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Office of Government Ethics
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MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Amy L. Comstock
Director

SUBJECT: Nominee Ethics Agreements

The Office of Government Ethics (OGE) is aware that the early months of any new administration are a busy and challenging time for Designated Agency Ethics Officials (DAEOs). Among their many other duties during this season, DAEOs play a crucial role in the review of financial disclosure reports filed by Presidential nominees prior to Senate confirmation proceedings. As part of that process, DAEOs frequently must prepare ethics agreements for nominees, for submission to OGE along with the nominee's financial disclosure report. 5 C.F.R. § 2634.803. Subsequently, DAEOs must ensure that confirmed nominees comply with their ethics agreements. In order to assist DAEOs, this Memorandum addresses various issues pertaining to ethics agreements. Additionally, we are providing a model ethics agreement, which we hope you will find helpful.

Ethics Agreements Generally

Ethics agreements are expressly contemplated in the Ethics in Government Act of 1978, as amended. 5 U.S.C. app. § 110; see also 5 C.F.R. part 2634, subpart H. The purpose and the importance of ethics agreements for nominees are set forth in OGE Informal Advisory Letter 88 x 13: "The agreements are established so that the steps the individual must take in order to insulate himself and protect the agency processes from conflict of interest are clear, not only to the individual, the agency and the public, but to the Senate committee responsible for holding the confirmation hearing. These agreements, therefore, serve an important purpose and should not be taken lightly by the individuals making them." Consistent with this important purpose, an appropriate ethics agreement often will be a necessary condition for OGE's certification of the financial disclosure statement of a nominee. See 5 C.F.R. § 2634.605(c).

An ethics agreement is broadly 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." 5 C.F.R. § 2634.802(a). In the case of Presidential nominees requiring confirmation by the Senate, any such promise must be reduced to writing, in some form, so that it may be transmitted "with the report to the Office of Government Ethics." 5 C.F.R. § 2634.803(a)(1). As a practical matter, these agreements take various written forms, such as a letter or memorandum from the nominee to the DAEO, a letter from the nominee to OGE, or a letter from the DAEO to OGE summarizing the actions to which the nominee has agreed.

Among the most common actions that are reflected in an ethics agreement are recusals, divestitures, and resignations. 5 C.F.R. § 2634.802(a)(1)-(3). Depending on the circumstances, ethics agreements also will address other specific actions, such as potential waivers, qualified trusts, authorizations under 5 C.F.R. § 2635.502(d), outside earned income limitations, the resolution of severance and other payments under 18 U.S.C. § 209 and 5 C.F.R. § 2635.503, the disposition of interests in claims or other matters involving the United States under 18 U.S.C. §§ 203 and 205, and miscellaneous actions necessary to comply with a variety of other ethics requirements.

It is important that any ethics agreement be sufficiently specific to make clear -- to the nominee, the agency, OGE, and the Senate -- precisely what measures will be undertaken. We note that Congress has expressed concern in the past, particularly in the case of certain agreements to recuse, that "the coverage of those agreements and the extent of the recusals have been unclear." H.R. Rep. 89, 98th Cong., 1st Sess. 20 (1983) (legislative history of predecessor of section 110 of Ethics in Government Act). OGE expects that any ethics agreement will adequately describe the "specific actions" which a nominee must take in order to prevent an actual or apparent conflict of interest. 5 C.F.R. § 2634.802(a).

Model Ethics Agreement

The attached model ethics agreement covers a number of the more common specific actions that may need to be addressed. We must emphasize, however, that no model can address all possible ethics issues that may arise, and no standard language can adequately convey all the nuances and details that may be relevant in a particular case.

In addition to the specific provisions found in the model agreement, we want to point out some intentional omissions. First, there is no mention of the possibility that the nominee might request or be eligible for a Certificate of Divestiture in connection with any of the required divestitures. As we have indicated on prior occasions, an ethics agreement may not make "the divestiture of prohibited or problematic holdings contingent upon receiving a Certificate of Divestiture." DAEOgram DO-98-013, April 8, 1998. (Of course, the possibility of receiving a Certificate of Divestiture and the relevant requirements should be discussed with the nominee during the SF 278 review process.) Second, the model agreement does not use any language suggesting that the nominee's commitments might be aspirational, rather than binding. Thus, for example, the various commitments do not use expressions such as "I will attempt," "I will try," "I will seek to avoid," etc., but rather state unequivocally, "I will," "I will not," or "I agree to." It is inconsistent with the very nature of an ethics agreement to suggest that its terms are not binding.

Finally, we note that use of the model is by no means mandatory. DAEOs remain free to develop and use their own ethics agreement language, provided, of course, that any agreements adequately describe the specific actions that would be required for the given nominee to avoid any actual or apparent conflicts of interest. Nevertheless, even for DAEOs who wish to develop their own ethics agreement language, we hope the attached model will provide timely guidance with respect to the minimum degree of specificity and some of the typical commitments that OGE generally expects to find in an agreement.

