);
- gifts authorized by an OGE-approved agency supplemental regulation, 5 C.F.R. § 2635.204(k); and
- gifts accepted under specific statutory authority, 5 C.F.R. § 2635.204(l).

Because the lobbyist gift ban is very broad, these common sense exceptions are necessary to avoid potentially absurd results. Thus, an appointee may accept a birthday present from his or her spouse who is a registered lobbyist or sign up for a training course sponsored by a registered lobbying organization that provides a discount for Federal Government employees. However, the following exceptions in the OGE gift regulations are not exceptions to the lobbyist gift ban:

- \$20 de minimis value, 5 C.F.R. § 2635.204(a);
- awards and honorary degrees, 5 CFR § 2635.204(d);



- gifts resulting from the employee's own outside business or employment, 5 C.F.R. § 2635.204(e)(2);
- gifts from political organizations in connection with political participation, 5 C.F.R. § 2635.204(f);
- widely attended gatherings (WAG), 5 C.F.R. § 2635.204(g)(2);<sup>3</sup>
- social invitations from non-prohibited sources, 5 C.F.R. § 2635.204(h); and
- food, refreshments and entertainment from persons other than a foreign government in a foreign area.<sup>4</sup>

This means, for example, an appointee may not accept a \$15 lunch from a registered lobbyist or go to a widely attended reception sponsored by a registered lobbying organization.

The Executive Order also expressly provides that the lobbyist gift ban covers gifts that are solicited or accepted "indirectly" within the meaning of section 2635.203(f). Executive Order 13490, sec. 2(c)(2). The OGE gift regulations define an indirect gift as including any gift to an employee's parent, sibling, spouse, child or dependent relative because of that person's relationship to the employee, provided that the employee knows of and acquiesces in the gift. § 2635.203(f)(1). In other words, the lobbyist gift ban cannot be circumvented by extending an invitation or benefit to an appointee's family. An indirect gift also includes any gift given to any other person, including a charitable organization, based on the employee's designation, recommendation or other specification. 5 C.F.R. § 2635.203(f)(2). Thus, for example, if a lobbying organization offered an appointee free tickets to a Broadway show, the appointee could not simply suggest that the tickets be given instead to his favorite charity or even to one of several charities whose names are provided by the appointee. *See* § 2635.203(f)(Example 1).

Finally, appointees will not be deemed to have accepted a gift in violation of the Pledge if the gift is disposed of as provided in 5 C.F.R. § 2635.205. Executive Order 13490, sec. 4(c)(3)(iv). As provided in the OGE gift regulation, proper disposition includes paying the donor the market value or returning a tangible item. In the case of perishable items that cannot

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<sup>3</sup> Appointees still may accept offers of free attendance on the day of an event when they are speaking or presenting information in an official capacity, as described in 5 C.F.R. § 2635.204(g)(1), notwithstanding the lobbyist gift ban. This is not a gift exception, but simply an application of the definition of "gift" in section 2635.203(b): "The employee's participation in the event on that day is viewed as a customary and necessary part of his performance of the assignment and does not involve a gift to him or to the agency." 5 C F R § 2635.204(g)(1).

<sup>4</sup> Note that the Pledge does not prohibit an appointee from accepting "[g]ifts from a foreign government or international or multinational organization, or its representative, when accepted by the employee under the authority of the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342." 5 C.F.R. § 2635.204(l)(2); *see* Executive Order 13490, sec. 2(c)(3). Whether, or under what circumstances, any of these entities referenced in the Foreign Gifts and Decorations Act could be a registered lobbyist or lobbying organization is beyond the scope of this Memorandum.

be returned, the appointee's supervisor or agency ethics official can determine that the gift will be given to an appropriate charity, shared within the appointee's office, or destroyed. Under section 2635.205(c), an appointee who promptly consults an agency ethics official to determine whether an unsolicited gift may be accepted, and promptly complies with that official's instructions, will not be deemed to have accepted a prohibited gift.<sup>5</sup> For example, if an appointee receives an unsolicited item, but is unsure whether the donor is registered under the Lobbying Disclosure Act (see discussion below), the appointee will not be in violation of the ban if he or she promptly contacts an agency ethics official to determine whether the gift may be accepted and follows the instructions of that official.

#### Other Permissible Gifts

Although the lobbyist gift ban is broad, it was not intended to prohibit certain gifts that do not implicate the purposes of the ban. Pending the issuance of final rules or procedures, appointees may rely on the following interim guidance, which OGE developed in consultation with the White House Counsel's Office, to accept certain gifts from 501(c)(3) organizations and media organizations.

Charitable and other not-for-profit organizations that are exempt from taxation under 26 U.S.C. § 501(c)(3) are already restricted as to the amount of lobbying in which they may engage. *See* 26 U.S.C. § 501(c)(3), (h). Consequently, the practices that the Executive Order and Pledge were intended to curb are already less implicated by 501(c)(3) organizations than by other entities that may employ lobbyists. Furthermore, any 501(c)(3) organizations that receive Federal funds are subject to limitations on the use of those funds to lobby for Federal contracts, grants, loans or cooperative agreements. *See* 31 U.S.C. § 1352. Given the kinds of purposes for which 501(c)(3) organizations are granted tax-exempt status (e.g., educational, charitable, scientific), there is little reason to prohibit employees from relying on the usual gift exceptions in the Standards of Conduct, many of which have particular relevance to the activities of such organizations. *See, e.g.,* 5 C.F.R. § 2635.204(g)(2)(permitting attendance at conferences and other widely attended events in the interest of the agency); § 2635.204(d)(permitting certain honorary degrees and awards). This judgment is analogous to policies reflected in the Federal Employees Training Act. *See* 5 U.S.C. § 4111 (permitting employees to accept certain items from 501(c)(3) organizations). Therefore, the gift ban will not apply to a gift from a 501(c)(3) organization, as long as the gift otherwise may be accepted under the Standards of Conduct. However, in keeping with the purposes of the ban, appointees still may not accept a gift if the organization employee who extends the offer is a registered lobbyist him- or herself.

Similar considerations are relevant to gifts from media organizations. The LDA itself reflects solicitude for the unique constitutional role of the press in gathering and disseminating

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<sup>5</sup> *See* OGE Informal Advisory Letter 06 x 4 (employee must take initiative to consult with ethics official and cannot wait until contacted, if ever, by an ethics official before disposing of gift properly).

information. *See* 2 U.S.C. § 1602(8)(B)(ii). Likewise, the lobbyist gift ban is not intended to erect unnecessary barriers to interaction between appointees and journalists. This is consistent with concerns about the application of the OGE gift prohibitions to certain press dinners shortly after the Standards of Conduct became effective. *See* Memorandum from the Counsel to the President to All Agency Heads, December 21, 1993 (suspending enforcement of gift rule with respect to press dinners, pending revision of rule). Therefore, an appointee may accept a gift from an employee of a media organization, as long as the gift is permissible under the OGE gift rules, including any applicable exceptions. The only proviso, as discussed above, is that appointees may not accept a gift if the organization employee who extends the offer is actually a registered lobbyist.

### Conclusion

OGE will continue to provide guidance on the lobbyist gift ban and other aspects of the Executive Order in the future. Ethics officials should consult with OGE if they have any questions concerning these matters.



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

February 23, 2009  
DO-09-008

MEMORANDUM

TO: Agency Heads and Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Authorizations Pursuant to Section 3 of Executive Order 13490, "Ethics Commitments by Executive Branch Personnel"

The purpose of this DAEOgram is to provide guidance to agency heads and Designated Agency Ethics Officials (DAEOs) on the application of section 3 of Executive Order 13490. As you know, section 1 of the Executive Order requires all covered appointees to abide by several commitments in an Ethics Pledge, unless they are granted a waiver under section 3. The Director of the Office of Management and Budget (OMB) has now designated the DAEO of each executive agency to exercise section 3 waiver authority in consultation with the Counsel to the President. This designation and the limitations on waiver authority are addressed below.

DAEOs are Now Designated to Exercise Waiver Authority in Consultation with White House Counsel

Section 3(a) of the Executive Order provides:

The Director of the Office of Management and Budget, or his or her designee, in consultation with the Counsel to the President or his or her designee, may grant to any current or former appointee a written waiver of any restrictions contained in the pledge signed by such appointee if, and to the extent that, the Director of the Office of Management and Budget, or his or her designee, certifies in writing (i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver.

The Director of OMB has, after consultation with Counsel to the President, determined that the most appropriate designee of his authority is the Designated Agency Ethics Official (DAEO) of each executive agency. This designation reflects the high degree of trust and confidence with which the experience and professional judgment of the DAEOs are viewed. The deep agency knowledge of the DAEOs was also an important factor in the Director's decision.

