Presidential Documents

Executive Order 13490 of January 21, 2009

Ethics Commitments by Executive Branch Personnel

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and sections 3301 and 7301 of title 5, United States Code, it is hereby ordered as follows:

Section 1. *Ethics Pledge.* Every appointee in every executive agency appointed on or after January 20, 2009, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee:

"As a condition, and in consideration, of my employment in the United States Government in a position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:

"1. *Lobbyist Gift Ban.* I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.

"2. *Revolving Door Ban—All Appointees Entering Government.* 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 clients, including regulations and contracts.

"3. *Revolving Door Ban—Lobbyists Entering Government.* If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:

(a) participate in any particular matter on which I lobbied within the 2 years before the date of my appointment;

(b) participate in the specific issue area in which that particular matter falls; or

(c) seek or accept employment with any executive agency that I lobbied within the 2 years before the date of my appointment.

"4. *Revolving Door Ban—Appointees Leaving Government.* If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.

"5. *Revolving Door Ban—Appointees Leaving Government to Lobby.* In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

"6. *Employment Qualification Commitment.* I agree that any hiring or other employment decisions I make will be based on the candidate's qualifications, competence, and experience.

"7. *Assent to Enforcement.* I acknowledge that the Executive Order entitled 'Ethics Commitments by Executive Branch Personnel,' issued by the President on January 21, 2009, which I have read before signing this document, defines certain of the terms applicable to the foregoing obligations and sets forth

the methods for enforcing them. I expressly accept the provisions of that Executive Order as a part of this agreement and as binding on me. I understand that the terms of this pledge are in addition to any statutory or other legal restrictions applicable to me by virtue of Federal Government service."

Sec. 2. *Definitions.* As used herein and in the pledge set forth in section 1 of this order:

(a) "Executive agency" shall include each "executive agency" as defined by section 105 of title 5, United States Code, and shall include the Executive Office of the President; provided, however, that for purposes of this order "executive agency" shall include the United States Postal Service and Postal Regulatory Commission, but shall exclude the Government Accountability Office.

(b) "Appointee" shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

(c) "Gift"

(1) shall have the definition set forth in section 2635.203(b) of title 5, Code of Federal Regulations;

(2) shall include gifts that are solicited or accepted indirectly as defined at section 2635.203(f) of title 5, Code of Federal Regulations; and

(3) shall exclude those items excluded by sections 2635.204(b), (c), (e)(1) & (3) and (j)-(l) of title 5, Code of Federal Regulations.

(d) "Covered executive branch official" and "lobbyist" shall have the definitions set forth in section 1602 of title 2, United States Code.

(e) "Registered lobbyist or lobbying organization" shall mean a lobbyist or an organization filing a registration pursuant to section 1603(a) of title 2, United States Code, and in the case of an organization filing such a registration, "registered lobbyist" shall include each of the lobbyists identified therein.

(f) "Lobby" and "lobbied" shall mean to act or have acted as a registered lobbyist.

(g) "Particular matter" shall have the same meaning as set forth in section 207 of title 18, United States Code, and section 2635.402(b)(3) of title 5, Code of Federal Regulations.

(h) "Particular matter involving specific parties" shall have the same meaning as set forth in section 2641.201(h) of title 5, Code of Federal Regulations, except that it shall also include any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties.

(i) "Former employer" is any person for whom the appointee has within the 2 years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner, except that "former employer" does not include any executive agency or other entity of the Federal Government, State or local government, the District of Columbia, Native American tribe, or any United States territory or possession.

(j) "Former client" is any person for whom the appointee served personally as agent, attorney, or consultant within the 2 years prior to the date of his or her appointment, but excluding instances where the service provided was limited to a speech or similar appearance. It does not include clients

of the appointee's former employer to whom the appointee did not personally provide services.

(k) "Directly and substantially related to my former employer or former clients" shall mean matters in which the appointee's former employer or a former client is a party or represents a party.

(l) "Participate" means to participate personally and substantially.

(m) "Post-employment restrictions" shall include the provisions and exceptions in section 207(c) of title 18, United States Code, and the implementing regulations.

(n) "Government official" means any employee of the executive branch.

(o) "Administration" means all terms of office of the incumbent President serving at the time of the appointment of an appointee covered by this order.

(p) "Pledge" means the ethics pledge set forth in section 1 of this order.

(q) All references to provisions of law and regulations shall refer to such provisions as in effect on January 20, 2009.

Sec. 3. *Waiver.* (a) The Director of the Office of Management and Budget, or his or her designee, in consultation with the Counsel to the President or his or her designee, may grant to any current or former appointee a written waiver of any restrictions contained in the pledge signed by such appointee if, and to the extent that, the Director of the Office of Management and Budget, or his or her designee, certifies in writing (i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver. A waiver shall take effect when the certification is signed by the Director of the Office of Management and Budget or his or her designee.

(b) The public interest shall include, but not be limited to, exigent circumstances relating to national security or to the economy. *De minimis* contact with an executive agency shall be cause for a waiver of the restrictions contained in paragraph 3 of the pledge.

Sec. 4. *Administration.* (a) The head of every executive agency shall, in consultation with the Director of the Office of Government Ethics, establish such rules or procedures (conforming as nearly as practicable to the agency's general ethics rules and procedures, including those relating to designated agency ethics officers) as are necessary or appropriate to ensure that every appointee in the agency signs the pledge upon assuming the appointed office or otherwise becoming an appointee; to ensure that compliance with paragraph 3 of the pledge is addressed in a written ethics agreement with each appointee to whom it applies, which agreement shall also be approved by the Counsel to the President or his or her designee prior to the appointee commencing work; to ensure that spousal employment issues and other conflicts not expressly addressed by the pledge are addressed in ethics agreements with appointees or, where no such agreements are required, through ethics counseling; and generally to ensure compliance with this order within the agency.

(b) With respect to the Executive Office of the President, the duties set forth in section 4(a) shall be the responsibility of the Counsel to the President or his or her designee.

(c) The Director of the Office of Government Ethics shall:

(1) ensure that the pledge and a copy of this order are made available for use by agencies in fulfilling their duties under section 4(a) above;

(2) in consultation with the Attorney General or the Counsel to the President or their designees, when appropriate, assist designated agency ethics officers in providing advice to current or former appointees regarding the application of the pledge; and

(3) in consultation with the Attorney General and the Counsel to the President or their designees, adopt such rules or procedures as are necessary or appropriate:

(i) to carry out the foregoing responsibilities;

(ii) to apply the lobbyist gift ban set forth in paragraph 1 of the pledge to all executive branch employees;

(iii) to authorize limited exceptions to the lobbyist gift ban for circumstances that do not implicate the purposes of the ban;

(iv) to make clear that no person shall have violated the lobbyist gift ban if the person properly disposes of a gift as provided by section 2635.205 of title 5, Code of Federal Regulations;

(v) to ensure that existing rules and procedures for Government employees engaged in negotiations for future employment with private businesses that are affected by their official actions do not affect the integrity of the Government's programs and operations;

(vi) to ensure, in consultation with the Director of the Office of Personnel Management, that the requirement set forth in paragraph 6 of the pledge is honored by every employee of the executive branch;

(4) in consultation with the Director of the Office of Management and Budget, report to the President on whether full compliance is being achieved with existing laws and regulations governing executive branch procurement lobbying disclosure and on steps the executive branch can take to expand to the fullest extent practicable disclosure of such executive branch procurement lobbying and of lobbying for presidential pardons, and to include in the report both immediate action the executive branch can take and, if necessary, recommendations for legislation; and

(5) provide an annual public report on the administration of the pledge and this order.

(d) The Director of the Office of Government Ethics shall, in consultation with the Attorney General, the Counsel to the President, and the Director of the Office of Personnel Management, or their designees, report to the President on steps the executive branch can take to expand to the fullest extent practicable the revolving door ban set forth in paragraph 5 of the pledge to all executive branch employees who are involved in the procurement process such that they may not for 2 years after leaving Government service lobby any Government official regarding a Government contract that was under their official responsibility in the last 2 years of their Government service; and to include in the report both immediate action the executive branch can take and, if necessary, recommendations for legislation.

(e) All pledges signed by appointees, and all waiver certifications with respect thereto, shall be filed with the head of the appointee's agency for permanent retention in the appointee's official personnel folder or equivalent folder.

Sec. 5. *Enforcement.* (a) The contractual, fiduciary, and ethical commitments in the pledge provided for herein are solely enforceable by the United States pursuant to this section by any legally available means, including debarment proceedings within any affected executive agency or judicial civil proceedings for declaratory, injunctive, or monetary relief.

(b) Any former appointee who is determined, after notice and hearing, by the duly designated authority within any agency, to have violated his or her pledge may be barred from lobbying any officer or employee of that agency for up to 5 years in addition to the time period covered by the pledge. The head of every executive agency shall, in consultation with the Director of the Office of Government Ethics, establish procedures to implement this subsection, which procedures shall include (but not be limited to) providing for factfinding and investigation of possible violations of this order and for referrals to the Attorney General for his or her consideration pursuant to subsection (c).

(c) The Attorney General or his or her designee is authorized:

(1) upon receiving information regarding the possible breach of any commitment in a signed pledge, to request any appropriate Federal investigative authority to conduct such investigations as may be appropriate; and

(2) upon determining that there is a reasonable basis to believe that a breach of a commitment has occurred or will occur or continue, if not enjoined, to commence a civil action against the former employee in any United States District Court with jurisdiction to consider the matter.

(d) In any such civil action, the Attorney General or his or her designee is authorized to request any and all relief authorized by law, including but not limited to:

(1) such temporary restraining orders and preliminary and permanent injunctions as may be appropriate to restrain future, recurring, or continuing conduct by the former employee in breach of the commitments in the pledge he or she signed; and

(2) establishment of a constructive trust for the benefit of the United States, requiring an accounting and payment to the United States Treasury of all money and other things of value received by, or payable to, the former employee arising out of any breach or attempted breach of the pledge signed by the former employee.

Sec. 6. *General Provisions.* (a) No prior Executive Orders are repealed by this order. To the extent that this order is inconsistent with any provision of any prior Executive Order, this order shall control.

(b) If any provision of this order or the application of such provision is held to be invalid, the remainder of this order and other dissimilar applications of such provision shall not be affected.

(c) Nothing in this order shall be construed to impair or otherwise affect:

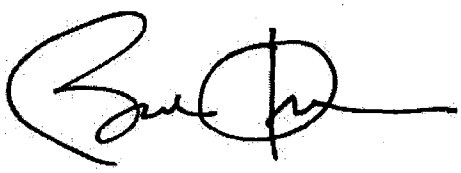
(1) authority granted by law to a department, agency, or the head thereof; or

(2) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(d) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(e) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(f) The definitions set forth in this order are solely applicable to the terms of this order, and are not otherwise intended to impair or affect existing law.



THE WHITE HOUSE,
January 21, 2009.

[FR Doc. E9–1719
Filed 1–23–09; 8:45 am]
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United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

January 22, 2009
DO-09-003

MEMORANDUM

TO: Agency Heads and Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Executive Order; Ethics Pledge

President Obama signed an Executive Order, "Ethics Commitments by Executive Branch Personnel," on January 21, 2009. Among other things, this Executive Order requires every full-time, political appointee appointed on or after January 20, 2009 to sign an Ethics Pledge. Pursuant to section 4(c)(1) of the Executive Order, the Office of Government Ethics (OGE) is providing you with a link to obtain a copy of the Order, https://www.whitehouse.gov/the-press-office/ethics-commitments-executive-branch-personnel, as well as an Ethics Pledge form (attached) to be used for appointees at your agency.

