

# Special Review of Executive Branch Agency Waivers & Authorizations

OGE

U.S. Office of Government Ethics

September

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# Special Review of Executive Branch Agency Waivers & Authorizations

## Executive Summary

The U.S. Office of Government Ethics (OGE) recently completed a special review of executive branch agency waivers and authorizations. This review was designed to: (1) evaluate agency procedures for issuing waivers of certain ethics restrictions and authorizations to participate in otherwise prohibited activities under a variety of authorities, and (2) assess agency compliance with these authorities.

On April 28, 2017, OGE issued a data call for waivers and authorizations issued to certain appointees in executive branch agencies, including the White House, from May 1, 2016 through April 30, 2017. OGE received responses from all agencies.

OGE evaluated the waivers and authorizations reported in response to the April 28, 2017, data call to determine whether they met legal and procedural standards. Based on this evaluation, OGE determined that agencies largely complied with statutory, regulatory, and procedural requirements when issuing waivers and authorizations. In particular, OGE found that most agencies followed appropriate procedures when issuing waivers and authorizations, including ensuring that they were signed, dated, and issued by an authorized official prior to the recipient engaging in the covered conduct. For the most part, agencies also appeared to have correctly applied (and articulated) any required legal standards and to have appropriately included necessary limitations on the recipient's ability to act in the matters involved. Finally, OGE's review found that OGE was consulted, when practicable, on each waiver issued under 18 U.S.C. § 208(b).

As a general matter, OGE found most agencies to be forthcoming and responsive to the data call and any follow-up communications. However, the White House did not provide OGE or make available to the public signed or dated copies of 14 waivers and authorizations. Moreover, the original White House reply to OGE's follow-up questions was entirely unresponsive. The White House did provide additional information in a supplemental response, but did not fully respond to OGE's follow-up questions.

OGE notes that the White House has committed to increasing transparency by supplementing the waiver information currently available on its website in the event it issues additional waivers. OGE urges the White House to do this by posting signed and dated versions of any additional waivers.

The White House has also indicated they are willing to discuss OGE conducting a review of the White House ethics program. OGE agrees the White House would benefit from a review of its program and looks forward to contacting the White House in the near future to discuss such a review.

## Highlights

- Most agencies followed appropriate procedures in issuing waivers and authorizations.
- Agencies appeared to have generally applied and articulated the correct legal standards in the waivers and authorizations.
- A little less than half of the waivers and authorizations contained some sort of limitation.
- OGE was consulted, when practicable, on each waiver issued under 18 U.S.C. § 208(b).
- The White House did not provide OGE or make publicly available all information requested.
- The White House has committed to increasing transparency by supplementing the waiver information currently available on its website in the event it issues additional waivers.
- The White House has indicated a willingness to discuss OGE conducting a review of the White House ethics program.

## **I. Background and Purpose**

The United States Office of Government Ethics (OGE) provides overall leadership and oversight of the executive branch ethics program designed to prevent and resolve conflicts of interest. The Ethics in Government Act gives OGE the authority to evaluate the effectiveness of executive branch agency ethics programs.<sup>1</sup> OGE uses this evaluation authority largely to conduct reviews of agency ethics programs. OGE also conducts special reviews of cross-cutting ethics issues that affect the executive branch ethics program as a whole.

OGE recently completed a special review of executive branch agency waivers and authorizations issued to a specified class of appointees during a 12-month period. This review was designed to evaluate agency procedures for issuing waivers and authorizations under a variety of statutory and regulatory authorities and to assess agency compliance with these authorities.

## **II. Methodology**

On April 28, 2017, OGE issued a data call for waivers and authorizations issued to certain appointees in executive branch agencies, including the White House, from May 1, 2016 through April 30, 2017 (*See* Appendix 1). OGE received responses from all agencies, including agencies that had not issued any waivers or authorizations.

OGE evaluated the waivers and authorizations provided in response to its data call and followed-up as necessary with agencies for additional information and when responses raised compliance concerns.

## **III. Waiver and Authorization Authorities**

Waivers of certain ethics restrictions and authorizations to participate in otherwise prohibited activities may be issued under a variety of authorities. The authorities covered by the data call and this special review are summarized below.