### Limitations on Exercise of Waiver Authority

**It is the President's intention that waivers will be granted sparingly and that their scope will be as limited as possible. All waivers must be in writing.** As specified in the Executive Order, a waiver may be granted only after consultation with the Counsel to the President and only upon the DAEO's certification either that the literal application of the restriction is inconsistent with the purposes of the restriction or that it is in the public interest to grant the waiver. Executive Order 13490, sec. 3(b). For the latter purpose, the public interest includes, but is not limited to, exigent circumstances relating to national security or the economy. Additionally, provisions in paragraph 3 of the Pledge, which pertains to appointees who have been registered lobbyists within two years of appointment, may be waived where the appointee's lobbying activities in connection with an agency, or on a particular matter, or in a specific issue area have been *de minimis*.

Finally, we wish to emphasize that the legal requirement under the Executive Order of advance consultation with the Counsel to the President remains and is to be strictly enforced. Norman Eisen, the Special Counsel to the President, is the point of contact in the Office of the Counsel to the President and can be reached at (202) 456-1214 or [neisen@who.eop.gov](mailto:neisen@who.eop.gov). To ensure that the consultation requirement is met, no waiver should ever be granted until the Special Counsel has provided a written acknowledgement affirmatively stating that the required consultation has occurred and is complete. Your OGE desk officers should also be consulted in advance with respect to all waiver issues.

### Conclusion

OGE will continue to publish additional guidance on the Pledge required by Executive Order 13490 as needed. Questions about the application of the Pledge should be referred to the OGE desk officer responsible for your agency.



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

March 16, 2009  
DO-09-010

## MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Who Must Sign the Ethics Pledge?

The Office of Government Ethics (OGE) has received numerous questions concerning which officials must sign the Ethics Pledge required under Executive Order 13490. Therefore, OGE is issuing this guidance to help agency ethics officials determine which officials are subject to the Pledge requirement.

### Definition of Appointee

Section 1 of the Executive Order states that "[e]very appointee in every executive agency appointed on or after January 20, 2009" shall sign the Ethics Pledge. Executive Order 13490, sec. 1, 74 Federal Register 4673 (January 26, 2009). The Order defines "appointee" as follows:

'Appointee' shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

*Id.*, sec. 2(b).

In broad terms, the Pledge was intended to apply to full-time "political" appointees of all types. Cf. OGE Informal Advisory Letter 04 x 10 ("when we identify a position as 'noncareer,' we are typically referring to a political appointment"). The term appointee generally includes, but is not limited to, all appointees to positions described as "covered noncareer" in 5 C.F.R. § 2636.303(a) and all full-time Presidential appointees subject to section 102 of Executive

Order 12371. However, the term is not limited by any salary thresholds, and it covers political employees appointed other than by the President. *See* DAEOgram DO-09-003.

In response to questions from several agencies, OGE wants to emphasize that the term appointee does not include every excepted service employee. Non-career is not synonymous with excepted service. *See* Detailed Explanation, Ethics Reform Act of 1989: Technical Amendments, 136 Cong. Rec. H 1646 (1990) (ethical limitations on "noncareer" appointees do not cover "for example, attorneys hired under Schedule A" of the excepted service). Rather, as the definition of appointee makes clear, the Pledge applies to appointees excepted from the competitive service "by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria)." Executive Order 13490, sec. 2(b); *see* 5 C.F.R. part 213, subpart C (excepted schedules). Again, the essentially political nature of a given appointment is the touchstone. *See* 04 x 10 (discussing the criteria for Schedule C and comparable appointments).

### **Categories of Officials**

OGE has received questions about the coverage of several categories of officials under the Pledge. These categories are discussed briefly below.

#### **1. Special Government Employees**

As explained in DAEOgram DO-09-005, special Government employees (SGEs) are not required to sign the Pledge. SGEs are described at 18 U.S.C. § 202(a), and for most purposes the term refers to employees who are expected to perform temporary duties on no more than 130 days during a period of 365 days. The definition of SGE and the process for determining who is an SGE are discussed in detail in various OGE documents. *E.g.*, OGE Advisory Memoranda 00 x 1; 01 x 2.

#### **2. Foreign Service and Similar Positions**

The definition of appointee excludes persons appointed as members of the Senior Foreign Service, but at the same time it includes "non-career" appointees in any "SES-type system." OGE elsewhere has determined that non-career Senior Foreign Service appointees are an example of what is meant by non-career members of an SES-type system. 5 C.F.R. § 2636.303(a)(2). The Executive Order carries forward this distinction and is intended to cover those Senior Foreign Service members who are considered non-career or political appointees, but not those who are deemed career officers. The same distinction applies with regard to any agency-specific or other categories of foreign service officials: those positions that are filled by political appointees are subject to the Pledge, whereas those positions that are not viewed as political are not subject to the Pledge. Likewise, this distinction will apply to Ambassadors: career Ambassadors (many of whom rotate through multiple Ambassadorial assignments and

other posts throughout their Government careers during successive administrations) will not be subject to the Pledge, but non-career or political Ambassador appointees must sign the Pledge.

### 3. Career Officials Appointed to Confidential Positions

OGE has received questions from several agencies about whether the Pledge applies to career staff who are appointed to serve as confidential assistants to Commissioners and other agency leaders. Some of these questions have come from independent agencies headed by a collegial body comprised of members with staggered, fixed terms. Apparently, it has been a regular practice at certain agencies to appoint regular career staff to serve in confidential positions with a given Commissioner, with the expectation that the confidential assistant will return to a career staff position at the end of the Commissioner's term or earlier. In consultation with the White House Counsel's Office, OGE has determined that the Pledge is not intended to apply to such employees, *provided* that the right of return to a career position is established by statute, regulation, or written agency personnel policy. Under such circumstances, a confidential "rotation" would be viewed as part of an established career pattern, and imposing the exacting requirements of the Pledge could create unintended disincentives for career employees to accept such rotations.

### 4. Career SES Members Given Presidential Appointments

The Pledge requirement does apply, however, to career SES members (or other career SES-equivalent employees) who are appointed to positions requiring Senate confirmation (PAS) or to other Presidentially-appointed positions (PA) that ordinarily are viewed as non-career. Career SES members may elect to retain certain benefits of career SES status, *see* 5 U.S.C. § 3392(c), and they also have certain reinstatement rights upon the completion of a separate Presidential appointment, *see* 5 C.F.R. § 317.703. However, PAS or PA appointments are of a different character and magnitude, and career SES members who accept such appointments become an important part of the political leadership in the administration. Therefore, they must sign the Pledge.

### 5. Schedule C Employees with No Policymaking Role

Certain Schedule C employees who have no policymaking role, such as chauffeurs and private secretaries, have been exempted from public financial disclosure requirements. *See* 5 U.S.C. app. § 101(f)(5); 5 C.F.R. § 2634.203(b). These positions have been excluded from public filing based on OGE's determination "that such exclusion would not affect adversely the integrity of the Government or the public's confidence in the integrity of the Government." 5 C.F.R. § 2634.203(a). For the same reasons, the Pledge is not intended to cover these individuals, *provided* that the agency has followed the procedures prescribed in section 2634.203(c). Apart from appointees under Schedule C and comparable authorities, the same result obtains with respect to employees, appointed under 3 U.S.C. §§ 105-108, who have similar non-policymaking duties, as determined by the White House Counsel's Office.



#### 6. Acting Officials and Detailees

The Pledge requirement does not apply to career officials who are acting temporarily in the absence of an appointee to a non-career position. This includes career officials acting in the absence of a Senate-confirmed Presidential appointee under the Vacancies Reform Act, 5 U.S.C. § 3345 *et seq.* Similarly, a career appointee who is temporarily detailed to a position normally occupied by a non-career appointee is not subject to the Pledge. *Cf.* 68 Federal Register 7844, 7848 (February 18, 2003)(employees detailed to a senior employee position do not become senior employees under 18 U.S.C. § 207(c)).

#### 7. Holdover Appointees

On its face, the Pledge requirement does not apply to individuals appointed prior to January 20, 2009, and the administration will not for 100 days ask anyone held over to complete the Pledge. The administration has not yet determined whether it will extend that 100 day grace period or at what point it will ask holdovers to complete the Pledge. Please bear in mind that in some cases the new administration may ask a holdover to remain in the position, not merely as a caretaker until some other choice for the position can be appointed, but as the President's choice for that position. In the latter situations, the appointees will be asked to sign the Pledge when they agree to remain even though there is not a new appointment.

#### 8. Term Appointees

Presidential appointees to positions with a fixed term of office typically are non-career appointees, even if they are removable only for cause as specified by statute. *See* OGE Informal Advisory Letter 89 x 16. Therefore, non-career term appointees are subject to the Pledge if they are full-time and were appointed on or after January 20, 2009.

Term appointees appointed prior to January 20, 2009 are not required to sign the Pledge. As a practical matter, however, agency ethics officials should counsel such individuals to follow the Pledge to the extent feasible, particularly paragraphs 1, 2, 3 and 6 of the Pledge. Doing so will help to prevent the confusion and questions that could result if these appointees, especially those in visible positions, do not abide by the same gift, recusal, and hiring rules that apply to fellow appointees at the same agency.

