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September 14, 2012

VIA E-MAIL

Mr. David Berry, Inspector General
Office of Inspector General
National Labor Relations Board

Re: Report of Investigation – OIG I-475

Dear Mr. Berry:

On behalf of Acting General Counsel Lafe Solomon, we appreciate this opportunity to respond to the report issued by your office concerning Mr. Solomon's participation in a matter involving Wal-Mart and its social media policy. Given Mr. Solomon's unblemished, forty year career in government service, it is imperative that the full picture regarding his actions, and his intent, be available to any person reading your report. We believe that your report reaches the wrong conclusion. Mr. Solomon did not commit even a technical violation of the applicable ethics rules.

The facts of this matter compel one, and only one, conclusion: that Mr. Solomon acted in the utmost good faith and at all times sought to abide by his ethical obligations as a government official. Mr. Solomon promptly disclosed his financial interest in Wal-Mart and sought a waiver, as provided by the governing regulations, so that he could participate in the Wal-Mart social media matter. As you make clear in your report, Mr. Solomon was denied that waiver by an NLRB official who deliberately misapplied the governing standards, was embroiled in a contentious personnel issue involving her management of the Division of Administration, and, indeed, was not authorized to grant or deny his waiver request in the first instance. Nonetheless, after being denied the waiver, Mr. Solomon sold the modest amount of Wal-Mart stock that he had inherited from his mother's estate just three months prior to the events in question. The value of his stock was so close to the de minimis threshold that he could have eliminated any issue by selling or giving away about 45 shares, but he chose to divest himself of all the stock.

It is undisputed that Mr. Solomon did nothing to advance or hinder his own or Wal-Mart's financial interests at any point in the life of this matter, much less in the brief period between when he became aware of the Wal-Mart social media matter and when he divested himself of the stock. Once he had divested, there was of course nothing improper about Mr. Solomon's involvement in the resolution of the Wal-Mart matter – a resolution which, it should be noted, spared all parties from unnecessary litigation and produced a model social

media policy to which other American employers can refer for guidance. That, as you acknowledge, Mr. Solomon was motivated to avoid filing a lawsuit against the nation's single largest employer, if such litigation could be avoided by a voluntary and constructive resolution, is only to his credit.

While Mr. Solomon respects the process by which the Office of Inspector General conducted this investigation, there are three specific issues on which we simply disagree with your analysis.

1. "Personal and Substantial Participation."

First, we submit that Mr. Solomon's participation in the brief meeting on January 23, 2012, did not constitute "personal and substantial" participation in the Wal-Mart social media matter.

On April 12, 2011, Mr. Solomon had issued a directive within the agency that all cases involving employers' social media policies would be decided by the Acting General Counsel. He therefore knew and always intended that he would ultimately decide whether to issue a complaint in the Wal-Mart matter, as he believed that the agency had a compelling interest in having the Wal-Mart matter handled in a manner consistent with the several other employers' policies that Mr. Solomon had reviewed and analyzed. Thus, fully cognizant of his financial conflict, Mr. Solomon knew that he would either obtain a waiver to permit him to participate, or, if unsuccessful in obtaining a waiver, that he would sell the Wal-Mart stock in order to eliminate the conflict.

On January 20, 2012, Mr. Solomon received a memorandum from the Associate General Counsel in the Division of Advice, which first alerted him to the existence of a social media matter involving Wal-Mart. Having read the January 20 memorandum, Mr. Solomon observed that there was more work to be done before the issue of whether or not a complaint should issue against Wal-Mart could properly be put to him for decision. Therefore, in a meeting on January 23, 2012, which he recalls lasting no more than ten minutes, Mr. Solomon told the Associate General Counsel and others that there were open questions to which the Division of Advice needed to find answers. He also noted that the agency's eventual action in the Wal-Mart matter would garner significant political and media attention. Mr. Solomon's goal at that meeting was to have the Division of Advice maintain control over the matter, do the additional research necessary, and engage with Wal-Mart to explore whether a resolution could be reached that would obviate the need for him ultimately to decide the case.