### **a. Waivers under 18 U.S.C. § 208(b)(1)**

The criminal financial conflict of interest statute, 18 U.S.C. § 208(a), prohibits an executive branch employee from participating personally and substantially in any particular matter that has a direct and predictable effect on the employee's own financial interests, as well as the financial interests of others whose financial interests are imputed to the employee. This prohibition, however, may be waived under 18 U.S.C. § 208(b)(1), upon a determination that the disqualifying financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services to the government. An employee who has been granted a waiver may participate in a particular matter without violating 18 U.S.C. § 208, even though the employee has what would otherwise be a disqualifying financial interest in the matter. Waivers must be issued in writing by the employee's appointing official (or an official delegated authority to issue the waiver) prior to the employee taking any action in the particular matter. When practicable, agencies must consult with OGE prior to granting a waiver.

### **b. Authorizations under 5 C.F.R. § 2635.502(d)**

In some circumstances other than those covered by 18 U.S.C. § 208(a), an employee should not perform official duties in order to avoid an appearance of loss of impartiality. OGE regulations at 5 C.F.R. § 2635.502(a) provide that an employee may not participate in any particular matter involving

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<sup>1</sup> *See* title IV of the Ethics in Government Act, 5 U.S.C. app. § 402 and 5 C.F.R. part 2638.

specific parties in which a person with whom he has a covered relationship is a party or represents a party, if the employee determines that a reasonable person with knowledge of the relevant facts would question the employee's impartiality in the matter. Covered relationships include a former employer or a client the appointee served in the past year. However, under 5 C.F.R. § 2635.502(d), an official who has been delegated authority to make ethics determinations ("agency designee") may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Authorizations are documented in writing at the agency designee's discretion or when requested by the employee. Agencies establish their own procedures for authorizing employee participation under 5 C.F.R. § 2635.502(d) and are not required to consult with OGE prior to issuance.

**c. Waivers under 5 C.F.R. § 2635.503(c)**

Appearance concerns are also addressed in 5 C.F.R. § 2635.503(a), which restricts an employee's participation in certain matters involving former employers if the former employer gave an employee an "extraordinary payment" in excess of \$10,000 prior to entering federal service. This provision bars the employee from participating for two years in matters in which that former employer is a party or represents a party. However, this disqualification requirement may be waived under 5 C.F.R. § 2635.503(c) based on a finding that the amount of the payment was not so substantial as to cause a reasonable person to question the employee's ability to act impartially in a matter in which the former employer is a party or represents a party. The waiver must be in writing, and may be given only by the head of the agency or his/her designee. Where the recipient of the payment is the agency head, the waiver may be given by the President or his/her designee. Waivers are retained at the agency for six years. Agencies establish their own procedures for waiving the disqualification requirement in 5 C.F.R. § 2635.503(a) and are not required to consult with OGE prior to issuance.

**d. Waivers under Executive Order 13490 (Obama Ethics Pledge)**

Executive Order 13490 required full-time, political appointees to commit to additional ethics restrictions, including heightened recusal obligations related to prior lobbying and to former employers and clients. Section 3 of the Executive Order provided a waiver mechanism for any of the restrictions contained in the Pledge, which allowed participation in specified matters otherwise prohibited under the Executive Order. The Designated Agency Ethics Official (DAEO) of each agency was designated authority to grant a waiver upon certification in writing that (1) the literal application of the restriction is inconsistent with the purposes of the restriction, or (2) it is in the public interest to grant the waiver. These waiver certifications, which took effect when signed by the DAEO, are retained at the agency for six years and are posted on OGE's website. Agencies and the Obama White House established their own procedures for granting waivers and were not required to consult with OGE prior to issuance.