A term appointee whose term has expired, but who is permitted by statute to holdover for some period of time, is not subject to the Pledge, provided the appointment preceded January 20, 2009. Where the President has nominated such a term appointee for reappointment for an additional term, the individual must sign the Pledge after Senate Confirmation but prior to reappointment. *See* DAEOgram DO-09-005. Again, as described in the previous paragraph, such term appointees should be counseled to follow the Pledge where practicable.

**Conclusion**

Given the great variety of appointment authorities in the executive branch, it is not possible for OGE to address every possible category of appointee in this Memorandum. OGE, in consultation with the White House Counsel's Office, can assist agency ethics officials as necessary in addressing any questions on a case-by-case basis.

**OFFICE OF GOVERNMENT ETHICS**

**04 x 10**

**Letter to a Deputy Ethics Official  
dated July 20, 2004**

This is in response to your letter of May 28, 2004, in which you requested our opinion as to whether the Executive Director of [your agency] is a "covered noncareer employee" as defined in 5 C.F.R. § 2636.303(a).

In your letter, in which you provided background on the roles and responsibilities of [your agency's Board] and the Executive Director, you indicated that [your agency's Board] consists of five part-time Presidentially appointed members who oversee the agency. This Board appoints an Executive Director to serve as the full-time chief executive of the agency. The Executive Director is responsible for carrying out the policies established by your agency's Board, [administering specific agency programs], and issuing regulations. While the Executive Director is charged with the day-to-day operations of the agency, your agency's Board can order the Executive Director to take a specific action. The Executive Director can serve in the position indefinitely, unless removed from office by your agency's Board for good cause.

The definition of covered noncareer employee in section 2636 focuses on both the employee's pay rate and type of appointment. For purposes of pay, a covered noncareer employee is an employee for whom the rate of basic pay is equal to or greater than 120 percent of the minimum rate of pay payable for GS-15 of the General Schedule, which is currently \$104,927. The Executive Director is paid at the rate of level III of the Executive Schedule, which is currently \$145,600, and thus meets the pay criteria under section 2636.303(a).

For purposes of type of appointment, the regulations at sections 2636.303(a)(1) - 2636.303(a)(4) specify under which appointment authorities employees will be considered covered noncareer employees. You have asked if the Executive Director would be a "covered noncareer employee" under either of two provisions in that regulation, specifically section 2636.303(a)(3), if he were appointed to his position "under an agency-specific statute that establishes appointment criteria essentially the same as those set forth in

section 213.3301 of this title for Schedule C positions;" or section 2636.303(a)(4) if he were appointed to his position under appointment criteria "essentially the same as those for noncareer executive assignment positions."

With regard to section 2636.303(a)(3) you have indicated that the Executive Director position is not a Schedule C position, but question whether he may have been appointed "under criteria essentially the same as that set forth in section 213.3301 of this title for Schedule C positions." The criteria at section 213.3301 focus on positions that are policy-determining or involve a close and confidential working relationship with key appointed officials. After consulting with the Office of Personnel Management, we conclude that the Executive Director is not appointed under criteria similar to a Schedule C position. Since the Executive Director's duties, as stated at 5 U.S.C. § 8474(b)(1), include carrying out the policies that are established by the Board, he does not appear to occupy a policy-determining position. The criteria for determining whether a position involves a close and confidential working relationship with key appointed officials, focuses on whether the individual is appointed by the President, or someone else who is appointed by the President, and whether the individual may be removed from office at the will of the appointing official. As you state in your letter, the agency's Presidentially-appointed Board appoints the Executive Director, who may be removed from office for good cause, 5 U.S.C. § 8472(g)(1)(C). Therefore, while the Executive Director is appointed in a manner consistent with a Schedule C appointment, the conditions for his removal are not the same as the "at will" conditions for removal of a Schedule C appointee.

With regard to section 2636.303(a)(4), we note first that the executive assignment system was abolished by the Federal Employees Pay Comparability Act of 1990 and replaced by the Senior Level system. However, we can still examine the appointment criteria to determine whether the Executive Director position would fall under section 2636.303(a)(4). Former regulations at 5 C.F.R. § 305.601(b) set forth three criteria to consider when determining whether a noncareer executive assignment could be made. These criteria, which include being deeply involved in the advocacy of Administration programs and support of their controversial aspects; participating significantly in the determination of major political policies of the Administration; or serving principally as personal assistant to or advisor of a Presidential appointee or other key figure, do not appear applicable to the Executive Director

position. Moreover, former section 305.601(c) indicated that a position does not qualify to be filled by noncareer executive assignment if its principal responsibility is the internal management of an agency, or if it involves long-standing recognized professional duties and responsibilities resting on a body of knowledge essentially politically neutral in nature. The Executive Director position appears to meet both these factors since he is responsible for the day-to-day operations of the agency and management of [a specific agency program] in accordance with the policies established by the Board.

In addition, when we identify a position as "noncareer," we are typically referring to a political appointment. In this case, while your Executive Director is appointed by the Presidentially-appointed Board, the position is for an indefinite period, not subject to political changes in Administrations. Also, you have indicated through telephone discussions that the Executive Director position demonstrates some characteristics similar to a career employee, such as the accrual of leave and participation in the Federal Employees Retirement System.

Therefore, we conclude that the Executive Director would not be a noncareer employee covered under either of the provisions in section 2636.303(a) about which you inquired. However, we still caution that given the Executive Director's role in your agency, he should remain particularly mindful of 5 C.F.R. §§ 2635.801 - 2635.808 regarding outside activities.

We hope this has been helpful.

Sincerely,

Marilyn L. Glynn  
Acting Director



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

March 26, 2009  
DO-09-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Ethics Pledge: Revolving Door Ban--All Appointees Entering Government

Executive Order 13490 requires any covered "appointee" to sign an Ethics Pledge that includes several commitments. 74 Fed. Reg. 4673 (January 26, 2009). OGE Memorandum DO-09-003 explains the definition of appointee, describes the commitments included in the Pledge, and provides a Pledge Form to be used for appointees.<sup>1</sup> The purpose of the present memorandum is to advise ethics officials on how to implement paragraph 2 of the Pledge, "Revolving Door Ban--All Appointees Entering Government."

Paragraph 2 of the Pledge requires an appointee to commit that he or she will not, for a period of two years following appointment, participate in any particular matter involving specific parties that is directly and substantially related to his or her former employer or former clients, including regulations and contracts. Exec. Order No. 13490 sec. 1(2). To help agencies implement this requirement, OGE is providing the following explanation of the phrases that comprise paragraph 2 of the Pledge and of how paragraph 2 interacts with existing impartiality regulations.

**Understanding the Meaning of the Terms that Comprise Paragraph 2 of the Pledge**

*"Particular matter involving specific parties"*

In order to determine whether an appointee's activities concern any particular matters involving specific parties, ethics officials must follow the definition of that phrase found in section 2(h) of the Executive Order. That definition incorporates the longstanding interpretation of particular matter involving specific parties reflected in 5 C.F.R. § 2641.201(h). However, it also expands the scope of the term to include any meeting or other communication with a former employer or former client relating to the performance of the appointee's official duties, unless

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<sup>1</sup> <https://www.oge.gov/Web/oge.nsf/Resources/DO-09-003:+Executive+Order+13490,+Ethics+Pledge>.

the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. The purpose of this expansion of the traditional definition is to address concerns that former employers and clients may appear to have privileged access, which they may exploit to influence an appointee out of the public view.<sup>2</sup>

The expanded party matter definition has a two-part exception for communications with an appointee's former employer or client, if the communication is: (1) about a particular matter of general applicability and (2) is made at a meeting or other event at which participation is open to all interested parties. Although the exception refers to particular matters of general applicability, it also is intended to cover communications and meetings regarding policies that do not constitute particular matters. An appointee may participate in communications and meetings with a former employer or client about these particular or non-particular matters if the meeting or event is "open to all interested parties." Exec. Order No. 13490 sec. 2(h). Because meeting spaces are typically limited, and time and other practical considerations also may constrain the size of meetings, common sense demands that reasonable limits be placed on what it means to be "open to all interested parties." Such meetings do not have to be open to every comer, but should include a multiplicity of parties. For example, if an agency is holding a meeting with five or more stakeholders regarding a given policy or piece of legislation, an appointee could attend such a meeting even if one of the stakeholders is a former employer or former client; such circumstances do not raise the concerns about special access at which the Executive Order is directed. Additionally, the Pledge is not intended to preclude an appointee from participating in rulemaking under section 553 of the Administrative Procedure Act simply because a former employer or client may have submitted written comments in response to a public notice of proposed rulemaking.<sup>3</sup> In any event, agency ethics officials will have to exercise judgment in determining whether a specific forum qualifies as a meeting or other event that is "open to all interested parties," and OGE is prepared to assist with this analysis.