Mr. Solomon believed that his words and actions at the January 23 meeting were consistent with his ethical obligations, because he was declining to exercise his authority as

General Counsel at that time and would instead address and resolve his financial conflict before the matter would be brought back to him for further action. Consistent with that understanding, Mr. Solomon did not participate in any further meetings or discussions regarding the Wal-Mart matter until after he sold all of his Wal-Mart shares on February 27, 2012. In other words, the sum total of what you contend was substantial participation consists of the ten minute meeting on January 23; there is no allegation that Mr. Solomon continued to participate personally and substantially from that point forward, until he divested himself of the stock.

Your analysis of the January 23 meeting is inaccurate as to important specifics and ignores the realities of the life of enforcement complaints. As to the former, it is simply untrue that Mr. Solomon "directed the Division of Advice to settle the Wal-Mart case by contacting Wal-Mart's counsel and getting Wal-Mart to amend the social media policy to comply with the law." (Report at 4). That description creates the false impression that: (a) either Mr. Solomon or the Associate General Counsel could somehow force Wal-Mart to engage and to voluntarily change its social media policy; and (b) that Mr. Solomon's direction to the Associate General Counsel was to settle the matter at all costs – in other words, that Mr. Solomon under no circumstances would authorize the filing of a complaint.

In truth, Mr. Solomon expressed at the meeting the pragmatic, if not obvious, view that if Wal-Mart would be willing to change the aspects of its policy that the Division of Advice took issue with, then he would not have to decide whether to issue a complaint. Mr. Solomon never stated that he would refuse under any circumstances to approve issuance of a complaint. The Associate General Counsel's own description of Mr. Solomon's position in an email he authored weeks later on March 5, 2012, undermines your characterization:

From: Kearney, Barry J.
Sent: Monday, March 05, 2012 7:27 AM
To: Harrell, Claude T.; North, Jane P.
Cc: Merberg, Elinor; Sophir, Jayme
Subject: FW: Walmart Revised Social Media Policy
Attachments: Document (3).pdf

Chip / Jane
As I earlier told Chip, Lafe doesn't want to ok issuance of a complaint if Walmart is willing to change those aspects of their social media policy that we had problems with. I met with Walmart and they have agreed to change their policy as set forth below. If we are ok with it, they would issuance the new policy calling attention to employees the change. Once they have done that I intend to issue an advice memo setting forth the violations under the old rule but direct you to dismiss for lack of effectuation because Walmart had changed their rules. Please get back to me with any concerns you might have. Thanks

Indeed, though your characterization purports to summarize the Associate General Counsel's testimony from his interview, he in fact described Mr. Solomon's position quite differently: "And so [Mr. Solomon] was interested in resolving the matter without a decision to issue a complaint being made . . . [H]e wanted to see if the matter could be resolved before that." IE 3 at p.10.

That the agency should exhaust informal avenues to try to resolve a dispute with the nation's largest employer before filing a complaint is certainly common sense, but regardless, the suggestion that what occurred at the January 23 meeting was in any sense determinative of the Wal-Mart case is simply wrong.

Your report also fails to place the January 23 meeting into context in terms of the life span of the Wal-Mart social media matter within the agency. Nowhere does the report acknowledge that the key events and decisions that shaped the outcome of the Wal-Mart matter – including the revisions Wal-Mart agreed to make to its policy, the agency's ongoing engagement and negotiation with Wal-Mart over the details of those revisions, internal discussion and deliberation regarding those proposed revisions, and the ultimate decision that the revised policy complied with the National Labor Relations Act, and thus that no complaint would issue – all occurred after Mr. Solomon sold his Wal-Mart stock on February 27, 2012. The report leaves the false impression that the earliest activity in the matter in January 2012 was pivotal, when in fact nearly all of the events that led to the ultimate resolution happened in March, April and May. The Division of Advice issued its memorandum to Region 11 stating that no complaint would need to issue in light of Wal-Mart's revised policy on May 30, 2012.

By honing in on the January 23 meeting, Mr. Solomon's participation prior to February 27 takes on a false and exaggerated significance. However, there is no suggestion, nor does your report make one, that the fact of Mr. Solomon's unresolved financial conflict on January 23, 2012, affected the agency's process in how it addressed and resolved the Wal-Mart social media matter.