The definition of "appointee" in the Executive Order covers all full-time, political appointees regardless of whether they are appointed by the President, the Vice President, an agency head, or otherwise. Executive Order, sec. 2(a). Unlike certain other ethical requirements (e.g., the restrictions on covered noncareer employees described in 5 C.F.R. part 2636), the Pledge applies without regard to the salary level of the political appointee. Individuals appointed to a career position are not required to sign the Pledge. Similarly, political appointees appointed to a full-time position prior to January 20, 2009 are not presently required to sign the Pledge. This means individuals appointed during the previous administration are not now covered by the Pledge even if they are continuing in their current position or are serving in an acting capacity under the Vacancies Reform Act, 5 U.S.C. § 3345 *et seq.*

Generally, appointees must commit to:

- not accept gifts or gratuities from registered lobbyists or lobbying organizations (subject only to a limited number of the exceptions provided in the OGE Standards of Ethical Conduct, as well as other exceptions that OGE may authorize in the future for situations that do not implicate the purpose of the gift ban)—Pledge, par. 1

- recuse for two years from any particular matter involving specific parties in which a former employer or client is or represents a party, if the appointee served that employer or client during the two years prior to the appointment—Pledge, par. 2

- if the appointee was a registered lobbyist during the prior two years,

  - recuse, for two years after appointment, from any particular matter on which he or she lobbied during the two years prior to appointment (or any particular matter that falls within the same specific issue area)—Pledge, par. 3(a) & (b)

  - not to seek or accept employment with an agency or department that he or she lobbied during the prior two years—Pledge, par. 3(c)

  [Note the requirement for a written ethics agreement for incoming lobbyists, described below, and the waiver mechanism as to lobbyists, also described below]

- if the appointee is subject to the senior employee post-employment restriction in 18 U.S.C. § 207(c), to abide by such restriction for two years after termination of the appointment—Pledge, par. 4

- not to lobby any covered executive branch official (as described in the Lobbying Disclosure Act) or any noncareer SES appointee for as long as President Obama is in office—Pledge, par. 5

- agree that any hiring or other employment decisions will be based on the candidate's qualifications, competence and experience—Pledge, par. 6

Section 3 of the Executive Order provides a waiver mechanism for any of the restrictions contained in the Pledge. The waiver must come from the Director of the Office of Management and Budget (or designee), in consultation with the White House Counsel (or designee). The Executive Order also provides for enforcement of the Pledge through civil action by the Attorney General. Executive Order, sec. 5(c). Moreover, the Order provides for agency debarment proceedings against former appointees found to have violated the Pledge, pursuant to debarment procedures established by each agency in consultation with OGE. Id., sec. 5(b).

The Executive Order requires each covered appointee to sign the Pledge "upon becoming an appointee." Sec. 1; see also sec. 4(a). Therefore, Agency Heads and Designated Agency Ethics Officials must work with relevant personnel officials to ensure that all political appointees are identified and provided with Pledge forms to sign. Section 4(a) of the Executive Order provides more detail on the responsibilities of agencies for administering the Pledge requirement. Section 4(a) also requires agencies to address compliance with the restrictions on incoming lobbyists (paragraph 3 of the Pledge) through a written ethics agreement, subject to approval by the White House Counsel (or designee) prior to the appointee commencing work.

OGE, in cooperation with the Office of the White House Counsel, will be providing you with more detailed guidance concerning the Ethics Pledge and other aspects of the Executive Order in the near future. That will also include scheduling a conference in the coming days to discuss these matters. In the meantime, please do not hesitate to contact OGE about any questions you may have concerning this matter.

Attachment:

Ethics Pledge Form

ETHICS PLEDGE

As a condition, and in consideration, of my employment in the United States Government in a position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:

1. **Lobbyist Gift Ban**. I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.

2. **Revolving Door Ban: All Appointees Entering Government**. 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 clients, including regulations and contracts.

3. **Revolving Door Ban: Lobbyists Entering Government**. If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:
(a) participate in any particular matter on which I lobbied within the 2 years before the date of my appointment;
(b) participate in the specific issue area in which that particular matter falls; or
(c) seek or accept employment with any executive agency that I lobbied within the 2 years before the date of my appointment.

4. **Revolving Door Ban: Appointees Leaving Government**. If, upon my departure from the Government, I am covered by the post employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.

5. **Revolving Door Ban: Appointees Leaving Government to Lobby**. In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

6. **Employment Qualification Commitment**. I agree that any hiring or other employment decisions I make will be based on the candidate's qualifications, competence, and experience.

7. **Assent to Enforcement**. I acknowledge that the Executive Order entitled "Ethics Commitments by Executive Branch Personnel," issued by the President on January 21, 2009, which I have read before signing this document, defines certain of the terms applicable to the foregoing obligations and sets forth the methods for enforcing them. I expressly accept the provisions of that Executive Order as a part of this agreement and as binding on me. I understand that the terms of this pledge are in addition to any statutory or other legal restrictions applicable to me by virtue of Federal Government service.

_____ _____, 20___
Signature Date

_____
Print or type your full name (Last, first, middle)

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

February 10, 2009
DO-09-005

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Signing the Ethics Pledge

The Office of Government Ethics (OGE) has received several questions about when appointees must sign the Ethics Pledge required under Executive Order 13490. In consultation with the White House Counsel's office, OGE has determined that Pledge forms must be signed:

- in the case of individuals nominated by the President to a position requiring Senate confirmation (PAS), after Senate confirmation but before appointment;

- in the case of non-PAS appointees who have already been appointed, no later than 30 days after the date of their appointment (in recognition of the logistics of bringing new appointees on board during the initial implementation of the Executive Order); and

- in the case of non-PAS appointees who may be appointed in the future, at the time such person is appointed to a position covered by the Executive Order.

In light of the serious nature of the commitments embodied in the Pledge, OGE wants to emphasize that special Government employees (SGEs) are not considered to be full-time, non-career appointees subject to the Pledge requirement. This follows the interpretation of similar language in section 2(a) of Executive Order 12834 and section 102 of Executive Order 12731. See OGE Advisory Memorandum 00 x 1. Note that individuals serving in an agency as temporary advisors or counselors, pending Senate confirmation to a PAS position, are considered SGEs unless and until they are confirmed. See OGE Advisory Memorandum 01 x 2. Such individuals, therefore, must sign the Pledge after their confirmation, but before their appointment to a PAS position.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

February 11, 2009
DO-09-007

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Lobbyist Gift Ban Guidance

Section 1 of Executive Order 13490 requires all full-time, non-career appointees, appointed on or after January 20, 2009, to sign an Ethics Pledge. 74 Federal Register 4673 (January 21, 2009). Paragraph 1 of the Pledge, titled "Lobbyist Gift Ban," sets out an appointee's agreement not to "accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee." The purpose of this Memorandum is to provide ethics officials with initial guidance concerning the implementation and interpretation of this gift ban.

Currently the ban applies only to those who meet the definition of "appointee" in the Executive Order.[1] The Order directs the Office of Government Ethics (OGE) to adopt rules or procedures to authorize limited exceptions to the lobbyist gift ban for circumstances that do not implicate the purposes of the ban. Executive Order 13490, sec. 4(c)(3)(iii). The guidance provided in this Memorandum is intended solely to help ethics officials understand the scope of the ban as it applies immediately to full-time, non-career appointees. While the Executive Order directs OGE to adopt rules and procedures to apply the lobbyist gift ban to all executive branch employees, any such rules or procedures will be developed in due course, with ample consideration of the situation of career employees. *See id.*, sec. 4(c)(3)(ii).

What is a "Registered Lobbyist" and a "Registered Lobbying Organization"

The Pledge prohibits gifts from lobbyists and lobbying organizations that are "registered" under the Lobbying Disclosure Act (LDA), 2 U.S.C. § 1601, *et seq.* However, neither ethics officials nor appointees must determine independently whether a particular donor meets the registration requirements of the LDA. Rather, in order to provide notice to appointees, the Executive Order purposely covers only those gifts received from a lobbyist or organization that actually has filed a registration with the Secretary of the Senate and the Clerk of the House of

[1] *See* DAEOgram 09-003 (explaining the scope of covered "appointee"), https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-003:+Executive+Order+13490,+Ethics+Pledge.

Representatives pursuant to 2 U.S.C. § 1603(a). Executive Order 13490, sec. 2(e). The Secretary and the Clerk maintain searchable registrant databases.[2] These are the only databases upon which appointees and ethics officials may rely to determine whether a given donor is registered, for purposes of compliance with the gift ban. Search results must be reviewed carefully. The databases contain the names of clients as well as lobbyists and lobbying organizations. Also, the databases contain historical information. This may indicate that an individual was a registered lobbyist at some time in the past but is not a lobbyist currently. OGE can assist ethics officials who have questions about the use of the databases.

The ban is not limited to donors that provide lobbying services to others. The phrase "registered lobbyist or lobbying organization" includes any "organization filing a registration," not just lobbying firms. Executive Order 13490, sec. 2(e). In particular, the ban includes any organization that registers because it employs at least one in-house lobbyist on its own behalf. *See* 2 U.S.C. § 1603(a)(2), (3)(A)(ii). For example, an appointee may not accept a bottle of wine from a telecommunications company that is registered under the LDA, even though the company is not a lobbying firm and registers only because it employs a single Governmental affairs officer to represent that company's own interests. Of course, the ban also covers registered lobbying firms, such as a law firm or Governmental relations firm that files registrations for activities on behalf of its clients.

The ban also applies without regard to whether the particular lobbyist or organization has any dealings with the appointee's own agency. As long as the donor is registered under the LDA, it does not matter that the donor's lobbying contacts and activities may be directed solely to another agency--or even solely to the Legislative Branch. As indicated below, the lobbyist gift ban is in addition to the OGE prohibitions on gifts from "prohibited sources" and gifts "given because of the employee's official position."

Furthermore, the ban is intended to prohibit gifts from any employee of a registered lobbyist or lobbying organization. In this regard, the ban applies in the same way as the OGE gift prohibitions, which treat a gift from an employee of an organization as a gift from the organization. *See* 5 C.F.R. § 2635.204(a)(Example 3). Otherwise, a lobbyist or lobbying organization could evade the ban simply by relying on non-lobbyist employees to make gifts. Thus, for example, an appointee could not accept a free dinner at a restaurant from an employee of an oil company that is registered under the LDA, even though that employee is not included among the lobbyists listed in the company's registration. Of course, if the appointee had a personal relationship with the company employee, the gift might be permitted under 5 C.F.R. § 2635.204(b). *Id.*

The lobbyist gift ban does not prohibit gifts from an organization that retains "outside" lobbyists or lobbying firms, as long as the organization itself is not registered under the LDA.

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[2] *See* http://lobbyingdisclosure.house.gov/; http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm.

Organizations that are merely "clients" but not actually employers of lobbyists do not have to file registrations under the LDA, even though they may be listed as clients in the registrations filed by the lobbyists and lobbying firms they retain. 2 U.S.C. §§ 1602(2); 1603(a)(2). The LDA definition of employee excludes both "independent contractors" and "volunteers who receive no financial or other compensation from the person or entity for their services," so a person who uses only such non-employees for all lobbying services would not be required to register. 2 U.S.C. §§ 1602(5); 1603(a)(2). These exclusions are important to keep in mind because the House and Senate databases (set out in footnote 2 of this DAEOgram) contain the names of many persons and entities that, for example, are clients of lobbying firms but are not themselves registered lobbyists or lobbying organizations.