*"Particular matter involving specific parties...including regulations"*

Because regulations often are cited as examples of particular matters that do not involve specific parties, OGE wants to emphasize that the phrase is not intended to suggest that all rulemakings are covered. Rather, the phrase is intended to serve as a reminder that regulations sometimes may be particular matters involving specific parties, although in rare circumstances. As OGE has observed in connection with 18 U.S.C. § 207, certain rulemakings may be so focused on the rights of specifically identified parties as to be considered a particular matter

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<sup>2</sup> Note, however, that the expanded definition of party matter is not intended to interfere with the ability of appointees to consult with experts at educational institutions and "think tanks" on general policy matters, at least where those entities do not have a financial interest, as opposed to an academic or ideological interest. See Office of Legal Counsel Memorandum, "Financial Interests of Nonprofit Organizations," January 11, 2006 (distinguishing between financial interests and advocacy interests of nonprofits), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v030-p0064.pdf>; cf. 5 C.F.R. § 2635.502(b)(1)(v)(Note)(OGE impartiality rule does not require recusal because of employee's political, religious or moral views).

<sup>3</sup> For other reasons discussed below, however, rulemaking sometimes may constitute a particular matter involving specific parties, albeit rarely

involving specific parties.<sup>4</sup> Such rulemakings likewise are covered by paragraph 2.

*“Directly and substantially related to”*

The phrase “directly and substantially related to,” as defined in section 2(k) of the Executive Order, means only that the former employer or client is a party or represents a party to the matter. Ethics officials should be familiar with this concept from 5 C.F.R. § 2635.502(a).

*“Former employer or former client”*

In order to determine who qualifies as an appointee’s former employer or former client, ethics officials must follow the definitions of each phrase found in section 2(i) and 2(j), respectively, of the Executive Order. In effect, the Executive Order splits the treatment of former employer found in the impartiality regulations into two discrete categories, “former employer” and “former client,” and removes contractor from the definition of either term. See 5 C.F.R. §§ 2635.502(b)(1)(iv), 2635.503(b)(2).

Former Employer

For purposes of the Pledge, a former employer is any person for whom the appointee has, within the two years prior to the date of his or her appointment, served as an employee, officer, director, trustee, or general partner, unless that person is an agency or entity of the Federal Government, a state or local government, the District of Columbia, a Native American tribe, or any United States territory or possession. Exec. Order No. 13490, sec. 2(i). While the terms employee, officer, director, trustee, or general partner generally follow existing ethics laws and guidance, OGE has received questions about the scope of the exclusion for government entities from the definition of former employer, specifically with regard to public colleges and universities. The exclusion for state or local government entities does extend to a state or local college or university.<sup>5</sup>

OGE also has received several questions about whether the definition of former employer includes nonprofit organizations. Consistent with the interpretation of similar terms in other ethics rules and statutes, the definition of former employer in the Executive Order covers

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<sup>4</sup> See, e.g., 73 Fed. Reg. 36168, 36176 (June 25, 2008); see also OGE Informal Advisory Letter 96 x 7, n.1.

<sup>5</sup> See OGE Informal Advisory Opinion 93 x 29 n.1 where OGE held that for purposes of applying the supplementation of salary restrictions in 18 U.S.C. § 209, the exception for payments from the treasury of any state, county, or municipality included a state university. OGE cautions, however, that the exclusion for state and local entities may not extend to all entities affiliated with a state or local college or university. OGE notes that some colleges and universities may create mixed public/private entities in partnership with commercial enterprises. Such entities should not automatically be considered as falling within the exclusion, but rather should be examined on a case-by-case basis to determine whether they should be viewed as instrumentalities of state or local government for the purposes of the Executive Order.



nonprofit organizations.<sup>6</sup> Moreover, it includes nonprofit organizations in which an appointee served without compensation, provided of course that the appointee actually served as an employee, officer, director, trustee, or general partner of the organization. Thus, for example, the recusal obligations of Pledge paragraph 2 would apply to an appointee who had served without pay on the board of directors or trustees of a charity, provided that the position involved the fiduciary duties normally associated with directors and trustees under state nonprofit organization law. This does not include, however, purely honorific positions, such as "honorary trustee" of a nonprofit organization. It also does not include unpaid positions as a member of an advisory board or committee of a nonprofit organization, unless the position involved fiduciary duties of the kind exercised by officers, directors or trustees, or involved sufficient supervision by the organization to create a common law employee-employer relationship (which is not typical, in OGE's experience).

#### Former Client

For purposes of the Pledge, a former client means any person for whom the appointee served personally as an agent, attorney, or consultant within two years prior to date of appointment. Exec. Order No. 13490 sec. 2(j). A former client does not include a client of the appointee's former employer to whom the appointee did not personally provide services. Therefore, although an appointee's former law firm provided legal services to a corporation, the corporation is not a former client of the appointee for purposes of the Pledge if the appointee did not personally render legal services to the corporation. Moreover, based on discussions with the White House Counsel's office, OGE has determined that the definition of former client is intended to exclude the same governmental entities as those excluded from the definition of former employer. Thus, for example, an appointee who had provided legal services to the Department of Energy would not be prohibited from participating personally in particular matters in which the Department is a party.

In addition, the term former client includes nonprofit organizations. However, a former client relationship is not created by service to a nonprofit organization in which an appointee participated solely as an unpaid advisory committee or advisory board member with no fiduciary duties. Although a former client includes any person whom the appointee served as a "consultant," OGE has not construed the term consultant, as used in analogous provisions of the Ethics in Government Act and the Standards of Ethical Conduct, to include unpaid, non-fiduciary advisory committee members of a nonprofit organization. See 5 U.S.C. app. § 102(a)(6)(A)(disclosure of consultant positions); 5 C.F.R. § 2635.502(b)(1)(iv)(covered relationship as former consultant). Likewise, former client does not include a nonprofit organization in which an appointee served solely in an honorific capacity.

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<sup>6</sup> For similar reasons, Federally-funded research and development centers (FFRDCs), whether nonprofit or for profit, are intended to be included in the definitions of former employer and former client for purposes of paragraph 2 of the Pledge.

The definition of former client specifically excludes “instances where the service provided was limited to a speech or similar appearance.” Exec. Order No. 13490, sec. 2(j). In addition to excluding all activities that consist merely of speaking engagements, this provision is intended to exclude other kinds of discrete, short-term engagements, including certain de minimis consulting activities. Essentially, the Pledge is not intended to require a two-year recusal based on activities so insubstantial that they are not likely to engender the kind of lingering affinity and mixed loyalties at which the Executive Order is directed. The exclusion for speaking and similar engagements was added to emphasize that the provision focuses on services that involved a significant working relationship with a former client. Therefore, the exclusion is not limited to speeches and speech-like activities (such as serving on a seminar panel or discussion forum), but includes other activities that similarly involve a brief, one-time service with little or no ongoing attachment or obligation. In order to determine whether any services were de minimis, ethics officials will need to consider the totality of the circumstances, including the following factors:

- the amount of time devoted;
- the presence or absence of an ongoing contractual relationship or agreement;
- the nature of the services (e.g., whether they involved any representational services or other fiduciary duties); and
- the nature of compensation (e.g., one-time fee versus a retainer fee).

For example, the recusal obligation of Pledge paragraph 2 would not apply to an appointee who had provided consulting services on a technical or scientific issue, for three hours on a single day, pursuant to an informal oral agreement, with no representational or fiduciary relationship.<sup>7</sup> On the other hand, an appointee who had an ongoing contractual relationship to provide similar services as needed over the course of several months would be covered. In closer cases, OGE believes ethics officials should err on the side of coverage, with the understanding that waivers, under section 3 of the Order, remain an option in appropriate cases.

### **The Relationship of Paragraph 2 of the Pledge to the Existing Impartiality Regulations**

Paragraph 2 of the Pledge is not merely an extension of the existing impartiality requirements of subpart E of the Standards of Ethical Conduct, although in some circumstances the restrictions of the Pledge and the existing impartiality restrictions could align. The effect of any overlap is that all of the relevant restrictions apply to the appointee and should be acknowledged in the appointee’s ethics agreement and considered when granting a waiver or authorization under either set of restrictions.

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<sup>7</sup> Note that appointees still will have a covered relationship for one year after they provided any consulting services, under the OGE impartiality rule, 5 C.F.R. § 2635.502(b)(1)(iv). Therefore, the OGE rule may require an appointee to recuse from certain matters (or obtain an authorization, as appropriate), even if the Pledge does not extend the recusal for an additional year. Indeed, the presence of the OGE rule as a “fall-back” was a factor in the decision to exclude certain de minimis consulting services from the Pledge in the first place.