The evidence also strongly suggests that the other participants at the January 23, 2012 meeting did not believe that Mr. Solomon's participation in that brief meeting constituted "personal and substantial" participation prohibited in light of his financial conflict. The Deputy General Counsel was aware that Mr. Solomon owned Wal-Mart stock. She was made aware of that fact by Mr. Solomon himself, who endeavored to go above and beyond in ensuring complete transparency regarding his financial interests. Although Mr. Solomon's annual financial disclosure was not due to be filed until May 15, 2012 under the operative statute, see 5 USC Appx. §101, and he inherited the Wal-Mart stock well after his 2011 disclosure was filed, Mr. Solomon provided the Deputy General Counsel with an updated list of his financial interests on January 5, 2012, so that she could perform her "gatekeeper" function regarding potential

conflicts. The Deputy General Counsel, herself a respected government attorney with thirty-seven years of service to the agency, did not raise any concern regarding Mr. Solomon's participation in the meeting on January 23.

Certainly, there is no suggestion that any participant in the January 23 meeting consciously sought to aid an ethical violation by the Acting General Counsel. The more logical conclusion was that no one believed that the meeting gave rise to any such violation. As expressed by the Deputy General Counsel herself, the January 23 meeting was brief, general, and did not result in any decisions regarding the outcome of the Wal-Mart matter. She reiterated that Mr. Solomon was still asking the basic questions that he had put to the Division of Advice in his email on January 21.

On the very morning of the meeting, Mr. Solomon had also notified the Associate General Counsel of the conflict posed by Mr. Solomon's ownership of Wal-Mart stock. Mr. Solomon told the Associate General Counsel that he would be seeking a waiver so that he could participate in and ultimately decide the case. At no time did the Associate General Counsel raise any concern about Mr. Solomon's participation in the brief meeting held later that afternoon. When pressed by your inquiry into why he neither questioned nor prevented Mr. Solomon's participation in the meeting later that day, the Associate General Counsel's statement that he "assumed" that Mr. Solomon had gotten the "go ahead" to participate is certainly questionable. It defies both logic and any understanding of administrative process that Mr. Solomon could have both applied for and received a written waiver between the time of their conversation that morning and the meeting at 3:00 that afternoon. We do not fault the Associate General Counsel for suggesting that it was not his duty to ensure that Mr. Solomon was in compliance with his ethical obligation; that duty was undoubtedly Mr. Solomon's. But the clearest inference from the facts of this episode is that no one, least of all Mr. Solomon, believed that the January 23 meeting violated those obligations.

We acknowledge that the scope of conduct that can be considered "personal and substantial participation" reaches more than the ultimate act of deciding a particular matter. See 5 CFR § 2640.103. However, viewed from Mr. Solomon's perspective, as of January 23, 2012, the Wal-Mart matter was at a preliminary stage and was simply not ripe for his participation. The memorandum he reviewed on January 20 made plain that the Division of Advice would need to do additional work before Mr. Solomon could reasonably engage and consider what the agency's position should be. Mr. Solomon knew he would need to eliminate his financial conflict before he could engage on the merits, and he took the appropriate steps to do so before engaging in any further discussions or consideration of the Wal-Mart matter.

2. "Direct and Predictable Effect"

We disagree with your conclusion that Mr. Solomon's participation in the Wal-Mart social media matter had a "direct and predictable effect" on his financial interest. A "direct" effect means that there must be a "close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest." 5 CFR § 2635.402(b)(1)(i). A "predictable" effect means that there is a "real, as opposed to a speculative, possibility that the matter will affect the financial interest." Id.

Your reasoning that "in any matter involving an unfair labor practice (ULP) charge, the financial interest of a charged party will be affected by the decisions of the Agency," and that therefore the Wal-Mart social media matter had a "direct and predictable effect" on Mr. Solomon's financial interest, does not accord with the prevailing guidance on this issue.