The Lobbyist Gift Ban is in Addition to Existing OGE Gift Rules

The Appointee Pledge refers to certain provisions in the existing OGE gift regulations found in the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) at 5 C.F.R. part 2635, subpart B, including the OGE definition of "gift." Executive Order 13490, sec. 2(c)(1); 5 C.F.R. § 2635.203(b). That definition excludes several items, such as certain modest refreshments, presentation items of little intrinsic value, benefits available to all Government employees, etc. 5 C.F.R. § 2635.203(b)(1)-(9). However, the prohibitions in the Pledge are more comprehensive and provide far fewer exceptions than the existing OGE rules. For example, an appointee may not accept a gift from a lobbyist or lobbying organization even if the donor is not a "prohibited source" and the gift is not given "because of the employee's official position." 5 C.F.R. § 2635.202(a).

The only exceptions to the lobbyist gift ban are ones that do not undermine the purpose of the lobbyist gift ban and are set out below:

- gifts based on a personal relationship, 5 C.F.R. § 2635.204(b);
- discounts and similar benefits, 5 C.F.R. § 2635.204(c);
- gifts resulting from a spouse's business or employment, 5 C.F.R. § 2635.204(e)(1);
- customary gifts/gratuities provided by a prospective employer, 5 CFR § 2635.204(e)(3);
- gifts to the President or Vice President, 5 C.F.R. § 2635.204(j);
- gifts authorized by an OGE-approved agency supplemental regulation, 5 C.F.R. § 2635.204(k); and
- gifts accepted under specific statutory authority, 5 C.F.R. § 2635.204(l).

Because the lobbyist gift ban is very broad, these common sense exceptions are necessary to avoid potentially absurd results. Thus, an appointee may accept a birthday present from his or her spouse who is a registered lobbyist or sign up for a training course sponsored by a registered lobbying organization that provides a discount for Federal Government employees. However, the following exceptions in the OGE gift regulations are not exceptions to the lobbyist gift ban:

- $20 de minimis value, 5 C.F.R. § 2635.204(a);
- awards and honorary degrees, 5 CFR § 2635.204(d);

- gifts resulting from the employee's own outside business or employment, 5 C.F.R. § 2635.204(e)(2);
- gifts from political organizations in connection with political participation, 5 C.F.R. § 2635.204(f);
- widely attended gatherings (WAG), 5 C.F.R. § 2635.204(g)(2);[3]
- social invitations from non-prohibited sources, 5 C.F.R. § 2635.204(h); and
- food, refreshments and entertainment from persons other than a foreign government in a foreign area.[4]

This means, for example, an appointee may not accept a $15 lunch from a registered lobbyist or go to a widely attended reception sponsored by a registered lobbying organization.

The Executive Order also expressly provides that the lobbyist gift ban covers gifts that are solicited or accepted "indirectly" within the meaning of section 2635.203(f). Executive Order 13490, sec. 2(c)(2). The OGE gift regulations define an indirect gift as including any gift to an employee's parent, sibling, spouse, child or dependent relative because of that person's relationship to the employee, provided that the employee knows of and acquiesces in the gift. § 2635.203(f)(1). In other words, the lobbyist gift ban cannot be circumvented by extending an invitation or benefit to an appointee's family. An indirect gift also includes any gift given to any other person, including a charitable organization, based on the employee's designation, recommendation or other specification. 5 C.F.R. § 2635.203(f)(2). Thus, for example, if a lobbying organization offered an appointee free tickets to a Broadway show, the appointee could not simply suggest that the tickets be given instead to his favorite charity or even to one of several charities whose names are provided by the appointee. *See* § 2635.203(f)(Example 1).

Finally, appointees will not be deemed to have accepted a gift in violation of the Pledge if the gift is disposed of as provided in 5 C.F.R. § 2635.205. Executive Order 13490, sec. 4(c)(3)(iv). As provided in the OGE gift regulation, proper disposition includes paying the donor the market value or returning a tangible item. In the case of perishable items that cannot

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[3] Appointees still may accept offers of free attendance on the day of an event when they are speaking or presenting information in an official capacity, as described in 5 C.F.R. § 2635.204(g)(1), notwithstanding the lobbyist gift ban. This is not a gift exception, but simply an application of the definition of "gift" in section 2635.203(b): "The employee's participation in the event on that day is viewed as a customary and necessary part of his performance of the assignment and does not involve a gift to him or to the agency." 5 C F R § 2635.204(g)(1).

[4] Note that the Pledge does not prohibit an appointee from accepting "[g]ifts from a foreign government or international or multinational organization, or its representative, when accepted by the employee under the authority of the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342." 5 C.F.R. § 2635.204(l)(2); *see* Executive Order 13490, sec. 2(c)(3). Whether, or under what circumstances, any of these entities referenced in the Foreign Gifts and Decorations Act could be a registered lobbyist or lobbying organization is beyond the scope of this Memorandum.

be returned, the appointee's supervisor or agency ethics official can determine that the gift will be given to an appropriate charity, shared within the appointee's office, or destroyed. Under section 2635.205(c), an appointee who promptly consults an agency ethics official to determine whether an unsolicited gift may be accepted, and promptly complies with that official's instructions, will not be deemed to have accepted a prohibited gift.[5] For example, if an appointee receives an unsolicited item, but is unsure whether the donor is registered under the Lobbying Disclosure Act (see discussion below), the appointee will not be in violation of the ban if he or she promptly contacts an agency ethics official to determine whether the gift may be accepted and follows the instructions of that official.

Other Permissible Gifts

Although the lobbyist gift ban is broad, it was not intended to prohibit certain gifts that do not implicate the purposes of the ban. Pending the issuance of final rules or procedures, appointees may rely on the following interim guidance, which OGE developed in consultation with the White House Counsel's Office, to accept certain gifts from 501(c)(3) organizations and media organizations.

Charitable and other not-for-profit organizations that are exempt from taxation under 26 U.S.C. § 501(c)(3) are already restricted as to the amount of lobbying in which they may engage. *See* 26 U.S.C. § 501(c)(3), (h). Consequently, the practices that the Executive Order and Pledge were intended to curb are already less implicated by 501(c)(3) organizations than by other entities that may employ lobbyists. Furthermore, any 501(c)(3) organizations that receive Federal funds are subject to limitations on the use of those funds to lobby for Federal contracts, grants, loans or cooperative agreements. *See* 31 U.S.C. § 1352. Given the kinds of purposes for which 501(c)(3) organizations are granted tax-exempt status (e.g., educational, charitable, scientific), there is little reason to prohibit employees from relying on the usual gift exceptions in the Standards of Conduct, many of which have particular relevance to the activities of such organizations. *See, e.g.,* 5 C.F.R. § 2635.204(g)(2)(permitting attendance at conferences and other widely attended events in the interest of the agency); § 2635.204(d)(permitting certain honorary degrees and awards). This judgment is analogous to policies reflected in the Federal Employees Training Act. *See* 5 U.S.C. § 4111 (permitting employees to accept certain items from 501(c)(3) organizations). Therefore, the gift ban will not apply to a gift from a 501(c)(3) organization, as long as the gift otherwise may be accepted under the Standards of Conduct. However, in keeping with the purposes of the ban, appointees still may not accept a gift if the organization employee who extends the offer is a registered lobbyist him- or herself.

Similar considerations are relevant to gifts from media organizations. The LDA itself reflects solicitude for the unique constitutional role of the press in gathering and disseminating

[5] *See* OGE Informal Advisory Letter 06 x 4 (employee must take initiative to consult with ethics official and cannot wait until contacted, if ever, by an ethics official before disposing of gift properly).

information. *See* 2 U.S.C. § 1602(8)(B)(ii). Likewise, the lobbyist gift ban is not intended to erect unnecessary barriers to interaction between appointees and journalists. This is consistent with concerns about the application of the OGE gift prohibitions to certain press dinners shortly after the Standards of Conduct became effective. *See* Memorandum from the Counsel to the President to All Agency Heads, December 21, 1993 (suspending enforcement of gift rule with respect to press dinners, pending revision of rule). Therefore, an appointee may accept a gift from an employee of a media organization, as long as the gift is permissible under the OGE gift rules, including any applicable exceptions. The only proviso, as discussed above, is that appointees may not accept a gift if the organization employee who extends the offer is actually a registered lobbyist.

Conclusion

OGE will continue to provide guidance on the lobbyist gift ban and other aspects of the Executive Order in the future. Ethics officials should consult with OGE if they have any questions concerning these matters.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

February 23, 2009
DO-09-008

MEMORANDUM

TO: Agency Heads and Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Authorizations Pursuant to Section 3 of Executive Order 13490, "Ethics Commitments by Executive Branch Personnel"

The purpose of this DAEOgram is to provide guidance to agency heads and Designated Agency Ethics Officials (DAEOs) on the application of section 3 of Executive Order 13490. As you know, section 1 of the Executive Order requires all covered appointees to abide by several commitments in an Ethics Pledge, unless they are granted a waiver under section 3. The Director of the Office of Management and Budget (OMB) has now designated the DAEO of each executive agency to exercise section 3 waiver authority in consultation with the Counsel to the President. This designation and the limitations on waiver authority are addressed below.

DAEOs are Now Designated to Exercise Waiver Authority in Consultation with White House Counsel

Section 3(a) of the Executive Order provides:

> The Director of the Office of Management and Budget, or his or her designee, in consultation with the Counsel to the President or his or her designee, may grant to any current or former appointee a written waiver of any restrictions contained in the pledge signed by such appointee if, and to the extent that, the Director of the Office of Management and Budget, or his or her designee, certifies in writing (i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver.

The Director of OMB has, after consultation with Counsel to the President, determined that the most appropriate designee of his authority is the Designated Agency Ethics Official (DAEO) of each executive agency. This designation reflects the high degree of trust and confidence with which the experience and professional judgment of the DAEOs are viewed. The deep agency knowledge of the DAEOs was also an important factor in the Director's decision.

Limitations on Exercise of Waiver Authority

It is the President's intention that waivers will be granted sparingly and that their scope will be as limited as possible. All waivers must be in writing. As specified in the Executive Order, a waiver may be granted only after consultation with the Counsel to the President and only upon the DAEO's certification either that the literal application of the restriction is inconsistent with the purposes of the restriction or that it is in the public interest to grant the waiver. Executive Order 13490, sec. 3(b). For the latter purpose, the public interest includes, but is not limited to, exigent circumstances relating to national security or the economy. Additionally, provisions in paragraph 3 of the Pledge, which pertains to appointees who have been registered lobbyists within two years of appointment, may be waived where the appointee's lobbying activities in connection with an agency, or on a particular matter, or in a specific issue area have been *de minimis*.

Finally, we wish to emphasize that the legal requirement under the Executive Order of advance consultation with the Counsel to the President remains and is to be strictly enforced. Norman Eisen, the Special Counsel to the President, is the point of contact in the Office of the Counsel to the President and can be reached at (202) 456-1214 or neisen@who.eop.gov. To ensure that the consultation requirement is met, no waiver should ever be granted until the Special Counsel has provided a written acknowledgement affirmatively stating that the required consultation has occurred and is complete. Your OGE desk officers should also be consulted in advance with respect to all waiver issues.

Conclusion

OGE will continue to publish additional guidance on the Pledge required by Executive Order 13490 as needed. Questions about the application of the Pledge should be referred to the OGE desk officer responsible for your agency.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 16, 2009
DO-09-010

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Who Must Sign the Ethics Pledge?

The Office of Government Ethics (OGE) has received numerous questions concerning which officials must sign the Ethics Pledge required under Executive Order 13490. Therefore, OGE is issuing this guidance to help agency ethics officials determine which officials are subject to the Pledge requirement.

Definition of Appointee

Section 1 of the Executive Order states that "[e]very appointee in every executive agency appointed on or after January 20, 2009" shall sign the Ethics Pledge. Executive Order 13490, sec. 1, 74 Federal Register 4673 (January 26, 2009). The Order defines "appointee" as follows:

> 'Appointee' shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

Id., sec. 2(b).

