



United States
Office of Government Ethics
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November 4, 2014
LA-14-06

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Flexibility in Ensuring and Documenting Compliance with Ethics Agreements

An ethics agreement helps to set clear expectations regarding the obligation of an official in a Presidentially-appointed, Senate-confirmed (PAS) position to avoid conflicts of interest, as well as the steps the official will take to remain conflict-free, including recusal, resignation and divestiture.¹ *See* OGE DO-01-013. With an eye toward facilitating a more effective and flexible system, this advisory explains and expands the options available to ethics officials for ensuring and documenting compliance with PAS officials' ethics agreements. This advisory also clarifies the discretion ethics officials have in determining whether screening arrangements are necessary to implement PAS officials' recusal obligations. This expanded discretion does not, however, include the discretion to modify an ethics agreement once it has been reviewed by the U.S. Office of Government Ethics ("OGE"), signed by the PAS official and provided to the Senate.²

Timing for Ethics Agreement Compliance and the Role of Ethics Officials

Maximum flexibility in ethics agreement implementation and documentation can be realized when ethics officials are actively engaged in educating PAS officials regarding their ethical obligations and encouraging prompt compliance with ethics agreement commitments. Unless otherwise specified in the ethics agreement, a PAS official must comply with his or her ethics agreement within 90 calendar days from the date of Senate confirmation. *See* 5 C.F.R. § 2634.802(b). OGE closely monitors the status of PAS nominees' ethics agreement

¹ Every PAS official must have an ethics agreement. *See* 5 C.F.R. § 2634.800 *et seq.* Other Executive Branch employees may not need such agreements, and government-wide ethics regulations do not require employees to document all types of recusals in writing. *See, e.g.,* 5 C.F.R. §§ 2635.402(c)(2) & 2635.502(e)(i) (disqualification under Subparts D and E of the Standards of Conduct); § 2640.103(d)(1) (disqualification under 18 U.S.C. § 208). Some agency-specific regulations may, however, require officials other than PAS officials to document recusals in writing. *See, e.g.,* Joint Ethics Regulation (JER) § 2-204 (Department of Defense regulation).

² An ethics agreement forms the basis of OGE's certification of the PAS official's financial disclosure report and the Senate's decision to confirm. As such, the agreement may not subsequently be modified at will by the employee or the agency. Should the need to change an ethics agreement arise, OGE must be involved.

compliance, beginning immediately after Senate confirmation. Ethics officials therefore should strive to engage individuals as early as possible to stress the importance of prompt compliance with ethics agreements and to make clear that PAS officials (not other staff members) bear the ultimate responsibility for understanding, implementing and continuously observing ethics agreements commitments. As discussed in detail below, proactively approaching education and compliance can facilitate a more streamlined process for documenting and effecting ethics agreement obligations, including determining whether a screening arrangement is necessary and the appropriate level of complexity for such an arrangement.

Documenting and Effecting Compliance with Ethics Agreements

With a goal of increased flexibility, OGE is clarifying what constitutes sufficient evidence of PAS officials' compliance with ethics agreement resignation, divestiture and recusal obligations, which must occur within the timeframe described above (unless, in its sole discretion, OGE extends the deadline).³ Additionally, OGE is willing to afford ethics officials discretion in determining when screening arrangements are necessary to implement PAS officials' recusal obligations and what form such arrangements can take.

Documenting Divestitures and Resignations.

Evidence of compliance with a divestiture or resignation commitment consists of "written notification that the divestiture or resignation has occurred." 5 C.F.R. § 2634.802(b)(2). After careful consideration, OGE has concluded that the limited value of providing an exact date of divestiture or resignation (as required by prior OGE guidance) is outweighed by the potential difficulty in pinpointing a specific date, particularly in the case of multiple divestitures. Therefore, to provide greater flexibility, OGE will no longer require a specific date of divestiture or resignation for purposes of compliance tracking – it will be sufficient for an agency official to inform OGE in writing⁴ that the PAS official has provided written notification that the divestiture or resignation occurred within the compliance window.⁵ This confirmation can be provided in paper or electronic form – *e.g.*, email.

Documenting Recusals.

Under the Ethics in Government Act of 1978, where an ethics agreement includes recusal obligations, the PAS official must "reduce to writing those subjects regarding which the recusal agreement will apply and the process by which it will be determined whether the individual must recuse himself or herself in a specific instance." 5 U.S.C. § app. 110. Over the years, OGE has published detailed suggestions for complying with recusal obligations, and implementing screening arrangements to effectively carry out such commitments. *See* OGE DO-99-018, DO-

³ Agency ethics officials do not have the authority to extend the compliance deadline; in rare circumstances, OGE may decide to extend the deadline. *See* 5 C.F.R. § 2634.802(b) (exceptions can be made "in cases of unusual hardship").