*Paragraph 2 of the Pledge and Impartiality Regulations Differ and Overlap*

An appointee's commitments under paragraph 2 of the Pledge both overlap and diverge from the existing impartiality regulations in important ways depending upon the facts of each appointee's circumstances. The following highlights some of the key areas in which paragraph 2 of the Pledge and the existing impartiality restrictions differ. In addition, OGE has developed a chart as a quick reference tool to identify the key differences among the existing impartiality regulations and paragraph 2 of the Pledge. *See Attachment 1.*

Paragraph 2 of the Pledge is at once more expansive and more limited than the existing impartiality restrictions found at 5 C.F.R. §§ 2635.502, 2635.503. For example, an appointee is subject to impartiality restrictions based on his covered relationships with a much broader array of persons<sup>8</sup> than to the restrictions of paragraph 2, which are limited to the appointee's former employer and former clients. Thus, for instance, if the appointee has served as a contractor, but not in any of the roles described in the definitions of former employer or former client in the Executive Order, then the appointee may have recusal obligations under 5 C.F.R. §§ 2635.502 and 2635.503, but not under Pledge paragraph 2. Conversely, Pledge paragraph 2 is more expansive than the definition of covered relationship in section 2635.502 because the Pledge provision looks back two years to define a former employer or former client and it imposes a two-year recusal obligation after appointment, both of which are considerably broader than the one-year focus of section 2635.502(b)(1)(iv). Pledge paragraph 2 also is more expansive in that the recusal obligation may apply to certain communications and meetings that do not constitute particular matters involving specific parties as that phrase is used in sections 2635.502 and 2635.503.<sup>9</sup>

On the subject of recusal periods alone, ethics officials will need to be especially attentive to the possible variations, as it may be possible for as many as three periods to overlap. For example, an appointee could have: a one-year recusal, under 5 C.F.R. § 2635.502, from the date she last served a former employer; a two-year recusal, under section 2635.503, from the date she received an extraordinary payment from that same former employer; and a two-year recusal with respect to that former employer, under Pledge paragraph 2, from the date of her appointment.

*Specific Recusals under Paragraph 2 of the Pledge are Not Required to be Memorialized in an Appointee's Ethics Agreement.*

Executive Order 13490 does not require recusals under paragraph 2 of the Pledge to be addressed specifically in an appointee's ethics agreement, unlike recusals under paragraph 3 of

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<sup>8</sup> See definition of "covered relationship" at 5 C.F.R. § 2635.502(b)(1).

<sup>9</sup> Compare Exec. Order No. 13490, sec. 2(h)(definition broader than post-employment regulation); with 5 C.F.R. § 2635.502(b)(3)(defining particular matter involving specific parties solely by reference to post-employment regulations).

the Pledge. *See* Exec. Order No. 13490 sec. 4(a).<sup>10</sup> However, if an appointee will have a written ethics agreement addressing other commitments, OGE requires that the following language be inserted in that written ethics agreement in order to ensure that the appointee is aware of her commitments and restrictions under both her ethics agreement and the Pledge.

Finally, I understand that as an appointee I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this and any other ethics agreement.

Written ethics agreements will continue to address section 2635.502 and 2635.503 issues separately using the model provisions from OGE's "Guide to Drafting Ethics Agreements for PAS Nominees." Thus, regardless of paragraph 2 of the Pledge, the one-year "covered relationship" under the OGE impartiality rule remains in effect and may require an appointee to recuse from certain matters, even if the Pledge does not extend the recusal for an additional year. *See* 5 C.F.R. § 2635.502(b)(1)(iv).

#### *The Pledge and Impartiality Regulations Waiver Provisions*

Designated Agency Ethics Officials have been designated to exercise the waiver authority for the Ethics Pledge, under section 3 of Executive Order 13490, in addition to their existing role in the issuance of impartiality waivers and authorizations. DAEOgram DO-09-008; 5 C.F.R. §§ 2635.502(d), 2635.503(c). Generally, it is expected that waivers of the various requirements of the Pledge will be granted sparingly. *See* OGE DAEOgram DO-09-008. Although paragraph 2 clearly adds new limits on the revolving door, those limits are not intended to bar the use of qualified appointees who have relevant private sector experience in their fields of expertise. Therefore, at least where the lobbyist restrictions of paragraph 3 of the Pledge are not implicated, OGE expects that DAEOs will exercise the waiver authority for paragraph 2 in a manner that reasonably meets the needs of their agencies. In this regard, DAEOs already have significant experience in determining whether authorizations under 5 C.F.R. § 2635.502(d) are justified, and DAEOs should use similar good judgment in decisions about whether to waive paragraph 2 of the Pledge. Of course, any such waiver decisions still must be made in consultation with the Counsel to the President. Exec. Order No. 13490, sec. 3. Additional details on the standards for issuing a waiver of provisions of Pledge paragraph 2, as well as on issues related to the interaction of the waiver provisions of the impartiality regulations and relevant paragraphs of the Pledge, are reserved for future guidance.

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<sup>10</sup> An ethics agreement is defined as "any oral or written promise by a reporting individual to undertake specific actions in order to alleviate an actual or apparent conflict of interest," such as recusal from participation in a particular matter, divestiture of a financial interest, resignation from a position, or procurement of a waiver. 5 C.F.R. § 2634.802.

## ATTACHMENT 1

OGE developed the following table as a quick reference tool to highlight the main differences between paragraph 2 of the Pledge and existing impartiality regulations. It is not intended to be a substitute for thorough analysis, but we hope you find it useful.

		<b>5 C.F.R. § 2635.502</b>	<b>5 C.F.R. § 2635.503</b>	<b>Paragraph 2 of the Pledge</b>
<b>Relationship:</b>	Former Employer	Any person which the employee served, within the last year, as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; no exclusion for governmental entities (other than Federal)	Any person which the employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; no exclusion for governmental entities (other than Federal)	Two years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner; contractor and consultant omitted from list (although consultant added below under former client); is not a former employer if governmental entity
	Former Client	Clients of attorney, agent, consultant, or contractor covered same way as former employer, under 5 C.F.R. § 2635.502(b)(1)(iv)	Clients of attorney, agent, consultant, or contractor covered same way as former employer, under 5 C.F.R. § 2635.503(b)(2)	Two years prior to date of appointment served as an agent, attorney, or consultant. Is not former client if: <ul style="list-style-type: none"> <li>• Only provided speech/similar appearance (including de minimis consulting)</li> <li>• Only provided contracting services other than as agent, attorney, or consultant</li> <li>• Served governmental entity</li> </ul>
	Business and Personal/ Covered Relationship	In addition to former employers/ clients discussed above, includes various <u>current</u> business and personal relationships, as listed in 5 C.F.R. § 2635.502(b)(1)	No equivalent concept	No equivalent concept
<b>Prohibition:</b>	May not participate in particular matter involving specific parties if:	Reasonable person with knowledge of facts would question impartiality	Extraordinary payment from former employer	Includes communication by former employer or former client unless matter of general applicability or non-particular matter and open to all interested parties
<b>Length of recusal:</b>		1 year from the end of service	2 years from date of receipt of payment	2 years from date of appointment



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

April 28, 2009  
DO-09-014

MEMORANDUM

TO: Agency Heads and Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Holdover Appointees and the Ethics Pledge

We have received numerous questions regarding whether appointees temporarily holding over from the previous Administration pending the appointment of a successor need to sign the Ethics Pledge promulgated by Executive Order 13490 of January 21, 2009. We previously advised that holdover appointees would be given a 100-day grace period before being required to sign the pledge. As you know, April 29<sup>th</sup> will be the 100<sup>th</sup> day of the Administration. Accordingly, if you have not done so already, please ask all your holdover appointees to sign the ethics pledge within the coming days. The pledge form may be found at:

<https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-003:+Executive+Order+13490,+Ethics+Pledge>

Persons who are not prepared to sign the pledge should transition out within 30 days, by May 29<sup>th</sup>.

Please note that limited extensions of the deadline may be granted in situations where a holdover declines to sign and his or her continued service is determined by the head of the agency to be mission critical and essential for continuity. In those instances, DAEOs should submit a written extension request to the Special Counsel to the President for Ethics and Government Reform explaining why the requesting holdover meets those criteria. Limited extensions may be granted to address those concerns in an appropriate manner that both respects the circumstances of the individual appointee's current status as well as the President's commitment to the principles contained in the ethics pledge. No mission critical holdover appointee should be asked to leave until this consultation has taken place.



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

May 26, 2009  
DO-09-020

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Ethics Pledge Issues: Speeches and Pledge Paragraph 2; Intergovernmental  
Personnel Act Detailees

The Office of Government Ethics (OGE) continues to work with the White House Counsel's Office to identify and answer various questions concerning Executive Order 13490 and the Ethics Pledge for non-career appointees. OGE thought it would be useful to advise agency ethics officials of the resolution of two questions that recently arose at several agencies. The first question concerns how to apply paragraph 2 of the Pledge to an appointee who gives an official speech at an event sponsored by a former employer or client. The second question is whether the Pledge applies to non-Federal personnel detailed to an agency under the Intergovernmental Personnel Act. The answers to these questions are set out below.