In broad terms, the Pledge was intended to apply to full-time "political" appointees of all types. *Cf.* OGE Informal Advisory Letter 04 x 10 ("when we identify a position as 'noncareer,' we are typically referring to a political appointment"). The term appointee generally includes, but is not limited to, all appointees to positions described as "covered noncareer" in 5 C.F.R. § 2636.303(a) and all full-time Presidential appointees subject to section 102 of Executive

Order 12371. However, the term is not limited by any salary thresholds, and it covers political employees appointed other than by the President. *See* DAEOgram DO-09-003.

In response to questions from several agencies, OGE wants to emphasize that the term appointee does not include every excepted service employee. Non-career is not synonymous with excepted service. *See* Detailed Explanation, Ethics Reform Act of 1989: Technical Amendments, 136 Cong. Rec. H 1646 (1990) (ethical limitations on "noncareer" appointees do not cover "for example, attorneys hired under Schedule A" of the excepted service). Rather, as the definition of appointee makes clear, the Pledge applies to appointees excepted from the competitive service "by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria)." Executive Order 13490, sec. 2(b); *see* 5 C.F.R. part 213, subpart C (excepted schedules). Again, the essentially political nature of a given appointment is the touchstone. *See* 04 x 10 (discussing the criteria for Schedule C and comparable appointments).

Categories of Officials

OGE has received questions about the coverage of several categories of officials under the Pledge. These categories are discussed briefly below.

1. Special Government Employees

As explained in DAEOgram DO-09-005, special Government employees (SGEs) are not required to sign the Pledge. SGEs are described at 18 U.S.C. § 202(a), and for most purposes the term refers to employees who are expected to perform temporary duties on no more than 130 days during a period of 365 days. The definition of SGE and the process for determining who is an SGE are discussed in detail in various OGE documents. *E.g.*, OGE Advisory Memoranda 00 x 1; 01 x 2.

2. Foreign Service and Similar Positions

The definition of appointee excludes persons appointed as members of the Senior Foreign Service, but at the same time it includes "non-career" appointees in any "SES-type system." OGE elsewhere has determined that non-career Senior Foreign Service appointees are an example of what is meant by non-career members of an SES-type system. 5 C.F.R. § 2636.303(a)(2). The Executive Order carries forward this distinction and is intended to cover those Senior Foreign Service members who are considered non-career or political appointees, but not those who are deemed career officers. The same distinction applies with regard to any agency-specific or other categories of foreign service officials: those positions that are filled by political appointees are subject to the Pledge, whereas those positions that are not viewed as political are not subject to the Pledge. Likewise, this distinction will apply to Ambassadors: career Ambassadors (many of whom rotate through multiple Ambassadorial assignments and

other posts throughout their Government careers during successive administrations) will not be subject to the Pledge, but non-career or political Ambassador appointees must sign the Pledge.

3. Career Officials Appointed to Confidential Positions

OGE has received questions from several agencies about whether the Pledge applies to career staff who are appointed to serve as confidential assistants to Commissioners and other agency leaders. Some of these questions have come from independent agencies headed by a collegial body comprised of members with staggered, fixed terms. Apparently, it has been a regular practice at certain agencies to appoint regular career staff to serve in confidential positions with a given Commissioner, with the expectation that the confidential assistant will return to a career staff position at the end of the Commissioner's term or earlier. In consultation with the White House Counsel's Office, OGE has determined that the Pledge is not intended to apply to such employees, *provided* that the right of return to a career position is established by statute, regulation, or written agency personnel policy. Under such circumstances, a confidential "rotation" would be viewed as part of an established career pattern, and imposing the exacting requirements of the Pledge could create unintended disincentives for career employees to accept such rotations.

4. Career SES Members Given Presidential Appointments

The Pledge requirement does apply, however, to career SES members (or other career SES-equivalent employees) who are appointed to positions requiring Senate confirmation (PAS) or to other Presidentially-appointed positions (PA) that ordinarily are viewed as non-career. Career SES members may elect to retain certain benefits of career SES status, *see* 5 U.S.C. § 3392(c), and they also have certain reinstatement rights upon the completion of a separate Presidential appointment, *see* 5 C.F.R. § 317.703. However, PAS or PA appointments are of a different character and magnitude, and career SES members who accept such appointments become an important part of the political leadership in the administration. Therefore, they must sign the Pledge.

5. Schedule C Employees with No Policymaking Role

Certain Schedule C employees who have no policymaking role, such as chauffeurs and private secretaries, have been exempted from public financial disclosure requirements. *See* 5 U.S.C. app. § 101(f)(5); 5 C.F.R. § 2634.203(b). These positions have been excluded from public filing based on OGE's determination "that such exclusion would not affect adversely the integrity of the Government or the public's confidence in the integrity of the Government." 5 C.F.R. § 2634.203(a). For the same reasons, the Pledge is not intended to cover these individuals, *provided* that the agency has followed the procedures prescribed in section 2634.203(c). Apart from appointees under Schedule C and comparable authorities, the same result obtains with respect to employees, appointed under 3 U.S.C. §§ 105-108, who have similar non-policymaking duties, as determined by the White House Counsel's Office.

6. Acting Officials and Detailees

The Pledge requirement does not apply to career officials who are acting temporarily in the absence of an appointee to a non-career position. This includes career officials acting in the absence of a Senate-confirmed Presidential appointee under the Vacancies Reform Act, 5 U.S.C. § 3345 *et seq.* Similarly, a career appointee who is temporarily detailed to a position normally occupied by a non-career appointee is not subject to the Pledge. *Cf.* 68 Federal Register 7844, 7848 (February 18, 2003)(employees detailed to a senior employee position do not become senior employees under 18 U.S.C. § 207(c)).

7. Holdover Appointees

On its face, the Pledge requirement does not apply to individuals appointed prior to January 20, 2009, and the administration will not for 100 days ask anyone held over to complete the Pledge. The administration has not yet determined whether it will extend that 100 day grace period or at what point it will ask holdovers to complete the Pledge. Please bear in mind that in some cases the new administration may ask a holdover to remain in the position, not merely as a caretaker until some other choice for the position can be appointed, but as the President's choice for that position. In the latter situations, the appointees will be asked to sign the Pledge when they agree to remain even though there is not a new appointment.

8. Term Appointees

Presidential appointees to positions with a fixed term of office typically are non-career appointees, even if they are removable only for cause as specified by statute. *See* OGE Informal Advisory Letter 89 x 16. Therefore, non-career term appointees are subject to the Pledge if they are full-time and were appointed on or after January 20, 2009.

Term appointees appointed prior to January 20, 2009 are not required to sign the Pledge. As a practical matter, however, agency ethics officials should counsel such individuals to follow the Pledge to the extent feasible, particularly paragraphs 1, 2, 3 and 6 of the Pledge. Doing so will help to prevent the confusion and questions that could result if these appointees, especially those in visible positions, do not abide by the same gift, recusal, and hiring rules that apply to fellow appointees at the same agency.

A term appointee whose term has expired, but who is permitted by statute to holdover for some period of time, is not subject to the Pledge, provided the appointment preceded January 20, 2009. Where the President has nominated such a term appointee for reappointment for an additional term, the individual must sign the Pledge after Senate Confirmation but prior to reappointment. *See* DAEOgram DO-09-005. Again, as described in the previous paragraph, such term appointees should be counseled to follow the Pledge where practicable.

Conclusion

Given the great variety of appointment authorities in the executive branch, it is not possible for OGE to address every possible category of appointee in this Memorandum. OGE, in consultation with the White House Counsel's Office, can assist agency ethics officials as necessary in addressing any questions on a case-by-case basis.

OFFICE OF GOVERNMENT ETHICS

04 x 10

Letter to a Deputy Ethics Official
dated July 20, 2004

This is in response to your letter of May 28, 2004, in which you requested our opinion as to whether the Executive Director of [your agency] is a "covered noncareer employee" as defined in 5 C.F.R. § 2636.303(a).

In your letter, in which you provided background on the roles and responsibilities of [your agency's Board] and the Executive Director, you indicated that [your agency's Board] consists of five part-time Presidentially appointed members who oversee the agency. This Board appoints an Executive Director to serve as the full-time chief executive of the agency. The Executive Director is responsible for carrying out the policies established by your agency's Board, [administering specific agency programs], and issuing regulations. While the Executive Director is charged with the day-to-day operations of the agency, your agency's Board can order the Executive Director to take a specific action. The Executive Director can serve in the position indefinitely, unless removed from office by your agency's Board for good cause.

The definition of covered noncareer employee in section 2636 focuses on both the employee's pay rate and type of appointment. For purposes of pay, a covered noncareer employee is an employee for whom the rate of basic pay is equal to or greater than 120 percent of the minimum rate of pay payable for GS-15 of the General Schedule, which is currently $104,927. The Executive Director is paid at the rate of level III of the Executive Schedule, which is currently $145,600, and thus meets the pay criteria under section 2636.303(a).

For purposes of type of appointment, the regulations at sections 2636.303(a)(1) - 2636.303(a)(4) specify under which appointment authorities employees will be considered covered noncareer employees. You have asked if the Executive Director would be a "covered noncareer employee" under either of two provisions in that regulation, specifically section 2636.303(a)(3), if he were appointed to his position "under an agency-specific statute that establishes appointment criteria essentially the same as those set forth in

section 213.3301 of this title for Schedule C positions;" or section 2636.303(a)(4) if he were appointed to his position under appointment criteria "essentially the same as those for noncareer executive assignment positions."

With regard to section 2636.303(a)(3) you have indicated that the Executive Director position is not a Schedule C position, but question whether he may have been appointed "under criteria essentially the same as that set forth in section 213.3301 of this title for Schedule C positions." The criteria at section 213.3301 focus on positions that are policy-determining or involve a close and confidential working relationship with key appointed officials. After consulting with the Office of Personnel Management, we conclude that the Executive Director is not appointed under criteria similar to a Schedule C position. Since the Executive Director's duties, as stated at 5 U.S.C. § 8474(b)(1), include carrying out the policies that are established by the Board, he does not appear to occupy a policy-determining position. The criteria for determining whether a position involves a close and confidential working relationship with key appointed officials, focuses on whether the individual is appointed by the President, or someone else who is appointed by the President, and whether the individual may be removed from office at the will of the appointing official. As you state in your letter, the agency's Presidentially-appointed Board appoints the Executive Director, who may be removed from office for good cause, 5 U.S.C. § 8472(g)(1)(C). Therefore, while the Executive Director is appointed in a manner consistent with a Schedule C appointment, the conditions for his removal are not the same as the "at will" conditions for removal of a Schedule C appointee.

With regard to section 2636.303(a)(4), we note first that the executive assignment system was abolished by the Federal Employees Pay Comparability Act of 1990 and replaced by the Senior Level system. However, we can still examine the appointment criteria to determine whether the Executive Director position would fall under section 2636.303(a)(4). Former regulations at 5 C.F.R. § 305.601(b) set forth three criteria to consider when determining whether a noncareer executive assignment could be made. These criteria, which include being deeply involved in the advocacy of Administration programs and support of their controversial aspects; participating significantly in the determination of major political policies of the Administration; or serving principally as personal assistant to or advisor of a Presidential appointee or other key figure, do not appear applicable to the Executive Director

position. Moreover, former section 305.601(c) indicated that a position does not qualify to be filled by noncareer executive assignment if its principal responsibility is the internal management of an agency, or if it involves long-standing recognized professional duties and responsibilities resting on a body of knowledge essentially politically neutral in nature. The Executive Director position appears to meet both these factors since he is responsible for the day-to-day operations of the agency and management of [a specific agency program] in accordance with the policies established by the Board.

In addition, when we identify a position as "noncareer," we are typically referring to a political appointment. In this case, while your Executive Director is appointed by the Presidentially-appointed Board, the position is for an indefinite period, not subject to political changes in Administrations. Also, you have indicated through telephone discussions that the Executive Director position demonstrates some characteristics similar to a career employee, such as the accrual of leave and participation in the Federal Employees Retirement System.

