



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

March 24, 2017

ACTION MEMORANDUM

TO: DONALD F. MCGAHN
WHITE HOUSE COUNSEL

FROM: Rochelle F. Granat *RF*
Assistant General Counsel for General Law, Ethics and
Regulation and Designated Agency Ethics Official

SUBJECT: Waiver of Ethics Pledge Paragraph 6 for Brian Callanan

RECOMMENDATION

That you approve a narrow waiver of paragraph 6 of the Ethics Pledge, out of an abundance of caution, so that Brian Callanan, the Department of the Treasury's Deputy General Counsel, may participate fully in policy matters related to housing finance reform even if an issue arises that might impact pending litigation in which his former employer represents one of several plaintiffs.

Mr. Callanan has no financial interest in this matter and had no involvement whatsoever in the representation. Mr. Callanan will continue to refrain, however, from participation in the management of the litigation, including refraining from any communication with his former employer concerning this matter.

DFM Approve _____ Disapprove _____ Let's Discuss _____

BACKGROUND

Executive Order 13770, "Ethics Commitments by Executive Branch Appointees," (EO) requires all Presidential appointees to sign an Ethics Pledge that, among other things, prohibits them from working on particular matters involving specific parties directly and substantially related to a former employer or client for a period of two years. Section 3 of the EO permits the President or his designee to grant a waiver of any restrictions contained in this pledge.

From January 12, 2017, to March 8, 2017, Mr. Callanan was a partner at Cooper & Kirk PLLC. On March 9, 2017, Mr. Callanan was appointed to the non-career position of Deputy General Counsel. Notwithstanding his brief tenure at Cooper & Kirk, pursuant to paragraph 6 of the Ethics Pledge, for two years from the date of his appointment he would not be able to participate in matters involving Cooper & Kirk. The firm represents Fairholme Funds in pending litigation against the Department and the Federal Housing Finance Agency (FHFA) challenging an aspect of the conservator agreements Treasury and FHFA entered into with Fannie Mae and Freddie Mac (hereinafter, "GSE litigation"). Fairholme is one of several plaintiffs challenging the

variable net worth dividend under the agreements. Mr. Callanan did no work related to the GSE litigation while he was at Cooper & Kirk.

Currently, Mr. Callanan is the only non-career appointee in the Office of General Counsel (OGC). By virtue of having been appointed to the position of Deputy General Counsel, he currently also serves as Acting General Counsel pursuant to 31 U.S.C. § 301(f)(1). I recognize that it is critical that a non-career OGC official be able to participate fully in sensitive housing finance reform policy discussions. Some of these discussions could at some point touch upon issues that might impact the litigation. I independently determined that to avoid any possible future impediment to Mr. Callanan's ability to provide appropriate advice to the Secretary and others on the important matter of housing finance reform, and out of an abundance of caution, a waiver is necessary and appropriate. Even with the waiver, Mr. Callanan will continue to refrain from participation in management of the litigation, including refraining from any communication with his former employer concerning this matter.

ANALYSIS

Paragraph 6 of the Ethics Pledge provides in pertinent part:

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 client.

Section 2(d) of the Executive Order defines "directly and substantially related to my former employer" as "matters in which the appointee's former employer . . . is a party or represents a party." The GSE litigation is such a matter. The development of policy options for housing finance reform is not such a matter. Nevertheless, consideration of certain policy options could evolve into discussion of litigation strategy or the implication of the options for the plaintiffs. This possibility could implicate paragraph 6 of the Ethics Pledge.

A waiver of the Pledge to allow Mr. Callanan to participate in this policy matter without impediment (but not to extend to matters involving management of the GSE litigation) is warranted for the reasons discussed below.

Mr. Callanan served briefly as a partner at the firm of Cooper & Kirk. While at the firm, he did not participate in any matters related to Fairholme or the GSE litigation. Immediately prior to joining the firm, he served as Staff Director and General Counsel for the Senate Permanent Subcommittee on Investigations, having joined the Subcommittee in February 2017.⁵

It will be disruptive and impractical for Mr. Callanan to participate in some but not all aspects of this important policy matter. As discussions of housing finance reform options proceed, it will be increasingly difficult to readily anticipate when deliberations might evolve into consideration of the litigation. Absent Mr. Callanan's ability to participate in this policy matter, there will be no non-career legal input into this sensitive high priority matter. As a result, the Secretary and other policy officials will be deprived of his advice and counsel on this matter; career staff in the Office of General Counsel will be deprived of his guidance and supervision on this matter. There

is no other non-career official in the Office of the General Counsel to whom this responsibility could be assigned. Given the nature of his brief tenure at the firm, a reasonable person with knowledge of the facts would not question his impartiality if he were to participate.

I have determined that a waiver is therefore appropriate because: (1) it is in the Department's and public's interest; (2) it will be impossible for Mr. Callanan to fully perform the duties of his position if he had to recuse from aspects of the housing finance reform policy discussions; and (3) Mr. Callanan's full participation in this matter will have no impact on his financial interests.

CONCLUSION

Based on the above analysis, a waiver of paragraph 6 of the Ethics Pledge so that Mr. Callanan may participate fully in housing finance reform matters, is necessary and appropriate. The waiver record should note that Mr. Callanan will continue to refrain from participation in management of the litigation, including refraining from any communication with his former employer concerning this matter.