Speeches and the Effect of Pledge Paragraph 2

OGE and the White House have received numerous questions about whether paragraph 2 of the Ethics Pledge prohibits an appointee from giving an official speech at an event sponsored by a former employer or client. Paragraph 2 prohibits appointees from participating, for two years after their appointment, in any particular matter involving specific parties that is directly and substantially related to a former employer or client. (Paragraph 2 is discussed in more detail in DO-09-011, [https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-011:+Revolving+Door+Ban+of+the+Ethics+Pledge+\(Ban+on+All+Appointees+Entering+Government\)](https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-011:+Revolving+Door+Ban+of+the+Ethics+Pledge+(Ban+on+All+Appointees+Entering+Government)).) With regard to speeches and presentations made in an official capacity OGE, in consultation with the White House Counsel's Office, has determined that the Pledge is not intended to prohibit an appointee from participating in an official speech unless the speech would have a demonstrable financial effect on the former employer or client.<sup>1</sup>

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<sup>1</sup> It is important to note that the Pledge does not apply to speeches given in an appointee's personal capacity. Presentations given in one's personal capacity may be subject to other ethics provisions, including 5 C.F.R. § 2635.807, 5 C.F.R. § 2635.808(c), and 5 C.F.R. part 2636.

By way of background, OGE has addressed the application of 18 U.S.C. § 208 and 5 C.F.R. § 2635.502 to official speeches on several occasions. *See, e.g.*, OGE Informal Advisory Letters 98 x 14; 96 x 2; 94 x 14. For purposes of section 208, OGE generally has viewed the decision to give an official speech as a particular matter. 96 x 2 (Ed. Note); *cf.* OGE, *Report to the President and to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment* 8 (January 2006)(application of 18 U.S.C. § 205 to request for Government speaker). An employee is prohibited from giving an official speech to an organization whose interests are imputed to the employee under section 208, if the speech would have a direct and predictable effect on the organization's financial interest. In OGE's experience, usually the sponsor of an event will have a financial interest in an official speech only if an admission fee is charged, the event is a fundraiser, or the event is some kind of business development activity (such as a seminar for current or prospective clients).

For purposes of 5 C.F.R. § 2635.502, OGE also generally has viewed the decision to give an official speech as a particular matter involving the event sponsor as a specific party. OGE 98 x 14; OGE 94 x 14. If an employee has a covered relationship with the sponsor--for example, the sponsor is a former employer under section 2635.502(b)(1)(iv)--the employee should not participate in an official speech if a reasonable person would question his or her impartiality, absent an authorization under section 2635.502(d). OGE 94 x 14. Nevertheless, OGE certainly is aware of cases in which agencies have determined either that the circumstances surrounding the speech really did not raise any reasonable impartiality concerns or that any such concerns were outweighed by the need for the employee's services. *See* 5 C.F.R. § 2635.502(c), (d). In such cases, agency ethics officials often still will emphasize that the employee should not use the same organization as a preferred forum for repeated speeches when other comparable forums are available.

Pledge paragraph 2, of course, is similar in many respects to section 2635.502, including the focus on particular matters involving specific parties. *See* DO-09-011. Consistent with how speeches have been treated for purposes of 18 U.S.C. § 208 and 5 C.F.R. § 2635.502, the Pledge was not intended to sweep every official speech to a former employer or client under the bar of Pledge paragraph 2. The Executive order elsewhere recognizes that making a speech does not necessarily reflect a close affinity with the event sponsor. *See* Exec. Order 13490, sec. 2(j)(definition of former client excludes services limited to speech or similar appearance). While paragraph 2 does not include the same "reasonable person" clause as section 2635.502, the Pledge provision was not intended to bar speeches that do not implicate the underlying concerns about special access to Government decisionmakers who can bestow regulatory and financial benefits on former associates. *Cf. U.S. v. Sun-Diamond Growers*, 526 U.S. 398, 407 (1999)(dicta)(official speech to farmers about USDA policy should not be viewed as official act implicating illegal gratuities statute). In many cases, the sponsor will have an academic or policy interest in the subject matter of the speech but no direct pecuniary interest in hosting the speech itself.

This does not mean that paragraph 2 is wholly inapplicable to official speeches. Where the decision to give an official speech actually would affect the financial interests of the sponsor,



the concerns under the Pledge about special access are relevant. Thus, if the former employer or client charges an admission fee or organizes the event for the purpose of fundraising or business development, the appointee will be barred from giving an official speech, absent a waiver under section 3 of the Executive Order. Even where Pledge paragraph 2 is inapplicable, ethics officials are reminded to analyze any official speaking engagements under 18 U.S.C. § 208 and 5 C.F.R. § 2635.502, as discussed above.

Detailees under the Intergovernmental Personnel Act Are Not Subject to the Pledge

Several agencies have asked whether detailees under the Intergovernmental Personnel Act (IPA) are required to sign the Pledge. The short answer is no.

The IPA provides for the temporary assignment of personnel from certain non-Federal entities to Federal agencies. 5 U.S.C. § 3372; *see generally* DO-06-031, [https://www.oge.gov/Web/OGE.nsf/Resources/DO-06-031:+Intergovernmental+Personnel+Act+\(IPA\)+Summary](https://www.oge.gov/Web/OGE.nsf/Resources/DO-06-031:+Intergovernmental+Personnel+Act+(IPA)+Summary). The IPA clearly distinguishes between those who actually are appointed by an agency and those who are merely detailed from a non-Federal entity to an agency. 5 U.S.C. § 3374(a)(1),(2). IPA detailees from academia, State and local government, and non-profit entities may serve in executive branch agencies for two years with the possibility of a two year extension. While working in the executive branch, detailees remain employed by their institution or organization and return to their employer when the detail is over. Simply put, IPA detailees are not appointees at all. Therefore, they are not subject to the Pledge, which applies to "every *appointee* in every executive agency *appointed* on or after January 20, 2009." Exec. Order 13490, sec. 1 (emphasis added); *see also id.*, sec. 2(b).

This analysis would not apply to any personnel who actually receive an appointment under the IPA. However, as a general matter, OGE rarely encounters questions about IPA appointees. Agency ethics officials should contact OGE if they have any question about whether a particular IPA appointee should be considered a non-career appointee subject to the Pledge. *See generally* DO-09-010 (discussing criteria for appointments subject to Pledge).



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

February 18, 2010  
DO-10-003

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Attendance by Staff Accompanying Official Speakers

In OGE DAEOgram DO-09-007 dated February 11, 2009, the United States Office of Government Ethics (OGE) addressed implementation of the lobbyist gift ban imposed by section 1 of Executive Order 13490.<sup>1</sup> The lobbyist gift ban is one part of the President's efforts to curb undue influence by special interests, but as stated in that DAEOgram, the lobbyist gift ban was not intended to prohibit Executive Branch officials from communicating official views to audiences comprised in part of registered lobbyists or at events that may be sponsored by organizations that employ registered lobbyists. Such events may have a registration fee or include a luncheon. Consequently, DAEOgram DO-09-007 concluded in part:

Appointees still may accept offers of free attendance on the day of an event when they are speaking or presenting information in an official capacity, as described in 5 C.F.R. § 2635.204(g)(1), notwithstanding the lobbyist gift ban. This is not a gift exception, but simply an application of the definition of "gift" in section 2635.203(b).

In short, free attendance for official Executive Branch speakers in such circumstances, consistent with long-standing rules, falls outside the meaning of "gift." It has come to OGE's attention that there may be some inconsistencies in how agency ethics officials are applying these rules with regard to employees who must accompany official agency speakers to such events. The purpose of this memorandum is to provide guidance on such personnel, who have no speaking role themselves but may provide essential support to an official speaker.

The OGE gift rules have always been clear on the treatment of free attendance for official speakers at an outside event. Employees may accept offers of free attendance on the day of an event when they are speaking or presenting information in an official capacity, notwithstanding the gift restrictions in 5 C.F.R. § 2635.202(a). The rationale is that "the employee's participation in the event on that day is viewed as a customary and necessary part of his performance of the assignment and does not involve a gift to him or to the agency." 5 C.F.R. § 2635.204(g)(1).

This guidance also applies to agency personnel whose presence at the event is deemed essential under agency procedures to the speaker's participation at the event. Examples could include members of security details, a representative of the agency's public affairs division, or an aide to assist with a presentation. The number and types of personnel necessary, if any, to the speaker's participation will vary depending upon who the speaker is and the nature of the event. There are obviously different considerations for the Secretary of Defense addressing several thousand people at a convention center as compared to a Federal Communications Commissioner speaking to a luncheon attended by several dozen communications lawyers. OGE does not view having essential personnel either remain outside the room where the event is taking place or refraining from food that is offered with the event as necessary to comply with the gift rules. Such an interpretation would not only be impractical to enforce, but it would ignore the reality that some aspects of attendance may be difficult or impossible to avoid. See 5 C.F.R. § 2635.204(g)(4) (definition of free attendance includes more than food).