**e. Waivers under Executive Order 13770 (Trump Ethics Pledge)**

Executive Order 13770, which revoked and superseded Executive Order 13490, requires full-time, political appointees to commit to additional ethics restrictions, including heightened recusal obligations related to prior lobbying and to former employers and clients. Section 3 of the Executive Order provides a waiver mechanism for any of the restrictions contained in the Pledge, which allows participation in specified matters otherwise prohibited under the Executive Order. The President or his designee has authority to grant a waiver, which, per the Executive Order, takes effect when it is signed by the President or his designee. Unlike Executive Order 13490, Executive Order 13770 does not include a waiver standard. Copies of any waiver certifications granted pursuant to Executive Order 13770 are provided to the appointee covered by the waiver and to the head of the agency in which he or she was

appointed to serve. Agencies and the Trump White House establish their own procedures for granting waivers and are not required to consult with OGE prior to issuance.

**IV. Data Call Responses**

In response to OGE’s April 28, 2017, data call, OGE was provided copies of, or was otherwise made aware of, 69 waivers or authorizations issued from May 1, 2016, through April 30, 2017.<sup>2</sup> Table 1 below depicts these waivers and authorizations, by agency.

**Table 1. Waivers and Authorizations by Agency**

Agency	Type of Waiver/Authorization	Number of Each Type	Total Number of Waivers/Authorizations
1. DHS	13770 Pledge Waiver	1	2
	502 Authorization	1	
2. DOJ	13490 Pledge Waiver	4	23
	208 Waiver	1	
	502 Authorization	18	
3. HHS	13770 Pledge Waiver	1	6
	208 Waiver	1	
	502 Authorization	4	
4. Peace Corps	502 Authorization	2	2
5. SEC	502 Authorization	2	2
6. State	13770 Pledge Waiver	1	9
	13490 Pledge Waiver	1	
	208 Waiver	1	
	502 Authorization	6	
7. Treasury	13770 Pledge Waiver	2	5
	502 Authorization	3	
8. White House (Obama)	208 Waiver	1	1
9. White House (Trump)	13770 Pledge Waiver	11 <sup>3</sup>	19
	208 Waiver	2	
	502 Authorization	5	
	503 Authorization	1	
<b>Totals</b>	<b>13770 Pledge Waiver</b>	<b>16</b>	<b>69</b>
	<b>13490 Pledge Waiver</b>	<b>5</b>	
	<b>208 Waiver</b>	<b>6</b>	
	<b>502 Authorization</b>	<b>41</b>	
	<b>503 Authorization</b>	<b>1</b>	

Table 2 below depicts waivers and authorizations reported to OGE, by recipient.

<sup>2</sup> The current White House did not provide copies of its waivers and authorizations to OGE in response to the data call; rather, copies of White House waivers and authorizations were posted on the White House web site.

<sup>3</sup> Three of these waivers applied to multiple employees.