Therefore, we conclude that the Executive Director would not be a noncareer employee covered under either of the provisions in section 2636.303(a) about which you inquired. However, we still caution that given the Executive Director's role in your agency, he should remain particularly mindful of 5 C.F.R. §§ 2635.801 - 2635.808 regarding outside activities.

We hope this has been helpful.

Sincerely,

Marilyn L. Glynn
Acting Director

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 26, 2009
DO-09-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics Pledge: Revolving Door Ban--All Appointees Entering Government

Executive Order 13490 requires any covered "appointee" to sign an Ethics Pledge that includes several commitments. 74 Fed. Reg. 4673 (January 26, 2009). OGE Memorandum DO-09-003 explains the definition of appointee, describes the commitments included in the Pledge, and provides a Pledge Form to be used for appointees.[1] The purpose of the present memorandum is to advise ethics officials on how to implement paragraph 2 of the Pledge, "Revolving Door Ban--All Appointees Entering Government."

Paragraph 2 of the Pledge requires an appointee to commit that he or she will not, for a period of two years following appointment, participate in any particular matter involving specific parties that is directly and substantially related to his or her former employer or former clients, including regulations and contracts. Exec. Order No. 13490 sec. 1(2). To help agencies implement this requirement, OGE is providing the following explanation of the phrases that comprise paragraph 2 of the Pledge and of how paragraph 2 interacts with existing impartiality regulations.

Understanding the Meaning of the Terms that Comprise Paragraph 2 of the Pledge

"Particular matter involving specific parties"

In order to determine whether an appointee's activities concern any particular matters involving specific parties, ethics officials must follow the definition of that phrase found in section 2(h) of the Executive Order. That definition incorporates the longstanding interpretation of particular matter involving specific parties reflected in 5 C.F.R. § 2641.201(h). However, it also expands the scope of the term to include any meeting or other communication with a former employer or former client relating to the performance of the appointee's official duties, unless

[1] https://www.oge.gov/Web/oge.nsf/Resources/DO-09-003:+Executive+Order+13490,+Ethics+Pledge.

the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. The purpose of this expansion of the traditional definition is to address concerns that former employers and clients may appear to have privileged access, which they may exploit to influence an appointee out of the public view.[2]

The expanded party matter definition has a two-part exception for communications with an appointee's former employer or client, if the communication is: (1) about a particular matter of general applicability and (2) is made at a meeting or other event at which participation is open to all interested parties. Although the exception refers to particular matters of general applicability, it also is intended to cover communications and meetings regarding policies that do not constitute particular matters. An appointee may participate in communications and meetings with a former employer or client about these particular or non-particular matters if the meeting or event is "open to all interested parties." Exec. Order No. 13490 sec. 2(h). Because meeting spaces are typically limited, and time and other practical considerations also may constrain the size of meetings, common sense demands that reasonable limits be placed on what it means to be "open to all interested parties." Such meetings do not have to be open to every comer, but should include a multiplicity of parties. For example, if an agency is holding a meeting with five or more stakeholders regarding a given policy or piece of legislation, an appointee could attend such a meeting even if one of the stakeholders is a former employer or former client; such circumstances do not raise the concerns about special access at which the Executive Order is directed. Additionally, the Pledge is not intended to preclude an appointee from participating in rulemaking under section 553 of the Administrative Procedure Act simply because a former employer or client may have submitted written comments in response to a public notice of proposed rulemaking.[3] In any event, agency ethics officials will have to exercise judgment in determining whether a specific forum qualifies as a meeting or other event that is "open to all interested parties," and OGE is prepared to assist with this analysis.

"Particular matter involving specific parties... including regulations"

Because regulations often are cited as examples of particular matters that do not involve specific parties, OGE wants to emphasize that the phrase is not intended to suggest that all rulemakings are covered. Rather, the phrase is intended to serve as a reminder that regulations sometimes may be particular matters involving specific parties, although in rare circumstances. As OGE has observed in connection with 18 U.S.C. § 207, certain rulemakings may be so focused on the rights of specifically identified parties as to be considered a particular matter

2 Note, however, that the expanded definition of party matter is not intended to interfere with the ability of appointees to consult with experts at educational institutions and "think tanks" on general policy matters, at least where those entities do not have a financial interest, as opposed to an academic or ideological interest. See Office of Legal Counsel Memorandum, "Financial Interests of Nonprofit Organizations," January 11, 2006 (distinguishing between financial interests and advocacy interests of nonprofits), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v030-p0064.pdf; cf. 5 C.F.R. § 2635.502(b)(1)(v)(Note)(OGE impartiality rule does not require recusal because of employee's political, religious or moral views).

3 For other reasons discussed below, however, rulemaking sometimes may constitute a particular matter involving specific parties, albeit rarely

involving specific parties.[4] Such rulemakings likewise are covered by paragraph 2.

"Directly and substantially related to"

The phrase "directly and substantially related to," as defined in section 2(k) of the Executive Order, means only that the former employer or client is a party or represents a party to the matter. Ethics officials should be familiar with this concept from 5 C.F.R. § 2635.502(a).

"Former employer or former client"

In order to determine who qualifies as an appointee's former employer or former client, ethics officials must follow the definitions of each phrase found in section 2(i) and 2(j), respectively, of the Executive Order. In effect, the Executive Order splits the treatment of former employer found in the impartiality regulations into two discrete categories, "former employer" and "former client," and removes contractor from the definition of either term. *See* 5 C.F.R. §§ 2635.502(b)(1)(iv), 2635.503(b)(2).

Former Employer

For purposes of the Pledge, a former employer is any person for whom the appointee has, within the two years prior to the date of his or her appointment, served as an employee, officer, director, trustee, or general partner, unless that person is an agency or entity of the Federal Government, a state or local government, the District of Columbia, a Native American tribe, or any United States territory or possession. Exec. Order No. 13490, sec. 2(i). While the terms employee, officer, director, trustee, or general partner generally follow existing ethics laws and guidance, OGE has received questions about the scope of the exclusion for government entities from the definition of former employer, specifically with regard to public colleges and universities. The exclusion for state or local government entities does extend to a state or local college or university.[5]

OGE also has received several questions about whether the definition of former employer includes nonprofit organizations. Consistent with the interpretation of similar terms in other ethics rules and statutes, the definition of former employer in the Executive Order covers

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[4] *See, e.g,.* 73 Fed. Reg. 36168, 36176 (June 25, 2008); *see also* OGE Informal Advisory Letter 96 x 7, n.1.

[5] *See* OGE Informal Advisory Opinion 93 x 29 n.1 where OGE held that for purposes of applying the supplementation of salary restrictions in 18 U.S.C. § 209, the exception for payments from the treasury of any state, county, or municipality included a state university. OGE cautions, however, that the exclusion for state and local entities may not extend to all entities affiliated with a state or local college or university. OGE notes that some colleges and universities may create mixed public/private entities in partnership with commercial enterprises. Such entities should not automatically be considered as falling within the exclusion, but rather should be examined on a case-by-case basis to determine whether they should be viewed as instrumentalities of state or local government for the purposes of the Executive Order.

nonprofit organizations.[6] Moreover, it includes nonprofit organizations in which an appointee served without compensation, provided of course that the appointee actually served as an employee, officer, director, trustee, or general partner of the organization. Thus, for example, the recusal obligations of Pledge paragraph 2 would apply to an appointee who had served without pay on the board of directors or trustees of a charity, provided that the position involved the fiduciary duties normally associated with directors and trustees under state nonprofit organization law. This does not include, however, purely honorific positions, such as "honorary trustee" of a nonprofit organization. It also does not include unpaid positions as a member of an advisory board or committee of a nonprofit organization, unless the position involved fiduciary duties of the kind exercised by officers, directors or trustees, or involved sufficient supervision by the organization to create a common law employee-employer relationship (which is not typical, in OGE's experience).

Former Client

For purposes of the Pledge, a former client means any person for whom the appointee served personally as an agent, attorney, or consultant within two years prior to date of appointment. Exec. Order No. 13490 sec. 2(j). A former client does not include a client of the appointee's former employer to whom the appointee did not personally provide services. Therefore, although an appointee's former law firm provided legal services to a corporation, the corporation is not a former client of the appointee for purposes of the Pledge if the appointee did not personally render legal services to the corporation. Moreover, based on discussions with the White House Counsel's office, OGE has determined that the definition of former client is intended to exclude the same governmental entities as those excluded from the definition of former employer. Thus, for example, an appointee who had provided legal services to the Department of Energy would not be prohibited from participating personally in particular matters in which the Department is a party.

In addition, the term former client includes nonprofit organizations. However, a former client relationship is not created by service to a nonprofit organization in which an appointee participated solely as an unpaid advisory committee or advisory board member with no fiduciary duties. Although a former client includes any person whom the appointee served as a "consultant," OGE has not construed the term consultant, as used in analogous provisions of the Ethics in Government Act and the Standards of Ethical Conduct, to include unpaid, non-fiduciary advisory committee members of a nonprofit organization. *See* 5 U.S.C. app. § 102(a)(6)(A)(disclosure of consultant positions); 5 C.F.R. § 2635.502(b)(1)(iv)(covered relationship as former consultant). Likewise, former client does not include a nonprofit organization in which an appointee served solely in an honorific capacity.

[6] For similar reasons, Federally-funded research and development centers (FFRDCs), whether nonprofit or for profit, are intended to be included in the definitions of former employer and former client for purposes of paragraph 2 of the Pledge.

The definition of former client specifically excludes "instances where the service provided was limited to a speech or similar appearance." Exec. Order No. 13490, sec. 2(j). In addition to excluding all activities that consist merely of speaking engagements, this provision is intended to exclude other kinds of discrete, short-term engagements, including certain de minimis consulting activities. Essentially, the Pledge is not intended to require a two-year recusal based on activities so insubstantial that they are not likely to engender the kind of lingering affinity and mixed loyalties at which the Executive Order is directed. The exclusion for speaking and similar engagements was added to emphasize that the provision focuses on services that involved a significant working relationship with a former client. Therefore, the exclusion is not limited to speeches and speech-like activities (such as serving on a seminar panel or discussion forum), but includes other activities that similarly involve a brief, one-time service with little or no ongoing attachment or obligation. In order to determine whether any services were de minimis, ethics officials will need to consider the totality of the circumstances, including the following factors:

- the amount of time devoted;
- the presence or absence of an ongoing contractual relationship or agreement;
- the nature of the services (e.g., whether they involved any representational services or other fiduciary duties); and
- the nature of compensation (e.g., one-time fee versus a retainer fee).

For example, the recusal obligation of Pledge paragraph 2 would not apply to an appointee who had provided consulting services on a technical or scientific issue, for three hours on a single day, pursuant to an informal oral agreement, with no representational or fiduciary relationship.[7] On the other hand, an appointee who had an ongoing contractual relationship to provide similar services as needed over the course of several months would be covered. In closer cases, OGE believes ethics officials should err on the side of coverage, with the understanding that waivers, under section 3 of the Order, remain an option in appropriate cases.

The Relationship of Paragraph 2 of the Pledge to the Existing Impartiality Regulations

Paragraph 2 of the Pledge is not merely an extension of the existing impartiality requirements of subpart E of the Standards of Ethical Conduct, although in some circumstances the restrictions of the Pledge and the existing impartiality restrictions could align. The effect of any overlap is that all of the relevant restrictions apply to the appointee and should be acknowledged in the appointee's ethics agreement and considered when granting a waiver or authorization under either set of restrictions.

