

WAIVER OF EXECUTIVE ORDER 13770 FOR
SENATE CONFIRMED PRESIDENTIAL EMPLOYEES
OF THE DEPARTMENT OF ENERGY
IN NUCLEAR-RELATED POSITIONS

In accordance with Section 3 of Executive Order 13770 (January 28, 2017) (the "Executive Order") and after consultation with the Office of the White House Counsel, and for the reasons stated below, I hereby submit that it is in the public interest to grant Senate Confirmed Presidential Appointees (PAS) of the Department of Energy (DOE), in nuclear-related positions, waivers of the Ethics Pledge restriction set forth in Section 1, Paragraph 6, of the Executive Order, to enable them to effectively carry out their duties as Senate Confirmed Presidential Appointees of the Department of Energy. Absent this waiver, these PAS appointees would be restricted from participating in matters of importance to the Department of Energy, namely: Maintaining and enhancing the safety, security, and effectiveness of the U.S. nuclear weapons stockpile without nuclear explosive testing; reducing the global danger from weapons of mass destruction; providing the U.S. Navy with safe and effective nuclear propulsion; and responding to nuclear and radiological emergencies in the U.S. and abroad.

The Ethics Pledge provides that a political appointee will not, for a period of two years from the date of appointment, participate in any particular matter involving specific parties that is directly and substantially related to his or her former employer or former clients. E.O., Sec. 1.6. The Standards of Ethical Conduct for Employees of the Executive Branch also generally require recusal from participation in particular matters with specific parties in which an entity that the federal employee served as an employee or attorney within the last year is or represents a party (5 C.F.R. § 2635.502), unless an authorization is granted pursuant to 5 C.F.R. § 2635.502(d).

BACKGROUND

DOE plays a central role in our nation's nuclear science programs. DOE is responsible for enhancing national security through the military application of nuclear science. DOE maintains and enhances the safety, security, and effectiveness of the U.S. nuclear weapons stockpile without nuclear explosive testing; works to reduce the global danger from weapons of mass destruction; provides the U.S. Navy with safe and effective nuclear propulsion; and responds to nuclear and radiological emergencies in the U.S. and abroad. DOE advances nuclear power as a resource capable of making major contributions in meeting our Nation's energy supply. DOE also manages the largest environmental cleanup program in the world. This cleanup mission includes some of the world's most dangerous radioactive sites with large amounts of radioactive waste, spent nuclear fuel, excess plutonium and uranium, thousands of contaminated facilities, and contaminated soil and groundwater.

Much of the work performed by DOE in these nuclear-related areas is performed by DOE contractors, including those that manage and operate DOE's seventeen national laboratories and other DOE facilities. Many of these contractors are limited liability corporations or similar organizations that were created for the sole purpose of performing work under a specific DOE contract. Because this work is highly specialized, there are only a handful of companies and

universities that perform significant work in these areas. These companies and universities often team in different combinations to perform this work. The individual entities that make up these entities and their other subsidiaries are hereafter referred to as "related entities."

Furthermore, because DOE's nuclear-related missions are truly unique, the pool of potential candidates for these nuclear-related positions will either be longstanding Federal employees, long-time DOE contractor employees, or former Federal employees who then performed work for DOE contractors in nuclear-related fields. Therefore, it is reasonably anticipated that nominees in these specific fields will inherently enter government service with certain conflicts of interest which must be addressed in order to effectively execute their official government duties.

ANALYSIS

A substantial portion of DOE's mission is carried out by its contractors, and managing DOE's nuclear-related mission therefore requires constant collaboration with DOE's contractors. DOE's PAS appointees will be expected to meet and communicate with these contractors. DOE's PAS appointees will also be expected to direct meetings and communications with Departmental personnel and representatives of these contractors and entities related to the contractors, including their parent entities. Moreover, to effectively perform their duties, DOE's PAS appointees will also be personally and substantially involved in other particular matters involving these contractors, their parent entities, and related entities, such as making decisions about DOE's operating strategies and mission that could affect their former employers, clients or related entities. As described more fully below, their participation in contract matters associated with former employers, clients or related entities will be structured in a manner as to not raise any question regarding their ability to remain impartial, or whether they are providing preferential treatment to a former employer, client or related entities.

It is relevant to note that the previous Administration's ethics pledge that was contained in Executive Order 13490 had a provision that was identical to Paragraph 6 of the Executive Order. Of the 66 appointees during the previous Administration who received waivers of the provision that is the counterpart to Paragraph 6 of the Executive Order, five were DOE appointees.¹ All of these appointees were PAS appointees or individuals who would be acting in a vacant PAS position with responsibilities in DOE's nuclear-related areas and needed waivers because of their relationships with prior employers or clients who performed work in nuclear-related fields.

Allowing PAS appointees in nuclear-related positions to interact with contractors in this highly-specialized area would not undermine the purpose of the Executive Order to protect the public trust and ensure the integrity of government operations. There is virtually no possibility that the PAS appointee's involvement would contravene the intent or purpose of the Ethics

¹ U.S. Office of Government Ethics at:

<https://www.oge.gov/Web/OGE.nsf/Executive%20Branch%20Agency%20Ethics%20Pledge%20Waivers?openview>

Pledge, as the areas in which the DOE's appointed officials could interact with contractors would be sharply delineated, as indicated below.