**Table 2. Waivers and Authorizations by Individual**

Name	Agency	Type of Waiver/Authorization
1. John Kelly	DHS	13770 Pledge Waiver, 502 Authorization
2. Renata Hesse	DOJ	502 Authorizations (4)
3. Creighton Macy	DOJ	502 Authorization
4. Noel Francisco	DOJ	502 Authorizations (3), 208 Waiver
5. Brian Murray	DOJ	502 Authorizations (2)
6. Chad Readler	DOJ	502 Authorizations (4)
7. Vanita Gupta	DOJ	13490 Pledge Waivers (2), 502 Authorizations (2)
8. Brian Boynton	DOJ	13490 Pledge Waiver, 502 Authorization
9. Matthew Axelrod	DOJ	13490 Pledge Waiver, 502 Authorization
10. Amanda Pearlman	HHS	502 Authorization
11. Seema Verma	HHS	502 Authorizations (2)
12. Tom Price	HHS	502 Authorization
13. Lance Leggitt	HHS	13770 Pledge Waiver
14. Kate Heinzelman	HHS	208 Waiver
15. Carrie Hessler-Radelet	Peace Corps	502 Authorizations (2)
16. Mary Jo White	SEC	502 Authorizations (2)
17. Catherine M. Russell	State	502 Authorization
18. Heather N. Norby	State	13770 Pledge Waiver, 502 Authorization
19. Karen Florini	State	13490 Pledge Waiver
20. John Kerry	State	502 Authorization
21. Roybal Soledad	State	502 Authorization
22. Samantha Power	State	502 Authorizations (2)
23. Jonathan Winer	State	208 Waiver
24. Anthony Sayegh	Treasury	13770 Pledge Waiver, 502 Authorization
25. Brian Callanan	Treasury	13770 Pledge Waiver, 502 Authorization
26. Kody Kinsley	Treasury	502 Authorization
27. Susan Rice	White House (Obama)	208 Waiver
28. EOP Appointees	White House (Trump)	13770 Pledge Waiver
29. WHO Commissioned Officers	White House (Trump)	13770 Pledge Waiver
30. Rene Augustine	White House (Trump)	208 Waiver
31. Michael Catanzaro	White House (Trump)	13770 Pledge Waiver
32. Kellyanne Conway	White House (Trump)	13770 Pledge Waiver
33. Daniel Epstein	White House (Trump)	13770 Pledge Waiver, 502 Authorization
34. Former Jones Day Employees	White House (Trump)	13770 Pledge Waiver, 502 Authorization
35. Charles Herndon	White House (Trump)	13770 Pledge Waiver, 502 Authorization
36. Shahira Knight	White House (Trump)	13770 Pledge Waiver
37. Christopher Liddell	White House (Trump)	208 Waiver
38. Claire Murray	White House (Trump)	13770 Pledge Waiver, 502 Authorization
39. Andrew Olmem	White House (Trump)	13770 Pledge Waiver (para 6 & 7), 502 Authorization
40. Joshua Pitcock	White House (Trump)	13770 Pledge Waiver (para 6 & 7)
41. Reince Priebus	White House (Trump)	503 Authorization

## V. OGE Evaluation of Waivers and Authorizations

OGE evaluated the waivers and authorizations reported in response to the April 28, 2017, data call to determine whether they met legal and procedural standards. This evaluation focused primarily on four criteria:

1. Does the waiver/authorization raise any procedural concerns? For example, was the waiver/authorization issued by an authorized official? Is it signed? Is it dated? Was it issued prior to the employee participating in a prohibited matter?
2. Does the waiver/authorization articulate the correct legal standard and seek to apply that standard? (OGE did not assess whether it **agrees** with the waiver/authorization, but rather whether the agency's analysis is focused on the correct legal standard.)
  - For waivers under Executive Order 13770, OGE also evaluated the focus of any explanation provided for the waiver (e.g., the appointee has unique qualifications). In addition, OGE evaluated the level of detail the agency provided in support of the explanation. For example, in the case of a waiver based on unique qualifications, does the waiver describe qualifications that go beyond the basic qualifications one would expect anyone holding the job to possess?
3. Is the scope of the waiver/authorization subject to any limitations?
4. Was OGE consulted?

### a. Overall Findings

The overall findings of OGE's evaluation with regard to each of the criteria described above are summarized below. Specific issues that OGE identified and follow-up on with agency ethics officials are summarized in subsection b. below (Specific Issues and Agency Follow up).

#### i. Adherence to Reasonable Procedures

Based on its evaluation, OGE determined that most agencies followed reasonable procedures in issuing the waivers and authorizations. The majority of the waivers and authorizations appeared to have been issued by an authorized official and were signed and dated. Moreover, the majority appeared to have been issued prior to the employee participating in a prohibited matter. This last point is particularly important as OGE has consistently held that waivers cannot be issued retroactively.<sup>4</sup>

#### ii. Articulation and Application of Correct Legal Standard

Agencies also appeared to have generally applied and articulated the correct legal standards in the waivers and authorizations, as appropriate and required.<sup>5</sup> With regard to waivers under Executive Order 13770, OGE did not identify a notable lack in the level of detail agencies provided in support of the explanation of the recipients' unique qualifications justifying the waivers.

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<sup>4</sup> See OGE advisory DO-10-005 (April 22, 2010).

<sup>5</sup> Executive Order 13770 does not include a waiver standard.