You first state that "a decision that there is merit to a charge will require a charged party to expend financial resources to defend against the complaint or meet with the NLRB representatives to reach a settlement." Report at 11. But the fact that a party expends money on advocacy in a particular matter does not create a "direct and predictable effect" on a government employee's financial interest for purposes of the conflict of interest statute. See Jan. 11, 2006 Memorandum Opinion of the Office of Legal Counsel, Financial Interests of Nonprofit Organizations. The Department of Justice Office of Legal Counsel ("OLC") has analyzed the meaning of "direct and predictable effect," and concluded that it is not the financial consequences flowing from a proceeding itself that create a disqualifying interest, but the "financial consequences flowing from the outcome of a proceeding." Id. at 8-11. In other words, money spent on advocacy, while it certainly has a financial consequence to the party spending it, does not trigger a "direct and predictable effect" on a government employee. Rather, a "direct and predictable effect" on the employee's financial interest means that the employee must stand to either gain or lose depending on the outcome of the matter. Id. at 11. ("Even if an expenditure on advocacy could constitute a 'financial interest' in a particular proceeding, it would be, at most, a financial interest in the process by which the matter is considered rather than in the outcome of the proceeding.") Put simply, the fact that Wal-Mart or any other party engages lawyers to advocate on its behalf before the agency does not create a direct and predictable effect on Mr. Solomon's financial interest.

Second, you state that "if the matter involves the termination of an employee, the outcome will determine if the employee is reinstated and if back pay is owed." Report at 11. The sheer number of hypotheticals underlying that analysis place it well outside the governing framework of a "direct and predictable effect" as to Mr. Solomon. "A particular matter will not have a direct effect on a financial interest . . . if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative..." 5 CFR § 2640.103. To

suggest that if the agency had found merit to a terminated Wal-Mart employee's claim, and if the agency therefore authorized issuance of a complaint, and if that claim were litigated to a conclusion and if a financial judgment was entered against Wal-Mart, then Mr. Solomon's financial interest could be affected is exactly the type of speculative and attenuated connection that is neither "direct" nor "predictable." Moreover, there are no facts suggesting that Mr. Solomon participated personally and substantially in consideration of the specific Wal-Mart employee's ULP claim prior to February 27; it was not even discussed at the January 23 meeting.

It is even more speculative what the "direct and predictable effect" of the broader outcome - Wal-Mart revising its social media policy - had on Mr. Solomon. As explained above, that Wal-Mart may have avoided further litigation expense by doing so voluntarily is the same sort of financial interest in the process of the matter, not the outcome, that OLC has determined does not give rise to an employee conflict. Having a compliant social media policy is certainly a good thing, but it is untenable to suggest - and your report does not even attempt to do so - that this outcome created financial gain or loss to Wal-Mart, much less in any "measurable way," for purposes of triggering a disqualifying conflict for Mr. Solomon as a government official.

In sum, your conclusion that the Wal-Mart social media matter had the requisite "direct and predictable effect" on Mr. Solomon's financial interest is based on a misunderstanding of the legal standard. The outcome of Wal-Mart modifying its social media policy had no direct and predictable effect on Mr. Solomon's interest, nor does your report suggest one. Even if you had identified such an effect, there was nothing predictable about such an effect during the entire period in which Mr. Solomon owned Wal-Mart stock.

Finally, while not determinative of the issue, the relative size of Mr. Solomon's financial interest in Wal-Mart is certainly noteworthy. Mr. Solomon inherited three hundred shares from his mother's estate, which when sold on February 27, 2012 had a gross value of $17,562. While the value of Mr. Solomon's shares exceeded the $15,000 threshold that would have entitled him to an automatic regulatory exemption, see 5 CFR § 2640.202 (a)(2), the size of Mr. Solomon's financial interest, and the relative size of that financial interest judged against the size of Wal-Mart, further undermine any suggestion that Mr. Solomon's financial interests would have been affected by the outcome of the Wal-Mart matter.

3. Mr. Solomon's Waiver Request.

Third, we take issue with your description of the waiver request that Mr. Solomon submitted to the DAEO. While you nowhere suggest Mr. Solomon intentionally sought to mislead anyone, there was in fact nothing misleading about the content of the waiver request. It could hardly be clearer that the Wal-Mart matter had already come to Mr. Solomon's attention from the Division of Advice, as he wrote: "There is a Walmart case pending in Advice on the