It must be emphasized, however, that this is not an expansion of the categories of persons who may attend such events free of charge. Rather, it is recognition that attendance by particular personnel whose presence is truly essential to the performance of the speaker's official duties at a specific event does not violate either OGE's long-standing gift rules or the Executive Order 13490 lobbyist gift ban.

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<sup>1</sup> See <https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-007:+Lobbyist+Gift+Ban+Guidance>.



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1201 New York Avenue, NW., Suite 500  
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February 22, 2010  
DO-10-004

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Post-Employment Under the Ethics Pledge: FAQs

As you know, non-career appointees appointed on or after January 20, 2009, must sign an Ethics Pledge that contains a number of commitments. Exec. Order 13490, sec. 1. Several of these commitments pertain to the conduct of appointees while they are still in Government, but two of the commitments concern post-employment activities. Specifically, paragraphs 4 and 5 of the Pledge impose significant new post-employment restrictions on appointees. Paragraph 4 largely tracks the provisions of 18 U.S.C. § 207(c), with which most ethics officials are familiar. Paragraph 5, by contrast, introduces a number of concepts derived from the Lobbying Disclosure Act (LDA), with which ethics officials may be less familiar.

The Office of Government Ethics (OGE) has received questions about both paragraphs 4 and 5 of the Pledge. Therefore, OGE has compiled the following list of frequently asked questions and answers about these new post-employment restrictions. As always, OGE is ready to assist agency ethics officials with any other questions about the post-employment provisions or any other requirements of the Pledge.

**A. Paragraph 4: Post-Employment Cooling-Off Period**

Paragraph 4 of the Pledge provides:

If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.

**1. What is the relationship between paragraph 4 of the Pledge and 18 U.S.C. § 207(c)?**

For the most part, paragraph 4 of the Pledge extends the cooling-off period from one to two years for appointees who are senior employees under 18 U.S.C. § 207(c). The Pledge does not extend criminal penalties to conduct beyond the one-year period in section 207(c)--which only Congress can do--but the Executive Order does specify other enforcement mechanisms, including civil proceedings and agency debarment, for violations of the two-year restriction of paragraph 4. See Exec. Order 13490, sec. 5. (Note, however, that the trigger for the two-year period under paragraph 4 might not always coincide with the one-year cooling-off period of section 207(c), as illustrated in the answer to Question 6 below.)

**2. Which appointees are subject to the two-year restriction of paragraph 4?**

Like the existing restriction in 18 U.S.C. § 207(c), paragraph 4 of the Pledge is intended to cover any appointees who are "senior employees," which reflects the judgment that it is appropriate to impose a two-year cooling-off period on higher level appointees who are likely to have the most influence within their agencies. The categories of senior employees are described in 18 U.S.C. § 207(c)(2) and 5 C.F.R. § 2641.104. The restriction of paragraph 4 applies if the appointee is restricted by section 207(c) at the time of his or her departure from Government.

*Example: A non-career Senior Executive Service appointee, whose rate of basic pay meets the salary threshold for being a senior employee, leaves the Department of Energy to work for a private law firm. Sixteen months later, she is asked to represent a disappointed bidder in a bid protest suit against the Department in the Court of Federal Claims. Paragraph 4 of the Pledge would prohibit her from doing so. However, if she had only been a GS-14, Schedule C appointee, she could engage in this representation without violating paragraph 4 of the Pledge because she would never have been a senior employee under 18 U.S.C. § 207(c). Nevertheless, if she had participated personally and substantially as an employee in the contract award that led to the bid protest, she would be permanently prohibited from representing any other person in the matter, under 18 U.S.C. § 207(a)(1).*

**3. How does paragraph 4 affect "very senior employees?"**

Very senior employees, as described in 18 U.S.C. § 207(d)(1) and 5 C.F.R. § 2641.104, are not covered by 18 U.S.C. § 207(c), and therefore they are not subject to the two-year restriction in paragraph 4 of the Pledge. However, these very senior employees are already subject to a similar two-year cooling-off period under section 207(d) itself (as well as additional restrictions on contacting Executive Schedule officials even in agencies in which they did not serve).

**4. Which officials may not be contacted under paragraph 4 of the Pledge?**

Unlike paragraph 5 of the Pledge (discussed below), which augments the requirements of 18 U.S.C. § 207(c), paragraph 4 in this respect tracks 18 U.S.C. § 207(c), which bars representational contacts with any official of any agency in which a senior employee served in any capacity during the one-year period prior to terminating from a senior position. The scope of 18 U.S.C. § 207(c) is explained at length in OGE's post-employment regulations. See 5 C.F.R. § 2641.204.

**5. If post-employment activities are permitted by an exception to 18 U.S.C. § 207(c), are they likewise permitted under paragraph 4 of the Pledge?**

Yes. Paragraph 4 of the Pledge incorporates the exceptions and other provisions applicable to 18 U.S.C. § 207(c), as well as the relevant OGE post-employment regulations in 5 C.F.R. part 2641. See Exec. Order 13490, sec. 2(m).

*Example: An appointee leaves his senior position at the Department of Justice to become an employee of the State of New York. He wants to represent New York in a meeting with DOJ officials in a meeting about drug enforcement policy. This activity is permissible under 18 U.S.C. § 207, because it falls within the exception at 18 U.S.C. § 207(j)(2)(A) for carrying out official duties as an employee of a state or local government. Therefore, the activity also is permissible under paragraph 4 of the Pledge. However, if the former appointee does not actually become an employee of the State, but simply provides consulting or legal services as a contractor, he may not rely on this exception. See 5 C.F.R. § 2641.301(c)(2) and Example 3.*

**6. How does paragraph 4 of the Pledge apply to non-career appointees who later are appointed or reinstated to career positions?**

The two-year period specified in paragraph 4 runs from the end of the appointee's non-career appointment, not from the end of any separate career appointment the individual may have. In other words, the two-year clock begins to run as soon as a non-career appointee moves to a position that is not subject to the Pledge. (By contrast, the one-year cooling-off period of 18 U.S.C. § 207(c) commences when an individual ceases to be a senior employee, whether career or non-career. 5 C.F.R. § 2641.204(c).) Of course, in most cases, non-career appointees will leave Government when their non-career service is concluded.

*Example: A career member of the SES is given a non-career Presidential appointment, at which time she signs the Ethics Pledge. After the conclusion of her Presidential appointment, she is reinstated as a career SES appointee, pursuant to 5 C.F.R. § 317.703. After serving five more*

*years in a career SES position, she retires from Government. Although she is a senior employee subject to 18 U.S.C. § 207(c) when she retires, she is not restricted by paragraph 4 of the Pledge because more than two years already have elapsed since the end of her non-career appointment.*

**B. Paragraph 5: Post-Employment Lobbying Ban**

Paragraph 5 of the Pledge provides:

In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

**1. What is the relationship of the lobbying ban in paragraph 5 to the post-employment restrictions in paragraph 4 of the Pledge or 18 U.S.C. § 207?**

The restrictions of paragraph 5 are in addition to the restrictions of paragraph 4, 18 U.S.C. § 207, or any other provision of law (e.g., the Procurement Integrity Act, 41 U.S.C. § 423(d)).

**2. Does the lobbying ban in paragraph 5 apply to appointees who are not "senior employees?"**

Yes. The lobbying ban applies to all appointees who sign the Pledge, unlike the restriction in paragraph 4. Note, however, that certain Schedule C and other appointees are not required to sign the Pledge, i.e., those with no policymaking duties (such as chauffeurs and secretaries) who have been exempted for that reason from public financial disclosure requirements. See DO-09-010, [http://www.usoge.gov/ethics\\_guidance/daeograms/dgr\\_files/2009/do09010.pdf](http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2009/do09010.pdf).

*Example: A non-career SES appointee is paid below the basic pay threshold to be considered a senior employee, under 18 U.S.C. § 207(c)(2)(A)(ii). Although he is not subject to the two-year restriction in paragraph 4 of the Pledge, he is subject to the lobbying ban in paragraph 5.*

**3. Does the lobbying ban extend beyond the agency where the former appointee served?**

Yes. Paragraph 5, unlike paragraph 4 or 18 U.S.C. § 207(c), restricts a former appointee from lobbying certain officials throughout the entire Executive Branch, not just officials of the agency where the former appointee actually served. (What it means to "lobby," including the concepts of "lobbying contact" and "acting as a registered lobbyist," is discussed in questions 6 through 10 below.)