### **iii. Limitations**

OGE notes that a little less than half of the waivers and authorizations contained some sort of limitation. As described in OGE advisory DO-07-006 (February 23, 2007) related to waivers issued under 18 U.S.C. § 208(b), waivers must include any limitations on the employees' ability to act in the particular matters involved. This might include limits on the particular matters to which the waiver applies or limits on the work an employee is authorized to do on a particular matter. For example, an employee may have a waiver that allows participation in matters related to a particular contract, but specifically excludes a contract negotiation. Limitations tailored to an individual's specific circumstances can demonstrate that an agency has used its best efforts to address and resolve potential conflicts of interest.

### **iv. OGE Consultation**

Of the waivers and authorizations required to be provided in response to the April data call, only waivers issued under 18 U.S.C. § 208(b) require that agencies consult with OGE, when practicable, prior to issuance. OGE determined that OGE was consulted, when practicable, on each waiver issued under 18 U.S.C. § 208(b) during the timeframe covered by the data call.

#### **b. Specific Issues and Agency Follow-up**

As noted previously, OGE followed-up as necessary with agencies for additional information and when their responses raised compliance concerns. Specifically, OGE followed-up on the responses originally provided to its data call at four agencies: the Department of Justice (DOJ), the Department of State (State), the Department of the Treasury (Treasury), and the White House. A summary of OGE's follow-up efforts and agencies' responses are summarized immediately below.

#### **i. Department of Justice**

As indicated in Appendix 2, OGE followed up with DOJ to collect additional information about a waiver issued under 18 U.S.C. § 208(b)(1) and an authorization issued under 5 C.F.R. § 2635.502(d).

Regarding the 208(b)(1) waiver, OGE questioned whether DOJ consulted with OGE prior to granting the waiver. In accordance with 5 C.F.R. § 2640.303, agencies are required to consult formally or informally with OGE prior to granting a waiver under 18 U.S.C. § 208(b)(1), when practicable. In its response (*See* Appendix 3), DOJ responded that OGE was not consulted prior to granting the waiver because consultation was impracticable due to the time-sensitive nature of the matter at hand.<sup>6</sup>

Regarding the 5 C.F.R. § 2635.502(d) authorization, OGE sought to identify who specifically signed the authorization and whether that person was authorized to sign it.<sup>7</sup> In response, DOJ identified the individual who signed the authorization and explained that the individual signed it on behalf of the agency designee, who had reviewed and approved the document, but was unavailable to sign it.

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<sup>6</sup> As noted in DOJ's response, the recipient of the waiver became aware on February 6, 2017, that an amicus brief had been filed on behalf of companies in which he owned stock regarding a case in which he was deeply engaged. As the case was being argued the following evening, February 7, 2017, consultation with OGE prior to granting the waiver was impracticable.

<sup>7</sup> Authorizations issued under § 2635.502(d) must be made by an official delegated authority to make ethics determinations ("agency designee").



## **ii. Department of State**

As indicated in Appendix 4, OGE's follow-up request to State sought additional information about an undated waiver issued under Section 3 of Executive Order 13770 to a State spokesperson. As noted previously, according to Section 3 of Executive Order 13770, a waiver under this authority takes effect when it is signed by the President or his designee.

In its response (*See* Appendix 5), State explained that the waiver, which was issued by the White House, was undated when State received a copy from the White House on April 13, 2017. State added that they provided a copy of the waiver to the spokesperson on April 18, 2017, which was prior to the spokesperson's first day as a State employee on April 24, 2017.

## **iii. Department of the Treasury**

As indicated in Appendix 6, OGE followed up with Treasury to determine whether dated copies of waivers issued under Section 3 of Executive Order 13770 for two Treasury employees existed and if either of the waivers was intended to have retroactive effect. In its response (*See* Appendix 7), Treasury stated that it was not provided dated copies of the waivers, which were issued by the White House, but provided the dates on which the waivers were emailed to Treasury from the White House.<sup>8</sup> In addition, Treasury stated that neither waiver was intended to have retroactive effect.

## **iv. White House**

As discussed earlier, the current White House did not provide copies of its waivers and authorizations to OGE in response to the data call; rather, copies of White House waivers and authorizations were posted on the White House website. OGE's evaluation of these documents raised some compliance concerns about which OGE followed up with the White House.