⁴ OGE also will continue to accept copies of letters of resignation as evidence of resignation, and copies of divestiture documents (*e.g.*, sales or other transaction statements) as evidence of divestiture. *See* OGE DO-09-015.

⁵ Resignation generally will need to occur upon confirmation or, in special cases, not later than the date on which the individual assumes the duties of the position. This timing is particularly important for compensated outside positions due to the outside earned income ban applicable to certain appointees. *See* 5 C.F.R. § 2635.804.

04-012 and DO-09-015. As explained below, screening arrangements are not the only method for facilitating and documenting compliance with recusal obligations. OGE affords ethics officials discretion in determining when a screening arrangement is appropriate, what the content of such an arrangement should be and how PAS officials can demonstrate compliance with recusal commitments. Of course, with or without screening arrangements, ethics officials should take appropriate steps to help ensure that PAS officials recuse in appropriate cases, such as providing training, counseling and/or written advice.

Discretion in Determining When to Implement a Screening Arrangement. Ethics officials should consider all relevant factors and use their best judgment to determine when screening arrangements are necessary to effectuate recusal obligations. For example, it would be reasonable to determine that a screening arrangement is unnecessary for stocks that will be quickly divested; although the PAS official cannot participate in particular matters affecting those interests before divestiture is accomplished, there would not be a compelling case to implement specific written screening procedures for such short-lived recusal obligations, as long as the PAS official has been adequately counseled or trained on the recusal obligations.⁶ OGE also has previously acknowledged situations where a potential conflict or appearance concern might be remote. *See* OGE DO-09-015. One example of such a situation might be where a PAS official's ethics agreement includes a recusal obligation relating to a company that exists only "on paper" – *e.g.*, a company that has no active operations, but remains extant for administrative reasons. A screening arrangement might not be necessary in that scenario because there would be no reasonable chance that the official would be involved in a matter affecting the inactive company. A screening arrangement similarly would be unnecessary for an entity that has little likelihood of coming before the PAS official's agency, or for a non-substantive recusal under 5 C.F.R. § 2635.502. In contrast, where a PAS official is recused from particular matters or parties that are likely to come before him or her, a screening arrangement normally would be appropriate and advisable. In determining whether a screening arrangement should be implemented, ethics officials should be mindful of the value of such arrangements in helping PAS officials comply with all recusal commitments. *See* OGE DO-04-012 ("a good screening arrangement can help the employee with [recusal] obligation[s] by establishing a system under which ethics officials, assistants, and others actively screen for covered matters and refer any such matter to other agency personnel for appropriate handling").

Content of Screening Arrangements. Just as a rule of reason should be applied in determining when screening arrangements are necessary, the specific form and content of screening arrangements should be appropriate for the relevant circumstances. A screening arrangement need not be so complicated that comprehending it is challenging. A screening arrangement can be brief, as long as it: (1) specifies the matters to which it applies; (2) explains how the PAS official intends to implement the recusal; and (3) identifies any person to whom the matters should be redirected.⁷ *See* 5 C.F.R. § 2634.804(b)(1). The arrangement may be limited

⁶ The example provided for in 5 C.F.R. § 2634.804(b)(1) represents a robust approach to documenting recusal obligations. This advisory is intended to explain alternative, more streamlined approaches.

⁷ In OGE DO-04-012, OGE expressed reservations about the assignment of a matter to an employee's immediate subordinate, noting potential issues such as the perceived loyalties of the subordinate. Although PAS officials and ethics officials always should be mindful of appearance concerns, OGE does not believe that assigning a matter to an immediate subordinate is always problematic. Frequently, an immediate subordinate will be the most logical person to handle a screened matter, and delegation to such an official is not prohibited.

to addressing only those situations where screening is necessary to implement a recusal commitment – in other words, the screening arrangement does not necessarily need to reflect all items in an ethics agreement and may exclude those items for which screening is unnecessary. Conversely, an ethics official may establish a screening arrangement to ensure recusal from a potentially conflicting financial interest that is not specifically mentioned in an ethics agreement.

To assist ethics officials and PAS officials with developing more streamlined content for screening arrangements, this advisory includes a simplified sample screening arrangement that ethics officials may use in situations where they desire something less detailed than the approach to screening arrangements articulated in DO-04-012. *See* Attachment 1.