Public Disclosure of Nominee Ethics Agreements

OGE has received a number of questions recently about the public disclosure of ethics agreements. It is important to recognize that there are two alternative authorities under which ethics agreements may be released to the public, depending on how the particular agreement has been treated. Depending on the circumstances, public disclosure may be governed either by the Ethics in Government Act of 1978 or the Freedom of Information Act (FOIA).

Ethics agreements often are physically attached to the nominee's public financial disclosure report (SF 278), or are incorporated by reference on the face of the report. In such cases, the question of public disclosure is relatively straightforward: the public disclosure requirements of section 105 of the Ethics in Government Act apply equally to the SF 278 and to

any attached ethics agreement. 5 U.S.C. app. § 105; 5 C.F.R. § 2634.603. Under these circumstances, the ethics agreement should be made available to the public along with the SF 278 upon compliance with the requirements of section 105.

In some instances, however, the ethics agreement has not been made part of the SF 278, and any disclosure, therefore, is not governed by section 105. In such cases, public disclosure of the ethics agreement is governed by the FOIA, 5 U.S.C. § 552, and subject to the constraints of the Privacy Act, 5 U.S.C. § 552a. In those instances, questions may arise with respect to the possible need to redact certain sensitive information, consistent with the FOIA and the Privacy Act.

We recognize that some agencies may wish to avoid issues concerning the need to redact certain information prior to public disclosure of ethics agreements. Because of the two different ways in which public disclosure may be handled, we recommend that agencies wishing to avoid such questions adopt a practice of routinely incorporating all ethics agreements as attachments to the SF 278. This can be accomplished, for example, by including a note in the "Comments" section of the cover page, along the following lines: "Letter of (name of filer or DAEO who signed letter), dated _____, attached." Agencies following this practice may want to counsel nominees specifically concerning the public disclosure consequences of making the ethics agreement part of the SF 278.

This guidance regarding the treatment of ethics agreements applies only to nominees who are required to file an SF 278. Certain nominees, who otherwise would be required to file a public report, are exempt from public reporting because they are not reasonably expected to perform the duties of the particular office for more than 60 days in any calendar year. See 5 U.S.C. app. § 101(h); 5 C.F.R. § 2634.204. However, such nominees sometimes are required by the relevant Senate committee to file SF 278s, which are reviewed by OGE and transmitted to the Senate. The public disclosure provisions of the Ethics in Government Act are inapplicable to such reports and any ethics agreements filed in connection with them. If an employee who is exempt from the public reporting requirements instead files a confidential disclosure form (OGE Form 450), that form and any related ethics agreement also are not available to the public under the public disclosure provisions of the Ethics in Government Act.

Compliance with Ethics Agreements

Compliance with the terms of an ethics agreement is an important step in completing the confirmation and appointment process. The Ethics in Government Act expressly recognizes this by requiring individuals to provide written notice "of any action taken by the individual pursuant to that agreement." 5 U.S.C. app. § 110(a). Once a nominee is confirmed, the individual generally has up to three months from the Senate confirmation date to comply with the agreement. See 5 C.F.R. § 2634.802(b). Within those three months, the DAEO must receive evidence of compliance from the individual and transmit this evidence to OGE. See 5 U.S.C. app. § 110; 5 C.F.R. § 2634.804.

The following are the kinds of evidence or documentation that are generally acceptable for certain common types of actions required by an ethics agreement:

! Divestiture - A written statement that the item has been sold, along with the sale date or a copy of the sale document. If a Certificate of Divestiture is requested from OGE, the divestiture still must be completed within three months of the date of confirmation, unless an extension of time is obtained;

! Resignation - A written statement that the resignation has occurred, including the resignation date or a copy of the letter of resignation. A written statement is not required when an appointee resigns from a full-time outside position in order to enter a full-time Government position;

! Recusal - A copy of the appointee's recusal document identifying the matters from which the appointee will be recused and describing the recusal screening process. The screening process should identify the person(s) who will screen matters from the appointee and to whom such matters will be referred for action.

The recusal document should be revised and updated regularly based on the appointee's changing financial circumstances, staff, and official duties. As a good practice, a copy of the recusal document may be given to the appointee's subordinates and supervisors;

!Waiver - A copy of any waivers issued pursuant to 18 U.S.C. § 208(b) and signed by the appropriate official. The waiver should comply with the requirements of subpart C of 5 C.F.R. part 2640; and

!Qualified Trust - All information required by subpart D of 5 C.F.R. part 2634 must be submitted for OGE's certification of any qualified blind trust or qualified diversified trust.

OGE monitors the compliance of all Senate-confirmed Presidential appointees with the terms of their ethics agreements. If you have any questions about the compliance process, please contact Grace Clark of this Office, at 202-208-8000, ext. 1170. Questions concerning the content of any proposed ethics agreement should be addressed to the OGE reviewer assigned to a given nominee report.

[Attachment](#)