As indicated in Appendix 8, OGE's follow-up request to the White House sought additional information on a number of issues related to waivers and authorizations issued to White House officials. In its first response to OGE's follow-up request (*See* Appendix 9), the White House did not answer any of OGE's specific follow-up questions, but rather affirmed in a letter that it "takes seriously the need for appointees to resign, recuse and divest where required." After OGE informally communicated its view that this letter was unresponsive, the White House then supplemented its response to address some but not all of OGE's follow-up questions (*See* Appendix 10).

In its follow-up request, OGE first sought to determine whether the waivers issued to White House officials under Section 3 of Executive Order 13770 were issued by persons authorized to issue waivers. Under Section 3, only the President or his designee has authority to grant a waiver. According to the White House recent supplemental response, on January 28, 2017, the President authorized White House Counsel, Deputy Counsel, and Senior Associate White House Counsel as "designees" for the purpose of issuing waivers. The supplemental response added that all waivers issued to date were signed pursuant to that authority.

Second, OGE's follow-up request questioned whether there were signed and dated copies of the 10 Executive Order 13770 waivers that are posted on the White House website without a signature or date. OGE also asked if any of these waivers were intended to have retroactive effect. As noted

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<sup>8</sup> According to Treasury's response, Treasury considers the dates of these emails, March 14 and March 28, 2017, to be the effective dates of the waivers. Copies of the waivers were provided to the employees covered by them on March 15 and March 29, respectively.

previously, under Section 3 of Executive Order 13770, a waiver takes effect when it is signed by the President or his designee. According to the White House supplemental response, all White House waivers issued to date have been issued in writing, distributed to waiver recipients, and signed by a “designee” authorized to issue them. The White House did not provide OGE signed and dated copies of the 10 waivers in question nor did the White House provide the date on which each of the waivers was finalized, the dates on which the waivers were provided to the recipients, or the effective dates of the waivers, as requested.

With regard to some of the unsigned and undated Executive Order 13770 waivers, the White House supplemental response goes on to state, “Executive Order 13770 was not drafted with the intention of placing restrictions on such communications, and thus no waiver would be necessary. However, following a meeting with OGE where the issue was discussed, and after news reports of potential relevant communications, the White House Office elected to resolve all doubt by issuing the two waivers. Further, because the White House concluded that the public interest was being served by authorizing the conduct for which waiver authorizing communications with the news media was granted (and which was not prohibited in the first instance), the White House Office did not impose disciplinary action against White House appointees who may have had such communications.”

Third, OGE asked for an estimate of the number of individuals covered by these two “blanket” waivers issued to all Executive Office of the President appointees and White House Office commissioned officers. OGE also asked whether the issuer of these waivers was also a recipient of either of them. The White House responded that the two waivers covered all Executive Office of the President appointees and White House Office commissioned officers, but did not provide an estimate of the number of individuals covered by the waivers or indicate whether the issuer was also a recipient.

Fourth, OGE asked whether signed and dated copies of the four authorizations issued under 5 C.F.R. § 2635.502(d) existed and if any of these authorizations were intended to have retroactive effect. OGE also requested that the White House provide the date on which each of the authorizations was finalized, the dates on which the authorizations were provided to the recipients, the effective dates of the authorizations, and whether any of the authorizations were intended to have retroactive effect.<sup>9</sup> The White House supplemental response did not provide signed and/or dated versions of the authorizations, the dates on which they were finalized and provided to the recipients, or the specific dates on which the authorizations became effective, as requested by OGE. In its supplemental response, the White House stated that it, “understands that authorizations pursuant to section 2635.502(d) are to be prospective and each authorization was issued so that the employee could participate in the described particular matters involving specific parties prospectively.” The supplemental response also states that, “In granting each 502(d) waiver, the White House Office determined that the employee’s participation in those matters outweighed any concern that a reasonable person may question the integrity of the White House Office programs and operations.”

Finally, OGE asked the White House whether any appointees in the Executive Office of the President who received a waiver under Section 3 of Executive Order 13770, which covers matters involving, or communications with, former employers or clients, also received an authorization under 5 C.F.R. § 2635.502(d).<sup>10</sup> The White House responded that no appointees covered by this waiver received a related authorization under 5 C.F.R. § 2635.502(d).