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[7] Note that appointees still will have a covered relationship for one year after they provided any consulting services, under the OGE impartiality rule, 5 C.F.R. § 2635.502(b)(1)(iv). Therefore, the OGE rule may require an appointee to recuse from certain matters (or obtain an authorization, as appropriate), even if the Pledge does not extend the recusal for an additional year. Indeed, the presence of the OGE rule as a "fall-back" was a factor in the decision to exclude certain de minimis consulting services from the Pledge in the first place.

Paragraph 2 of the Pledge and Impartiality Regulations Differ and Overlap

An appointee's commitments under paragraph 2 of the Pledge both overlap and diverge from the existing impartiality regulations in important ways depending upon the facts of each appointee's circumstances. The following highlights some of the key areas in which paragraph 2 of the Pledge and the existing impartiality restrictions differ. In addition, OGE has developed a chart as a quick reference tool to identify the key differences among the existing impartiality regulations and paragraph 2 of the Pledge. *See* **Attachment 1.**

Paragraph 2 of the Pledge is at once more expansive and more limited than the existing impartiality restrictions found at 5 C.F.R. §§ 2635.502, 2635.503. For example, an appointee is subject to impartiality restrictions based on his covered relationships with a much broader array of persons[8] than to the restrictions of paragraph 2, which are limited to the appointee's former employer and former clients. Thus, for instance, if the appointee has served as a contractor, but not in any of the roles described in the definitions of former employer or former client in the Executive Order, then the appointee may have recusal obligations under 5 C.F.R. §§ 2635.502 and 2635.503, but not under Pledge paragraph 2. Conversely, Pledge paragraph 2 is more expansive than the definition of covered relationship in section 2635.502 because the Pledge provision looks back two years to define a former employer or former client and it imposes a two-year recusal obligation after appointment, both of which are considerably broader than the one-year focus of section 2635.502(b)(1)(iv). Pledge paragraph 2 also is more expansive in that the recusal obligation may apply to certain communications and meetings that do not constitute particular matters involving specific parties as that phrase is used in sections 2635.502 and 2635.503.[9]

On the subject of recusal periods alone, ethics officials will need to be especially attentive to the possible variations, as it may be possible for as many as three periods to overlap. For example, an appointee could have: a one-year recusal, under 5 C.F.R. § 2635.502, from the date she last served a former employer; a two-year recusal, under section 2635.503, from the date she received an extraordinary payment from that same former employer; and a two-year recusal with respect to that former employer, under Pledge paragraph 2, from the date of her appointment.

Specific Recusals under Paragraph 2 of the Pledge are Not Required to be Memorialized in an Appointee's Ethics Agreement.

Executive Order 13490 does not require recusals under paragraph 2 of the Pledge to be addressed specifically in an appointee's ethics agreement, unlike recusals under paragraph 3 of

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[8] See definition of "covered relationship" at 5 C.F.R. § 2635.502(b)(1).

[9] *Compare* Exec. Order No. 13490, sec. 2(h)(definition broader than post-employment regulation); *with* 5 C.F.R. § 2635.502(b)(3)(defining particular matter involving specific parties solely by reference to post-employment regulations).

the Pledge. *See* Exec. Order No. 13490 sec. 4(a).[10] However, if an appointee will have a written ethics agreement addressing other commitments, OGE requires that the following language be inserted in that written ethics agreement in order to ensure that the appointee is aware of her commitments and restrictions under both her ethics agreement and the Pledge.

> Finally, I understand that as an appointee I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this and any other ethics agreement.

Written ethics agreements will continue to address section 2635.502 and 2635.503 issues separately using the model provisions from OGE's "Guide to Drafting Ethics Agreements for PAS Nominees." Thus, regardless of paragraph 2 of the Pledge, the one-year "covered relationship" under the OGE impartiality rule remains in effect and may require an appointee to recuse from certain matters, even if the Pledge does not extend the recusal for an additional year. *See* 5 C.F.R. § 2635.502(b)(1)(iv).

The Pledge and Impartiality Regulations Waiver Provisions

Designated Agency Ethics Officials have been designated to exercise the waiver authority for the Ethics Pledge, under section 3 of Executive Order 13490, in addition to their existing role in the issuance of impartiality waivers and authorizations. DAEOgram DO-09-008; 5 C.F.R. §§ 2635.502(d), 2635.503(c). Generally, it is expected that waivers of the various requirements of the Pledge will be granted sparingly. *See* OGE DAEOgram DO-09-008. Although paragraph 2 clearly adds new limits on the revolving door, those limits are not intended to bar the use of qualified appointees who have relevant private sector experience in their fields of expertise. Therefore, at least where the lobbyist restrictions of paragraph 3 of the Pledge are not implicated, OGE expects that DAEOs will exercise the waiver authority for paragraph 2 in a manner that reasonably meets the needs of their agencies. In this regard, DAEOs already have significant experience in determining whether authorizations under 5 C.F.R. § 2635.502(d) are justified, and DAEOs should use similar good judgment in decisions about whether to waive paragraph 2 of the Pledge. Of course, any such waiver decisions still must be made in consultation with the Counsel to the President. Exec. Order No. 13490, sec. 3. Additional details on the standards for issuing a waiver of provisions of Pledge paragraph 2, as well as on issues related to the interaction of the waiver provisions of the impartiality regulations and relevant paragraphs of the Pledge, are reserved for future guidance.

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[10] An ethics agreement is 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," such as recusal from participation in a particular matter, divestiture of a financial interest, resignation from a position, or procurement of a waiver. 5 C.F.R. § 2634.802.

ATTACHMENT 1

OGE developed the following table as a quick reference tool to highlight the main differences between paragraph 2 of the Pledge and existing impartiality regulations. It is not intended to be a substitute for thorough analysis, but we hope you find it useful.

		5 C.F.R. § 2635.502	5 C.F.R. § 2635.503	Paragraph 2 of the Pledge
Relationship:	Former Employer	Any person which the employee served, within the last year, as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; no exclusion for governmental entities (other than Federal)	Any person which the employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; no exclusion for governmental entities (other than Federal)	Two years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner; contractor and consultant omitted from list (although consultant added below under former client); is not a former employer if governmental entity
	Former Client	Clients of attorney, agent, consultant, or contractor covered same way as former employer, under 5 C.F.R. § 2635.502(b)(1)(iv)	Clients of attorney, agent, consultant, or contractor covered same way as former employer, under 5 C.F.R. § 2635.503(b)(2)	Two years prior to date of appointment served as an agent, attorney, or consultant. Is not former client if: • Only provided speech/similar appearance (including de minimis consulting) • Only provided contracting services other than as agent, attorney, or consultant • Served governmental entity
	Business and Personal/ Covered Relation-ship	In addition to former employers/ clients discussed above, includes various current business and personal relationships, as listed in 5 C.F.R. § 2635.502(b)(1)	No equivalent concept	No equivalent concept
Prohibition:	May not participate in particular matter involving specific parties if:	Reasonable person with knowledge of facts would question impartiality	Extraordinary payment from former employer	Includes communication by former employer or former client unless matter of general applicability or non-particular matter and open to all interested parties
Length of recusal:		1 year from the end of service	2 years from date of receipt of payment	2 years from date of appointment

United States
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April 28, 2009
DO-09-014

MEMORANDUM

TO: Agency Heads and Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Holdover Appointees and the Ethics Pledge

We have received numerous questions regarding whether appointees temporarily holding over from the previous Administration pending the appointment of a successor need to sign the Ethics Pledge promulgated by Executive Order 13490 of January 21, 2009. We previously advised that holdover appointees would be given a 100-day grace period before being required to sign the pledge. As you know, April 29th will be the 100th day of the Administration. Accordingly, if you have not done so already, please ask all your holdover appointees to sign the ethics pledge within the coming days. The pledge form may be found at:

https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-003:+Executive+Order+13490,+Ethics+Pledge

Persons who are not prepared to sign the pledge should transition out within 30 days, by May 29th.

Please note that limited extensions of the deadline may be granted in situations where a holdover declines to sign and his or her continued service is determined by the head of the agency to be mission critical and essential for continuity. In those instances, DAEOs should submit a written extension request to the Special Counsel to the President for Ethics and Government Reform explaining why the requesting holdover meets those criteria. Limited extensions may be granted to address those concerns in an appropriate manner that both respects the circumstances of the individual appointee's current status as well as the President's commitment to the principles contained in the ethics pledge. No mission critical holdover appointee should be asked to leave until this consultation has taken place.

United States
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May 26, 2009
DO-09-020

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics Pledge Issues: Speeches and Pledge Paragraph 2; Intergovernmental Personnel Act Detailees

The Office of Government Ethics (OGE) continues to work with the White House Counsel's Office to identify and answer various questions concerning Executive Order 13490 and the Ethics Pledge for non-career appointees. OGE thought it would be useful to advise agency ethics officials of the resolution of two questions that recently arose at several agencies. The first question concerns how to apply paragraph 2 of the Pledge to an appointee who gives an official speech at an event sponsored by a former employer or client. The second question is whether the Pledge applies to non-Federal personnel detailed to an agency under the Intergovernmental Personnel Act. The answers to these questions are set out below.

Speeches and the Effect of Pledge Paragraph 2

OGE and the White House have received numerous questions about whether paragraph 2 of the Ethics Pledge prohibits an appointee from giving an official speech at an event sponsored by a former employer or client. Paragraph 2 prohibits appointees from participating, for two years after their appointment, in any particular matter involving specific parties that is directly and substantially related to a former employer or client. (Paragraph 2 is discussed in more detail in DO-09-011, https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-011:+Revolving+Door+Ban+of+the+Ethics+Pledge+(Ban+on+All+Appointees+Entering+Government).) With regard to speeches and presentations made in an official capacity OGE, in consultation with the White House Counsel's Office, has determined that the Pledge is not intended to prohibit an appointee from participating in an official speech unless the speech would have a demonstrable financial effect on the former employer or client.[1]

[1] It is important to note that the Pledge does not apply to speeches given in an appointee's personal capacity. Presentations given in one's personal capacity may be subject to other ethics provisions, including 5 C.F.R. § 2635.807, 5 C.F.R. § 2635.808(c), and 5 C.F.R. part 2636.

By way of background, OGE has addressed the application of 18 U.S.C. § 208 and 5 C.F.R. § 2635.502 to official speeches on several occasions. *See, e.g.*, OGE Informal Advisory Letters 98 x 14; 96 x 2; 94 x 14. For purposes of section 208, OGE generally has viewed the decision to give an official speech as a particular matter. 96 x 2 (Ed. Note); *cf.* OGE, *Report to the President and to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment* 8 (January 2006)(application of 18 U.S.C. § 205 to request for Government speaker). An employee is prohibited from giving an official speech to an organization whose interests are imputed to the employee under section 208, if the speech would have a direct and predictable effect on the organization's financial interest. In OGE's experience, usually the sponsor of an event will have a financial interest in an official speech only if an admission fee is charged, the event is a fundraiser, or the event is some kind of business development activity (such as a seminar for current or prospective clients).

For purposes of 5 C.F.R. § 2635.502, OGE also generally has viewed the decision to give an official speech as a particular matter involving the event sponsor as a specific party. OGE 98 x 14; OGE 94 x 14. If an employee has a covered relationship with the sponsor--for example, the sponsor is a former employer under section 2635.502(b)(1)(iv)--the employee should not participate in an official speech if a reasonable person would question his or her impartiality, absent an authorization under section 2635.502(d). OGE 94 x 14. Nevertheless, OGE certainly is aware of cases in which agencies have determined either that the circumstances surrounding the speech really did not raise any reasonable impartiality concerns or that any such concerns were outweighed by the need for the employee's services. *See* 5 C.F.R. § 2635.502(c), (d). In such cases, agency ethics officials often still will emphasize that the employee should not use the same organization as a preferred forum for repeated speeches when other comparable forums are available.