*Example: A former appointee at the Department of Transportation may not, as a registered lobbyist, make a lobbying contact with the Secretary of Health and Human Services. This would be prohibited even though she never served at HHS in any capacity and the subject matter of the lobbying is unrelated to her former Government position.*

#### **4. Which officials may not be contacted by former appointees under paragraph 5?**

The ban extends to lobbying contacts with specified Executive Branch personnel. The officials who may not be contacted are: any "covered executive branch official," defined in the LDA as the President, the Vice President, any official in the Executive Office of the President, any Executive Schedule official (EL I-V), any uniformed officer at pay grade 0-7 or above, and any Schedule C employee, 2 U.S.C. § 1602(3); and any non-career SES member, even though the latter are not covered under the LDA definition. For purposes of simplicity, the discussion below will refer to all Executive Branch officials who may not be contacted as "covered officials." Paragraph 5 of the Pledge does not prohibit former appointees from contacting other Executive Branch personnel besides these covered officials. Nor does it prohibit former appointees from contacting "covered legislative branch officials," within the meaning of the LDA, 2 U.S.C. § 1602(4).

*Example: A former appointee of the Environmental Protection Agency has become a registered lobbyist. She may not, on behalf of one of her lobbying clients, contact a non-career SES official at the Department of Agriculture. However, she may contact a career SES official at the Department, and she also may contact Legislative Branch officials.*

#### **5. How long does the lobbying ban last?**

The ban lasts for the "remainder of the Administration." This means the duration of all terms of the President who was in office at the time the appointee received an appointment covered by the Executive Order. Executive Order 13490, sec. 2(o)(definition of "Administration"). In some cases, holdover officials appointed during a prior Administration have signed the Pledge as a condition of continued employment. Such holdover officials are bound by their commitment under paragraph 5 for the same duration as appointees who actually were appointed during the current Administration.

#### **6. What does it mean to "lobby?"**

For purposes of the Pledge, to lobby is "to act . . . as a registered lobbyist." Exec. Order 13490, sec. 2(f). A registered lobbyist, in turn, is a person listed in required filings as a lobbyist for a particular client by a registrant under the LDA, 2 U.S.C. § 1603(a), because of the person's actual or anticipated lobbying activities and contacts. Executive Order 13490, sec. 2(e); see 2 U.S.C. §§ 1602(10)(definition of lobbyist). **In a nutshell: if a former appointee is a registered**



**lobbyist for a particular client, he or she is prohibited by paragraph 5 of the Pledge from making any lobbying contact with a covered official on behalf of that client.** The LDA definition of lobbying contact is broad, including oral or written communications made on behalf of a client with regard to Federal legislation (such as legislative proposals), executive branch programs and policies (such as rulemaking or contracts), and the nomination/confirmation of persons for PAS positions. 2 U.S.C. § 1602(8)(A). However, the definition also enumerates certain exceptions, which should be consulted to determine if a former appointee would be engaging in prohibited lobbying under the Pledge. 2 U.S.C. § 1602(8)(B).

*Example: An appointee recently left the Treasury Department to join XYZ Associates, a consulting firm. The firm is helping one of its clients to obtain Federal funding to develop an innovative telecommunications security product. XYZ Associates is registered for this client under the LDA, and it listed the former appointee as one of three lobbyists in its latest quarterly report of lobbying activity filed under the LDA. Under paragraph 5 of the Pledge, the former appointee may not meet with the Secretary of Homeland Security to seek support for funding of the client's research.*

*Example: An appointee leaves Government to become Chancellor of a large university. In her new job, she has occasion to make contacts with various covered officials about a range of issues of concern to her university, such as education policy, taxation, and Federal grants. The university itself is registered under the LDA, because it employs an in-house lobbyist in its governmental affairs office and it meets the monetary threshold for registration under 2 U.S.C. § 1603(a)(3)(A)(ii). However, the university has never listed its Chancellor as a lobbyist and is not required to do so under the LDA, because the Chancellor's lobbying contacts and other lobbying activities constitute a small fraction (far less than 20%) of the total time she devotes to university services during any 3-month period. See 2 U.S.C. § 1602(10)(definition of lobbyist). Therefore, the former appointee does not act as a registered lobbyist when she contacts the covered officials, and she does not violate paragraph 5 of the Pledge.*

**7. How does a former appointee know if she would be making a lobbying contact "as a registered lobbyist"?**

The most obvious way that a former appointee would know if she is acting as a registered lobbyist is if she is already listed as a lobbyist in a registration statement (LD-1 form) or quarterly report (LD-2 form), based on actual or expected lobbying for a particular client. These forms are filed by the lobbyist's employer with the Secretary of the Senate and the Clerk of the House. Additionally, even if the former appointee is not already listed as a lobbyist in an LDA filing, she will be acting as a registered lobbyist if she is engaging in lobbying that is expected to be reported in a subsequent LDA filing that will list her as a lobbyist. This interpretation recognizes that permitting former appointees a "grace period" during which they may freely

lobby covered officials, when they reasonably anticipate reporting those activities in a subsequent LDA filing, would be inconsistent with the purposes of the Pledge.

*Example: A former appointee has been retained by a client expressly for the purpose of making several lobbying contacts, and the former appointee's employer has determined that the LDA registration requirement has been triggered, under 2 U.S.C. § 1603(a). However, the employer has until 45 days after the former appointee is retained to file the initial registration statement that would list the individual as a lobbyist. 2 U.S.C. § 1603(a)(1). If the former appointee makes any lobbying contact with a covered official during that 45 day period, she will be deemed to have acted as a registered lobbyist during that time period, for purposes of the Pledge. This is because the registration statement that is eventually filed will list this individual "as an employee of the registrant who has acted . . . as a lobbyist on behalf the client." 2 U.S.C. § 1603(b)(6)(emphasis added).*

**8. Does this mean that ethics officials have to opine about what circumstances will trigger registration under the LDA?**

Ethics officials will need some familiarity with the LDA registration system in order to counsel appointees about their post-employment activities under paragraph 5 of the Pledge. However, neither OGE nor DAEOs can give definitive advice about LDA registration requirements. Appointees and former appointees should be advised to consult with their prospective employers and/or private counsel about whether their anticipated activities will trigger registration and reporting requirements under the LDA. Former appointees and their employers also may contact the Secretary of the Senate and the Clerk of the House of Representatives for guidance concerning registration and reporting requirements.

**9. Are there any circumstances under which a former appointee may become a registered lobbyist?**

There are relatively narrow circumstances in which a former appointee may become a registered lobbyist. Paragraph 5 of the Pledge is intended to minimize the potential for unfair advantage or undue influence resulting from an appointee's service in the Executive Branch. Consequently, for the remainder of the Administration, a former appointee cannot become a registered lobbyist if this will involve making any lobbying contact with a covered official in the Executive Branch. However, the Pledge does not restrict former appointees from registering and making contacts with Legislative Branch officials, as this would not implicate the same concerns about exploiting the access and influence obtained as a result of prior Executive Branch service.

*Example: A former Commerce Department appointee is retained by a utility company to lobby on a legislative proposal to create tax incentives for installing new emissions control technology. After being retained, the former appointee is*

*listed as a lobbyist in an LDA registration statement for this activity. As long as he makes no lobbying contacts with covered officials in the Executive Branch on behalf of this client and confines all his lobbying contacts to Legislative Branch officials, he will not violate paragraph 5 of the Pledge.*

***Example:** In the scenario above, the client asks the former appointee to attend a meeting with the Assistant Secretary for Tax Policy at the Treasury Department to discuss how the legislative proposal would be consistent with the Administration's agenda. He may not do so, because this would be a prohibited lobbying contact with a covered official in the Executive Branch.*

**10. If a former appointee is registered as a lobbyist on behalf of one client, is he prohibited from making contacts on behalf of another client for which he is not required to register?**

No. The registration and quarterly reporting requirements of the LDA are client-specific, as is the definition of "lobbyist." See 2 U.S.C. §§ 1603(a)(2)(single registration for each client); 1604(a)(separate quarterly report for each client); 1602(10)(lobbyist is individual employed or retained by client for certain amount of lobbying contacts and activities on behalf of that client). Therefore, a former appointee does not "lobby" a covered official, in violation of paragraph 5 of the Pledge, unless he does so on behalf of a specific client for which he is a registered lobbyist.

***Example:** A former appointee works for a law firm that does some lobbying. His firm has registered him as a lobbyist for Blue Corporation, a client which he represents in lobbying contacts with Legislative Branch officials. He also has another client, Green Corporation, for which he has provided only non-lobbying services. Green Corporation now asks him to make a lobbying contact with the Department of Transportation. His firm decides it will not be necessary to register him for Green Corporation. (The firm might determine, for example, that he does not meet the definition of lobbyist for Green Corporation, under 2 U.S.C. § 1602(10), or that the firm itself does not meet the monetary threshold to register for Green Corporation, under 2 U.S.C. § 1603(a)(3)(A)(i).) He would be prohibited, however, from making even a single lobbying contact with DOT on behalf of Blue Corporation, because he is a registered lobbyist for Blue Corporation, even though his other lobbying contacts for that client have been exclusively with the Legislative Branch.*

**11. Is there any exception to the requirements of paragraph 5 for former appointees who signed the Pledge but served only a brief time in the Administration?**

Neither paragraph 5 nor any other part of the Executive Order makes any exception for appointees who signed the Pledge but served only a short time.