issue of whether Walmart's social media policy is violative of the NLRA." (IE5). Obviously, Mr. Solomon would not know of the matter had it not already been briefed to him by Advice. His further statement that "absent settlement or withdrawal, the case would be presented to me to decide whether or not to issue a complaint" is both accurate and consistent with Mr. Solomon's position that the matter was not ripe for his determination, but that should it fail to settle, he would have to decide whether to proceed with a complaint. That Mr. Solomon did not include his "prior participation" is similarly consistent with Mr. Solomon's position that, to his mind, he had not substantially participated in the matter. Regardless, as he indicated by offering to answer any additional questions the DAEO might put to him, Mr. Solomon considered his January 30 submission to the DAEO to be the beginning, not the end, of a fulsome and fair consideration of the merits of his request. As you recognize, the waiver process is intended to be iterative, with guidance and engaged inquiry from the DAEO to aid the employee seeking to resolve his conflict. Instead, the DAEO acted immediately to deny Mr. Solomon's request, disregarding the governing standards for consideration of a waiver and exceeding her statutory authority.

4. Mr. Solomon's Efforts to Improve the Ethics Function at NLRB.

Despite our disagreement with your report on these specific subjects, Mr. Solomon takes very seriously his responsibility to adhere to all applicable laws and regulations pertaining to financial conflicts of interest. As a dedicated, forty-year government servant, Mr. Solomon recognizes that adherence to strict ethical standards is of paramount importance. While Mr. Solomon does not believe that his actions in the Wal-Mart matter violated those rules, he is cognizant of the need for every public servant to avoid even the appearance that his actions could be deemed in violation of the ethics rules. See 5 CFR § 2635.101(b)(14). With the benefit of hindsight, Mr. Solomon acknowledges that the best course would have been for him to have had no involvement in the Wal-Mart matter whatsoever – indeed, not to have even received the January 20, 2012 memorandum – until he had sold the Wal-Mart stock.

As Acting General Counsel, Mr. Solomon also recognizes his responsibility to ensure that the agency has developed, and consistently adheres to, a robust ethics compliance and oversight program. He has therefore taken the initiative to improve and reorganize the agency's existing Ethics Program and to restructure the function performed by the agency's new Designated Agency Ethics Official ("DAEO"). Specifically, at Mr. Solomon's urging and with the Board's approval, the agency will now have both its bar ethics and government-wide ethics programs merged into a single office, overseen and coordinated by the new DAEO, which will increase the ethics resources available to all agency employees. This office will also serve as the training center tasked with ensuring that all employees understand and follow all governing ethical standards and that, if faced with a situation on which they require guidance, they will immediately know where to turn and will receive the appropriate attention. Existing ethics

training will be enhanced, both from the moment of employee orientation and throughout each agency employee's career, with monthly trainings and bulletins covering a range of relevant topics. Your report summarizes these significant initiatives that Mr. Solomon has personally set into motion, and he will work with the DAEO to implement them.

Mr. Solomon has also established new protocols to ensure that staff in the immediate Office of the General Counsel will not participate in any way in cases or other matters that either actually or potentially create a conflict of interest. These protocols will act as safeguards to eliminate the possibility that an official in the immediate Office of General Counsel will act in a particular matter in which they have a financial conflict. Specifically, all initial communications – verbal, electronic, or written – regarding cases under consideration by the agency will be directed to an administrative staff person who will review all financial interest lists provided to her by officials in the Office of General Counsel. If there is no conflict, then those communications will be forwarded to appropriate members of the immediate Office of General Counsel for their consideration and participation in case discussions. If there is a potential conflict, whether personal or financial, the staff designee will contact the DAEO, who will analyze the facts and address all appropriate options with the affected employee. Mr. Solomon has urged a similar screening protocol for other managers, supervisors and employees outside of the immediate Office of General Counsel.

Conclusion

While we disagree with several aspects of your report, it is critical not to lose sight of the big picture. We take a different view of the substantiality of a ten minute meeting that Mr. Solomon participated in on January 23, 2012, after having disclosed his ownership of Wal-Mart stock. We disagree with your application of certain elements of the regulations. What we can and do agree on is that the fact that Mr. Solomon's ownership of $17,562 of Wal-Mart stock from January 20 through February 27, 2012, had no impact whatsoever on the course of the Wal-Mart social media matter. There is no suggestion that Mr. Solomon acted with any intent to violate his ethical obligations, and there is no suggestion that he put his or Wal-Mart's interests ahead of his duties as a government official.

Sincerely,

William W. Taylor, III

Caroline Judge Mehta