Pledge paragraph 2, of course, is similar in many respects to section 2635.502, including the focus on particular matters involving specific parties. *See* DO-09-011. Consistent with how speeches have been treated for purposes of 18 U.S.C. § 208 and 5 C.F.R. § 2635.502, the Pledge was not intended to sweep every official speech to a former employer or client under the bar of Pledge paragraph 2. The Executive order elsewhere recognizes that making a speech does not necessarily reflect a close affinity with the event sponsor. *See* Exec. Order 13490, sec. 2(j)(definition of former client excludes services limited to speech or similar appearance). While paragraph 2 does not include the same "reasonable person" clause as section 2635.502, the Pledge provision was not intended to bar speeches that do not implicate the underlying concerns about special access to Government decisionmakers who can bestow regulatory and financial benefits on former associates. *Cf. U.S. v. Sun-Diamond Growers*, 526 U.S. 398, 407 (1999)(dicta)(official speech to farmers about USDA policy should not be viewed as official act implicating illegal gratuities statute). In many cases, the sponsor will have an academic or policy interest in the subject matter of the speech but no direct pecuniary interest in hosting the speech itself.

This does not mean that paragraph 2 is wholly inapplicable to official speeches. Where the decision to give an official speech actually would affect the financial interests of the sponsor,

the concerns under the Pledge about special access are relevant. Thus, if the former employer or client charges an admission fee or organizes the event for the purpose of fundraising or business development, the appointee will be barred from giving an official speech, absent a waiver under section 3 of the Executive Order. Even where Pledge paragraph 2 is inapplicable, ethics officials are reminded to analyze any official speaking engagements under 18 U.S.C. § 208 and 5 C.F.R. § 2635.502, as discussed above.

Detailees under the Intergovernmental Personnel Act Are Not Subject to the Pledge

Several agencies have asked whether detailees under the Intergovernmental Personnel Act (IPA) are required to sign the Pledge. The short answer is no.

The IPA provides for the temporary assignment of personnel from certain non-Federal entities to Federal agencies. 5 U.S.C. § 3372; *see generally* DO-06-031, https://www.oge.gov/Web/OGE.nsf/Resources/DO-06-031:+Intergovernmental+Personnel+Act+(IPA)+Summary. The IPA clearly distinguishes between those who actually are appointed by an agency and those who are merely detailed from a non-Federal entity to an agency. 5 U.S.C. § 3374(a)(1),(2). IPA detailees from academia, State and local government, and non-profit entities may serve in executive branch agencies for two years with the possibility of a two year extension. While working in the executive branch, detailees remain employed by their institution or organization and return to their employer when the detail is over. Simply put, IPA detailees are not appointees at all. Therefore, they are not subject to the Pledge, which applies to "every *appointee* in every executive agency *appointed* on or after January 20, 2009." Exec. Order 13490, sec. 1 (emphasis added); *see also id.*, sec. 2(b).

This analysis would not apply to any personnel who actually receive an appointment under the IPA. However, as a general matter, OGE rarely encounters questions about IPA appointees. Agency ethics officials should contact OGE if they have any question about whether a particular IPA appointee should be considered a non-career appointee subject to the Pledge. *See generally* DO-09-010 (discussing criteria for appointments subject to Pledge).

United States
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February 18, 2010
DO-10-003

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Attendance by Staff Accompanying Official Speakers

In OGE DAEOgram DO-09-007 dated February 11, 2009, the United States Office of Government Ethics (OGE) addressed implementation of the lobbyist gift ban imposed by section 1 of Executive Order 13490.[1] The lobbyist gift ban is one part of the President's efforts to curb undue influence by special interests, but as stated in that DAEOgram, the lobbyist gift ban was not intended to prohibit Executive Branch officials from communicating official views to audiences comprised in part of registered lobbyists or at events that may be sponsored by organizations that employ registered lobbyists. Such events may have a registration fee or include a luncheon. Consequently, DAEOgram DO-09-007 concluded in part:

> Appointees still may accept offers of free attendance on the day of an event when they are speaking or presenting information in an official capacity, as described in 5 C.F.R. § 2635.204(g)(1), notwithstanding the lobbyist gift ban. This is not a gift exception, but simply an application of the definition of "gift" in section 2635.203(b).

In short, free attendance for official Executive Branch speakers in such circumstances, consistent with long-standing rules, falls outside the meaning of "gift." It has come to OGE's attention that there may be some inconsistencies in how agency ethics officials are applying these rules with regard to employees who must accompany official agency speakers to such events. The purpose of this memorandum is to provide guidance on such personnel, who have no speaking role themselves but may provide essential support to an official speaker.

The OGE gift rules have always been clear on the treatment of free attendance for official speakers at an outside event. Employees may accept offers of free attendance on the day of an event when they are speaking or presenting information in an official capacity, notwithstanding the gift restrictions in 5 C.F.R. § 2635.202(a). The rationale is that "the employee's participation in the event on that day is viewed as a customary and necessary part of his performance of the assignment and does not involve a gift to him or to the agency." 5 C.F.R. § 2635.204(g)(1).

This guidance also applies to agency personnel whose presence at the event is deemed essential under agency procedures to the speaker's participation at the event. Examples could include members of security details, a representative of the agency's public affairs division, or an aide to assist with a presentation. The number and types of personnel necessary, if any, to the speaker's participation will vary depending upon who the speaker is and the nature of the event. There are obviously different considerations for the Secretary of Defense addressing several thousand people at a convention center as compared to a Federal Communications Commissioner speaking to a luncheon attended by several dozen communications lawyers. OGE does not view having essential personnel either remain outside the room where the event is taking place or refraining from food that is offered with the event as necessary to comply with the gift rules. Such an interpretation would not only be impractical to enforce, but it would ignore the reality that some aspects of attendance may be difficult or impossible to avoid. See 5 C.F.R. § 2635.204(g)(4) (definition of free attendance includes more than food).

It must be emphasized, however, that this is not an expansion of the categories of persons who may attend such events free of charge. Rather, it is recognition that attendance by particular personnel whose presence is truly essential to the performance of the speaker's official duties at a specific event does not violate either OGE's long-standing gift rules or the Executive Order 13490 lobbyist gift ban.

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[1] See https://www.oge.gov/Web/OGE.nsf/Resources/DO-09-007:+Lobbyist+Gift+Ban+Guidance.

United States
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February 22, 2010
DO-10-004

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Post-Employment Under the Ethics Pledge: FAQs

As you know, non-career appointees appointed on or after January 20, 2009, must sign an Ethics Pledge that contains a number of commitments. Exec. Order 13490, sec. 1. Several of these commitments pertain to the conduct of appointees while they are still in Government, but two of the commitments concern post-employment activities. Specifically, paragraphs 4 and 5 of the Pledge impose significant new post-employment restrictions on appointees. Paragraph 4 largely tracks the provisions of 18 U.S.C. § 207(c), with which most ethics officials are familiar. Paragraph 5, by contrast, introduces a number of concepts derived from the Lobbying Disclosure Act (LDA), with which ethics officials may be less familiar.

The Office of Government Ethics (OGE) has received questions about both paragraphs 4 and 5 of the Pledge. Therefore, OGE has compiled the following list of frequently asked questions and answers about these new post-employment restrictions. As always, OGE is ready to assist agency ethics officials with any other questions about the post-employment provisions or any other requirements of the Pledge.

A. Paragraph 4: Post-Employment Cooling-Off Period

Paragraph 4 of the Pledge provides:

> If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.

1. What is the relationship between paragraph 4 of the Pledge and 18 U.S.C. § 207(c)?

For the most part, paragraph 4 of the Pledge extends the cooling-off period from one to two years for appointees who are senior employees under 18 U.S.C. § 207(c). The Pledge does not extend criminal penalties to conduct beyond the one-year period in section 207(c)--which only Congress can do--but the Executive Order does specify other enforcement mechanisms, including civil proceedings and agency debarment, for violations of the two-year restriction of paragraph 4. *See* Exec. Order 13490, sec. 5. (Note, however, that the trigger for the two-year period under paragraph 4 might not always coincide with the one-year cooling-off period of section 207(c), as illustrated in the answer to Question 6 below.)

2. Which appointees are subject to the two-year restriction of paragraph 4?

Like the existing restriction in 18 U.S.C. § 207(c), paragraph 4 of the Pledge is intended to cover any appointees who are "senior employees," which reflects the judgment that it is appropriate to impose a two-year cooling-off period on higher level appointees who are likely to have the most influence within their agencies. The categories of senior employees are described in 18 U.S.C. § 207(c)(2) and 5 C.F.R. § 2641.104. The restriction of paragraph 4 applies if the appointee is restricted by section 207(c) at the time of his or her departure from Government.

> ***Example:*** *A non-career Senior Executive Service appointee, whose rate of basic pay meets the salary threshold for being a senior employee, leaves the Department of Energy to work for a private law firm. Sixteen months later, she is asked to represent a disappointed bidder in a bid protest suit against the Department in the Court of Federal Claims. Paragraph 4 of the Pledge would prohibit her from doing so. However, if she had only been a GS-14, Schedule C appointee, she could engage in this representation without violating paragraph 4 of the Pledge because she would never have been a senior employee under 18 U.S.C. § 207(c). Nevertheless, if she had participated personally and substantially as an employee in the contract award that led to the bid protest, she would be permanently prohibited from representing any other person in the matter, under 18 U.S.C. § 207(a)(1).*

3. How does paragraph 4 affect "very senior employees?"

Very senior employees, as described in 18 U.S.C. § 207(d)(1) and 5 C.F.R. § 2641.104, are not covered by 18 U.S.C. § 207(c), and therefore they are not subject to the two-year restriction in paragraph 4 of the Pledge. However, these very senior employees are already subject to a similar two-year cooling-off period under section 207(d) itself (as well as additional restrictions on contacting Executive Schedule officials even in agencies in which they did not serve).

4. Which officials may not be contacted under paragraph 4 of the Pledge?

Unlike paragraph 5 of the Pledge (discussed below), which augments the requirements of 18 U.S.C. § 207(c), paragraph 4 in this respect tracks 18 U.S.C. § 207(c), which bars representational contacts with any official of any agency in which a senior employee served in any capacity during the one-year period prior to terminating from a senior position. The scope of 18 U.S.C. § 207(c) is explained at length in OGE's post-employment regulations. *See* 5 C.F.R. § 2641.204.

5. If post-employment activities are permitted by an exception to 18 U.S.C. § 207(c), are they likewise permitted under paragraph 4 of the Pledge?

Yes. Paragraph 4 of the Pledge incorporates the exceptions and other provisions applicable to 18 U.S.C. § 207(c), as well as the relevant OGE post-employment regulations in 5 C.F.R. part 2641. *See* Exec. Order 13490, sec. 2(m).

> ***Example:*** *An appointee leaves his senior position at the Department of Justice to become an employee of the State of New York. He wants to represent New York in a meeting with DOJ officials in a meeting about drug enforcement policy. This activity is permissible under 18 U.S.C. § 207, because it falls within the exception at 18 U.S.C. § 207(j)(2)(A) for carrying out official duties as an employee of a state or local government. Therefore, the activity also is permissible under paragraph 4 of the Pledge. However, if the former appointee does not actually become an employee of the State, but simply provides consulting or legal services as a contractor, he may not rely on this exception. See 5 C.F.R. § 2641.301(c)(2) and Example 3.*

6. How does paragraph 4 of the Pledge apply to non-career appointees who later are appointed or reinstated to career positions?