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<sup>9</sup> OGE considers these dates to be critical because authorizations must be prospective.

<sup>10</sup> As noted previously, 5 C.F.R. § 2635.502 establishes an additional recusal obligation with respect to former employers and clients. Specifically, an appointee may not participate in any particular matter involving specific parties in which a person with whom he has a covered relationship is a party or represents a party, if the appointee

## **VI. Conclusions**

OGE's review determined that agencies largely complied with statutory, regulatory, and procedural requirements when issuing the waivers and authorizations produced for this data call. In particular, OGE found that most agencies followed appropriate procedures when issuing waivers and authorizations, including ensuring that they were signed, dated, and issued by an authorized official prior to the recipient engaging in the conduct covered by the waiver or authorization. For the most part, agencies also appeared to have correctly applied (and articulated) any required legal standards when issuing the waivers and authorizations and to have appropriately included necessary limitations on the recipient's ability to act in the matters involved. Finally, OGE's review found that OGE was consulted, when practicable, on each waiver issued under 18 U.S.C. § 208(b) during the timeframe covered by the data call.

Another important aspect of this review was agency responsiveness to the data call and any necessary follow up. Agency responsiveness is imperative to OGE's ability to effectively conduct oversight of the decentralized executive branch ethics program and to fulfill its responsibility to facilitate transparency.

In support of this essential responsibility, OGE found most agencies to be forthcoming and responsive to the data call and any follow-up communications. However, the White House never provided OGE or made available to the public signed or dated copies of 10 waivers it issued under Executive Order 13770 and 4 authorizations issued under 5 C.F.R. § 2635.502 in response to the data call.<sup>11</sup> Moreover, the original White House reply to OGE's follow-up questions was entirely unresponsive. After being provided additional time to supplement its response, the White House did provide additional information, but did not fully respond to OGE's follow-up questions. The failure of the White House to provide a complete response hampers transparency and could undermine public confidence in its decision-making processes.

OGE notes that the White House has committed to increasing transparency by supplementing the waiver information currently available on the White House website in the event it issues additional waivers. OGE urges the White House to do this by posting signed and dated versions of any additional waivers.

The White House has also indicated they are willing to discuss OGE conducting a review of the White House ethics program. OGE agrees that the White House would benefit from a review of its program and looks forward to contacting the White House in the near future to discuss such a review.

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determines that a reasonable person with knowledge of the relevant facts would question the appointee's impartiality in the matter. Covered relationships include a former employer or a client the appointee served in the past year.

<sup>11</sup> Unsigned and undated versions of these waivers and authorizations are available on the White House website.

UNITED STATES OFFICE OF  
GOVERNMENT ETHICSApril 28, 2017  
PA-17-02

## MEMORANDUM

TO: Chief of Staff to the President, Agency Heads, Designated Agency Ethics Officials, Inspectors General, and Appointees

FROM: Walter M. Shaub, Jr.  
Director

SUBJECT: Data Call for Certain Waivers and Authorizations

This Program Advisory is a data call for documents and information. Copies of all documents and written responses required by this Program Advisory must be submitted to the U.S. Office of Government Ethics (OGE) by **Thursday, June 1, 2017**, except as specified herein. Documents are to be submitted in Portable Document Format (PDF) through the Designated Agency Ethics Official (DAEO) or the DAEO's designee for each agency, including the White House, to the agency's assigned OGE Desk Officer. Agencies and relevant agency officials, including White House officials, are required to exercise due diligence in collecting the documents and information covered by this data call.