Appropriate Evidence of Recusal. Following confirmation and appointment, a PAS official is required to issue a written recusal statement reaffirming his or her agreement to not engage in matters implicating the ethics agreement signed in connection with the PAS official's nomination. When an ethics official determines that a screening arrangement is not necessary, a recusal statement is the primary method by which the recusal is accomplished. OGE will consider such a statement to be acceptable evidence of compliance with recusal obligations. An example of such a statement is the sample recusal statement set forth in Attachment 2. The purpose of such a recusal statement is not only to comply with the statutory documentation obligation, *see* 5 U.S.C. § app. 110, but also to remind the PAS official of his or her recusal commitments.

When an ethics official determines that a screening arrangement is necessary, the screening arrangement should accompany or incorporate the recusal statement. Various options are available to describe the screening, including a simplified screening arrangement as illustrated in Attachment 1.⁸ *See also* OGE DO-09-015 (describing a screening arrangement modeled after DO-04-012 and three additional options OGE will accept as evidence of recusal). As explained above, the screening arrangement does not need to include all ethics agreement commitments and should reflect only those items for which screening would be useful. For all of these options, the screening arrangement must be in writing but does not need to be provided in a hard-copy medium; an email containing the relevant information is sufficient.

As articulated above, compliance with ethics agreements can be accomplished in many ways, and ethics officials have latitude in determining how a given PAS official can satisfy his or her obligations. OGE expects that the framework of flexible options for ensuring and documenting compliance with ethics agreements described in this advisory, coupled with early proactive efforts by ethics officials to train and counsel PAS officials, will facilitate an effective and workable system for managing PAS officials' ethics agreements.

⁸ OGE's suggested language in Attachment 1 screens for all particular matters that either involve identified interests as parties or affect identified interests. This suggested language is admittedly over inclusive in the cases of recusals limited to specific party matters – *e.g.*, recusals under 5 C.F.R. § 2635.503. This over inclusiveness does not alter the scope of the legal obligation to recuse; rather, it creates a prophylactic buffer to guard against inadvertent violations. After considering the risks, ethics officials are free to draft screening language drawing finer distinctions between what is permitted and what is prohibited, such as by limiting the screening to particular matters involving specific parties for a recusal required by 5 C.F.R. § 2635.502 or 5 C.F.R. § 2635.503.

Attachment 1 – Sample Simplified Screening Arrangement

MEMORANDUM

TO: Designated Agency Ethics Official

FROM: Under Secretary for Implementation

CC: Confidential Assistant

DATE: January 21, 2016

SUBJECT: Screening Arrangement and Recusal Obligations

The purpose of this memorandum is to establish a screening arrangement to implement certain recusal obligations stated in my attached November 27, 2015 ethics agreement. In addition, I affirm that I will observe all other recusal obligations stated in that ethics agreement. You have counseled me on the meaning and scope of these obligations, and I understand that I may contact you if I have questions about their application to matters that arise during my appointment.

By copy of this memorandum, I am instructing my Confidential Assistant to direct certain matters for action by the Deputy Under Secretary for Implementation, without further input from me. To the extent that my Confidential Assistant may have questions about the applicability of this memorandum, he is directed to seek clarification from either you or the Deputy Under Secretary. The matters covered by this screening arrangement include particular matters affecting or involving the entities listed below:

ABC, Inc.
CDE Corp.
FGH, LLC
IJKLM Industries, Inc.

An example of a covered matter might be a contract negotiation with ABC, Inc. Another example might be a discussion about the criteria the agency will establish for reviewing the performance of FGH, LLC with respect to its contract with the agency. A further example might be a regulation affecting an industry in which CDE Corp. operates.

To the extent that any language in this memorandum is construed as inconsistent with my ethics agreement dated November 27, 2015, the ethics agreement is controlling and is not modified by this memorandum.

Attachment: Ethics Agreement Dated November 27, 2015

Attachment 2 – Sample Recusal Statement

MEMORANDUM

TO: Designated Agency Ethics Official

FROM: Under Secretary for Implementation

DATE: January 21, 2016

SUBJECT: Recusal Obligations

The purpose of this memorandum is to affirm that I will observe all recusal obligations stated in my attached November 27, 2015 ethics agreement. You have counseled me on the meaning and scope of these obligations, and I understand that I may contact you if I have questions about their application to matters that arise during my appointment.

Attachment: Ethics Agreement Dated November 27, 2015