SCOPE OF THE WAIVER

PAS appointees at DOE who perform nuclear-related functions are permitted to work on the following matters in the course of their nuclear-related official duties, unless specifically excluded elsewhere in this waiver, even if they constitute particular matters involving specific parties directly and substantially related to their former employers, clients, or related entities, as defined in section 2 of Executive Order 13770:

- Communications with employees of former employers, clients and related entities in the course of briefings involving a broad group of DOE contractors;
- Meetings and communications with employees of former employers, clients and related entities concerning nuclear-related work and policies affecting DOE, such as responding to questions regarding the Department's National Laboratories and contractor-operated facilities;
- Participation in the management and performance of program activities and operations carried out in support of DOE's nuclear-related activities;
- Participation in any and all decision making and policy functions, including providing programmatic direction across the DOE nuclear-related enterprise and budgetary matters; and
- Receiving informational briefings from DOE employees regarding non-procurement matters that are not covered by this waiver when the information contained in the briefing is needed by the employee to inform their actions that are allowed by this waiver.

The waiver does not permit these PAS appointees to work on the following matters:

- Particular matters that directly and predictably affect their financial interests, as defined in 18 U.S.C. § 208, unless a waiver pursuant to § 208(b)(1) has been issued;
- Particular matters involving specific parties that are subject to the restrictions of 5 C.F.R. § 2635.502, unless an authorization pursuant to § 2635.502(d) has been issued;
- Fee determinations or awards to former employers, clients or related entities;
- Participation in any procurement activities (including contract competitions, re-competitions or extensions of an existing contract, or contract disputes) that involve former employers, clients or related entities;

- Negotiations and decisions specifically affecting any former employers, clients or related entities' financial arrangements with DOE (e.g., cooperative agreements, grants, strategic partnership projects, personnel matters requiring additional financial commitments, etc.);
- Budgetary matters unique to former employers, clients or related entities; or
- Participation in matters that would uniquely and significantly affect the commercial competitive standing of former employers, clients, or related entities.

This waiver does not apply to any PAS appointee who was a registered lobbyist within the two years prior to his or her confirmation. It also does not cover any PAS appointee who has triggered the need for a waiver because of work he or she performed as an attorney. Moreover, the DOE Designated Agency Ethics Official, in consultation with this office, may add additional restrictions to the waiver --any such additional restrictions will be made public by DOE. In addition, the nomination paperwork for DOE PAS appointees who are covered by this waiver specified that they were seeking a waiver of paragraph 6 of the ethics pledge contained in Executive Order 13770. For those DOE PAS nominees that are nominated after the date of this waiver, their nomination paperwork will specifically state that they will be covered by the terms of this waiver.

CONCLUSION

There is significant public interest in allowing PAS appointees at DOE who perform nuclear-related functions to interact with former employers, clients and related entities. Without a waiver, the PAS appointees would be precluded from handling matters of importance to the Department of Energy, in a highly specific field requiring specific technical training. Barring such senior officials from taking part in such work would have a negative impact on DOE's ability to adequately represent the interests of the United States. The appointees in this limited group would provide much-needed guidance while protecting the public trust in political appointees.

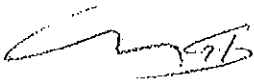
For this reason, the Designated Agency Ethics Official for the Department of Energy has determined that it is in the public interest to grant PAS appointees of DOE, who perform nuclear-related functions, a waiver of the Ethics Pledge restriction set forth in Section 1, paragraph 6, of the Executive Order to enable them to effectively carry out their duties as Senate Confirmed Presidential Appointees. Pursuant to Executive Order 13770, Section 3, the Department of Energy respectfully requests such a waiver from the President or his designee.

Office of White House Counsel Waiver Certification

Pursuant to Executive Order 13770, Section 3, and as the President's designee authorized to grant such a waiver, it is in the public interest to grant a waiver of Section 1, paragraph 6 of the Executive Order to Senate Confirmed Presidential Appointees (PAS) of the Department of Energy (DOE), in nuclear-related positions, as it pertains to particular matters related to nuclear energy and materials, involving specific parties that are directly and substantially related to former employers, clients or related entities, as defined in Executive Order 13770. I have determined that this waiver is required to enable them to effectively carry out their duties as Senate Confirmed Presidential Appointees. Absent this waiver, Senate Confirmed Presidential Appointees would be restricted for two years, beginning with their appointment date, from participating in any particular matter involving nuclear energy and materials that is directly and substantially related to former employers, clients or related entities. The role of Senate Confirmed Presidential Appointees is at the center of the DOE's important work involving nuclear energy and materials, and is significant enough to be handled by senior DOE officials with relevant expertise. In authorizing this waiver, I have considered that it would be highly impractical for other DOE employees to perform the PAS appointees' duties of handling all meetings, communications, and other matters involving such entities in this critical area. Moreover, these PAS appointees perform key roles in protecting our National Security, and they must be capable of participating in particular matters involving all entities and corporations that work within DOE's nuclear-related mission. This carefully delineated waiver will significantly promote and protect the public interest by enabling Senate Confirmed Presidential Appointees of DOE to carry out the responsibilities of their office in this particular specialized area.

This waiver will not extend to other matters involving DOE Senate Confirmed Presidential Appointees' former employers, clients or related entities. This waiver does not otherwise affect DOE Senate Confirmed Presidential Appointees' obligations to comply with all other pre-existing government ethics rules, other provisions of the Executive Order, or the other commitments they made in their Ethics Agreement.

6 April 2018
Date



Donald F. McGahn II
White House Counsel