The two-year period specified in paragraph 4 runs from the end of the appointee's non-career appointment, not from the end of any separate career appointment the individual may have. In other words, the two-year clock begins to run as soon as a non-career appointee moves to a position that is not subject to the Pledge. (By contrast, the one-year cooling-off period of 18 U.S.C. § 207(c) commences when an individual ceases to be a senior employee, whether career or non-career. 5 C.F.R. § 2641.204(c).) Of course, in most cases, non-career appointees will leave Government when their non-career service is concluded.

> ***Example:*** *A career member of the SES is given a non-career Presidential appointment, at which time she signs the Ethics Pledge. After the conclusion of her Presidential appointment, she is reinstated as a career SES appointee, pursuant to 5 C.F.R. § 317.703. After serving five more*

years in a career SES position, she retires from Government. Although she is a senior employee subject to 18 U.S.C. § 207(c) when she retires, she is not restricted by paragraph 4 of the Pledge because more than two years already have elapsed since the end of her non-career appointment.

B. Paragraph 5: Post-Employment Lobbying Ban

Paragraph 5 of the Pledge provides:

> In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

1. What is the relationship of the lobbying ban in paragraph 5 to the post-employment restrictions in paragraph 4 of the Pledge or 18 U.S.C. § 207?

The restrictions of paragraph 5 are in addition to the restrictions of paragraph 4, 18 U.S.C. § 207, or any other provision of law (e.g., the Procurement Integrity Act, 41 U.S.C. § 423(d)).

2. Does the lobbying ban in paragraph 5 apply to appointees who are not "senior employees?"

Yes. The lobbying ban applies to all appointees who sign the Pledge, unlike the restriction in paragraph 4. Note, however, that certain Schedule C and other appointees are not required to sign the Pledge, i.e., those with no policymaking duties (such as chauffeurs and secretaries) who have been exempted for that reason from public financial disclosure requirements. *See* DO-09-010, http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2009/do09010.pdf.

> ***Example:*** *A non-career SES appointee is paid below the basic pay threshold to be considered a senior employee, under 18 U.S.C. § 207(c)(2)(A)(ii). Although he is not subject to the two-year restriction in paragraph 4 of the Pledge, he is subject to the lobbying ban in paragraph 5.*

3. Does the lobbying ban extend beyond the agency where the former appointee served?

Yes. Paragraph 5, unlike paragraph 4 or 18 U.S.C. § 207(c), restricts a former appointee from lobbying certain officials throughout the entire Executive Branch, not just officials of the agency where the former appointee actually served. (What it means to "lobby," including the concepts of "lobbying contact" and "acting as a registered lobbyist," is discussed in questions 6 through 10 below.)

> ***Example:*** *A former appointee at the Department of Transportation may not, as a registered lobbyist, make a lobbying contact with the Secretary of Health and Human Services. This would be prohibited even though she never served at HHS in any capacity and the subject matter of the lobbying is unrelated to her former Government position.*

4. Which officials may not be contacted by former appointees under paragraph 5?

The ban extends to lobbying contacts with specified Executive Branch personnel. The officials who may not be contacted are: any "covered executive branch official," defined in the LDA as the President, the Vice President, any official in the Executive Office of the President, any Executive Schedule official (EL I-V), any uniformed officer at pay grade 0-7 or above, and any Schedule C employee, 2 U.S.C. § 1602(3); and any non-career SES member, even though the latter are not covered under the LDA definition. For purposes of simplicity, the discussion below will refer to all Executive Branch officials who may not be contacted as "covered officials." Paragraph 5 of the Pledge does not prohibit former appointees from contacting other Executive Branch personnel besides these covered officials. Nor does it prohibit former appointees from contacting "covered legislative branch officials," within the meaning of the LDA, 2 U.S.C. § 1602(4).

> ***Example:*** *A former appointee of the Environmental Protection Agency has become a registered lobbyist. She may not, on behalf of one of her lobbying clients, contact a non-career SES official at the Department of Agriculture. However, she may contact a career SES official at the Department, and she also may contact Legislative Branch officials.*

5. How long does the lobbying ban last?

The ban lasts for the "remainder of the Administration." This means the duration of all terms of the President who was in office at the time the appointee received an appointment covered by the Executive Order. Executive Order 13490, sec. 2(o)(definition of "Administration"). In some cases, holdover officials appointed during a prior Administration have signed the Pledge as a condition of continued employment. Such holdover officials are bound by their commitment under paragraph 5 for the same duration as appointees who actually were appointed during the current Administration.

6. What does it mean to "lobby?"

For purposes of the Pledge, to lobby is "to act . . . as a registered lobbyist." Exec. Order 13490, sec. 2(f). A registered lobbyist, in turn, is a person listed in required filings as a lobbyist for a particular client by a registrant under the LDA, 2 U.S.C. § 1603(a), because of the person's actual or anticipated lobbying activities and contacts. Executive Order 13490, sec. 2(e); *see* 2 U.S.C. §§ 1602(10)(definition of lobbyist). **In a nutshell: if a former appointee is a registered**

lobbyist for a particular client, he or she is prohibited by paragraph 5 of the Pledge from making any lobbying contact with a covered official on behalf of that client. The LDA definition of lobbying contact is broad, including oral or written communications made on behalf of a client with regard to Federal legislation (such as legislative proposals), executive branch programs and policies (such as rulemaking or contracts), and the nomination/confirmation of persons for PAS positions. 2 U.S.C. § 1602(8)(A). However, the definition also enumerates certain exceptions, which should be consulted to determine if a former appointee would be engaging in prohibited lobbying under the Pledge. 2 U.S.C. § 1602(8)(B).

> ***Example:*** *An appointee recently left the Treasury Department to join XYZ Associates, a consulting firm. The firm is helping one of its clients to obtain Federal funding to develop an innovative telecommunications security product. XYZ Associates is registered for this client under the LDA, and it listed the former appointee as one of three lobbyists in its latest quarterly report of lobbying activity filed under the LDA. Under paragraph 5 of the Pledge, the former appointee may not meet with the Secretary of Homeland Security to seek support for funding of the client's research.*

> ***Example:*** *An appointee leaves Government to become Chancellor of a large university. In her new job, she has occasion to make contacts with various covered officials about a range of issues of concern to her university, such as education policy, taxation, and Federal grants. The university itself is registered under the LDA, because it employs an in-house lobbyist in its governmental affairs office and it meets the monetary threshold for registration under 2 U.S.C. § 1603(a)(3)(A)(ii). However, the university has never listed its Chancellor as a lobbyist and is not required to do so under the LDA, because the Chancellor's lobbying contacts and other lobbying activities constitute a small fraction (far less than 20%) of the total time she devotes to university services during any 3-month period. See 2 U.S.C. § 1602(10)(definition of lobbyist). Therefore, the former appointee does not act as a registered lobbyist when she contacts the covered officials, and she does not violate paragraph 5 of the Pledge.*

7. How does a former appointee know if she would be making a lobbying contact "as a registered lobbyist"?

The most obvious way that a former appointee would know if she is acting as a registered lobbyist is if she is already listed as a lobbyist in a registration statement (LD-1 form) or quarterly report (LD-2 form), based on actual or expected lobbying for a particular client. These forms are filed by the lobbyist's employer with the Secretary of the Senate and the Clerk of the House. Additionally, even if the former appointee is not already listed as a lobbyist in an LDA filing, she will be acting as a registered lobbyist if she is engaging in lobbying that is expected to be reported in a subsequent LDA filing that will list her as a lobbyist. This interpretation recognizes that permitting former appointees a "grace period" during which they may freely

lobby covered officials, when they reasonably anticipate reporting those activities in a subsequent LDA filing, would be inconsistent with the purposes of the Pledge.

> ***Example:*** *A former appointee has been retained by a client expressly for the purpose of making several lobbying contacts, and the former appointee's employer has determined that the LDA registration requirement has been triggered, under 2 U.S.C. § 1603(a). However, the employer has until 45 days after the former appointee is retained to file the initial registration statement that would list the individual as a lobbyist. 2 U.S.C. § 1603(a)(1). If the former appointee makes any lobbying contact with a covered official during that 45 day period, she will be deemed to have acted as a registered lobbyist during that time period, for purposes of the Pledge. This is because the registration statement that is eventually filed will list this individual "as an employee of the registrant who has acted . . . as a lobbyist on behalf the client." 2 U.S.C. § 1603(b)(6)(emphasis added).*

8. Does this mean that ethics officials have to opine about what circumstances will trigger registration under the LDA?

Ethics officials will need some familiarity with the LDA registration system in order to counsel appointees about their post-employment activities under paragraph 5 of the Pledge. However, neither OGE nor DAEOs can give definitive advice about LDA registration requirements. Appointees and former appointees should be advised to consult with their prospective employers and/or private counsel about whether their anticipated activities will trigger registration and reporting requirements under the LDA. Former appointees and their employers also may contact the Secretary of the Senate and the Clerk of the House of Representatives for guidance concerning registration and reporting requirements.

9. Are there any circumstances under which a former appointee may become a registered lobbyist?

There are relatively narrow circumstances in which a former appointee may become a registered lobbyist. Paragraph 5 of the Pledge is intended to minimize the potential for unfair advantage or undue influence resulting from an appointee's service in the Executive Branch. Consequently, for the remainder of the Administration, a former appointee cannot become a registered lobbyist if this will involve making any lobbying contact with a covered official in the Executive Branch. However, the Pledge does not restrict former appointees from registering and making contacts with Legislative Branch officials, as this would not implicate the same concerns about exploiting the access and influence obtained as a result of prior Executive Branch service.

> ***Example:*** *A former Commerce Department appointee is retained by a utility company to lobby on a legislative proposal to create tax incentives for installing new emissions control technology. After being retained, the former appointee is*

listed as a lobbyist in an LDA registration statement for this activity. As long as he makes no lobbying contacts with covered officials in the Executive Branch on behalf of this client and confines all his lobbying contacts to Legislative Branch officials, he will not violate paragraph 5 of the Pledge.

***Example:** In the scenario above, the client asks the former appointee to attend a meeting with the Assistant Secretary for Tax Policy at the Treasury Department to discuss how the legislative proposal would be consistent with the Administration's agenda. He may not do so, because this would be a prohibited lobbying contact with a covered official in the Executive Branch.*

10. If a former appointee is registered as a lobbyist on behalf of one client, is he prohibited from making contacts on behalf of another client for which he is not required to register?

No. The registration and quarterly reporting requirements of the LDA are client-specific, as is the definition of "lobbyist." *See* 2 U.S.C. §§ 1603(a)(2)(single registration for each client); 1604(a)(separate quarterly report for each client); 1602(10)(lobbyist is individual employed or retained by client for certain amount of lobbying contacts and activities on behalf of that client). Therefore, a former appointee does not "lobby" a covered official, in violation of paragraph 5 of the Pledge, unless he does so on behalf of a specific client for which he is a registered lobbyist.

***Example:** A former appointee works for a law firm that does some lobbying. His firm has registered him as a lobbyist for Blue Corporation, a client which he represents in lobbying contacts with Legislative Branch officials. He also has another client, Green Corporation, for which he has provided only non-lobbying services. Green Corporation now asks him to make a lobbying contact with the Department of Transportation. His firm decides it will not be necessary to register him for Green Corporation. (The firm might determine, for example, that he does not meet the definition of lobbyist for Green Corporation, under 2 U.S.C. § 1602(10), or that the firm itself does not meet the monetary threshold to register for Green Corporation, under 2 U.S.C. § 1603(a)(3)(A)(i).) He would be prohibited, however, from making even a single lobbying contact with DOT on behalf of Blue Corporation, because he is a registered lobbyist for Blue Corporation, even though his other lobbying contacts for that client have been exclusively with the Legislative Branch.*

11. Is there any exception to the requirements of paragraph 5 for former appointees who signed the Pledge but served only a brief time in the Administration?

Neither paragraph 5 nor any other part of the Executive Order makes any exception for appointees who signed the Pledge but served only a short time.