### I. Background

The Ethics in Government Act vests OGE with responsibility for providing “overall direction of executive branch policies related to preventing conflicts of interest.”<sup>1</sup> OGE is the “supervising ethics office” for a decentralized executive branch ethics program established by the Ethics in Government Act.<sup>2</sup> OGE also has responsibility for interpreting and issuing guidance on Executive Order 13770.<sup>3</sup> In connection with these responsibilities, OGE conducts reviews of agency ethics programs in order to ensure their compliance with program requirements and to ensure their effectiveness in advancing the mission of the executive branch ethics program.<sup>4</sup> OGE also conducts single-issue reviews of individual agencies, groups of agencies, or the executive branch ethics program as a whole.<sup>5</sup> Accordingly, OGE is conducting a review of waivers and authorizations issued to a specified class of appointees during a 12-month period. The documents and information subject to this data call are necessary for the performance of the duties of OGE's Director and in furtherance of OGE's mission with respect to the executive branch ethics program.<sup>6</sup>

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<sup>1</sup> 5 U.S.C. app. § 402(a).

<sup>2</sup> 5 U.S.C. app. § 109(18)(D).

<sup>3</sup> See OGE Legal Advisory, LA-17-02 (2017); OGE Legal Advisory, LA-17-03 (2017); see also Exec. Order No. 13770, § 4(c) (Jan. 28, 2017).

<sup>4</sup> 5 C.F.R. § 2638.108(a)(9).

<sup>5</sup> *Id.*

<sup>6</sup> See 5 U.S.C. app. §§ 402(b)(10), 403(a)(2); 5 C.F.R. § 2638.202.



## II. Deadlines

### A. Appointees Serving in the United States

The deadline for submission of responsive documents and information is **Thursday, June 1, 2017**, with respect to all appointees who were stationed in the United States when the waiver or authorization was issued or approved.

### B. Appointees Serving Outside the United States

The deadline for submission of responsive documents and information is **Tuesday, August 1, 2017**, with respect to all appointees who were stationed outside the United States when the waiver or authorization was issued or approved.

## III. Documents

All agencies, including the White House, are required to produce the documents described in this section.

### A. Time Period Covered

This data call applies to all covered documents issued or approved during the period from May 1, 2016, through April 30, 2017. The period between these times is the “covered period.”

### B. Persons Covered<sup>7</sup>

This data call applies to individuals who met the definition of “appointee” under Executive Order 13770 at any time during the period from January 20, 2017, through April 30, 2017.<sup>8</sup> This data call also applies to individuals who met the definition of “appointee” under Executive Order 13490 at any time during the period from May 1, 2016, through January 20, 2017.<sup>9</sup> Every individual meeting either of these criteria is a “covered person,” unless excluded in the next paragraph.

Notwithstanding the preceding description of covered persons, several exclusions apply. Members of the uniformed services are excluded from this data call, except to the extent that, at the time of the waiver or authorization, they were serving in positions traditionally filled by civilian appointees (e.g., Secretary of Defense, Assistant to the President for National Security Affairs, etc.). Appointees whose public financial disclosure reports are, or were at the time of the waiver or authorization, excluded from public availability pursuant to 5 U.S.C. app. § 105(a)(1) are excluded from this data call. Appointees who were, at the time of the waiver or authorization, required to file confidential financial disclosure reports are excluded from this data call.

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<sup>7</sup> Note that, as used in this Program Advisory, the term “appointee” applies to appointees and to former appointees who were appointees at the time of the waiver or authorization.

<sup>8</sup> Exec. Order No. 13770, § 2(b) (Jan. 28, 2017).

<sup>9</sup> Exec. Order No. 13490, § 2(b) (Jan. 21, 2009).

### C. Waivers and Authorizations Covered

This data call applies to all of the types of waivers and authorizations listed below that were issued or approved with respect to a covered person during the covered time period. These documents are the “covered documents.”

1. Waivers issued or approved under Executive Order 13770.<sup>10</sup>
2. Waivers issued or approved under Executive Order 13490.<sup>11</sup>
3. Waivers issued or approved under 18 U.S.C. § 208(b)(1).
4. Authorizations issued or approved under 5 C.F.R. § 2635.502(d).
5. Waivers issued or approved under 5 C.F.R. § 2635.503(c).

### IV. Information

Agencies, including the White House, are required to produce the information identified below as to each covered waiver or authorization, **unless a written copy of the waiver or authorization is produced**. The information identified below is not required as to any written waiver or authorization that is produced in response to this Program Advisory.

#### A. Executive Order 13770

As to each waiver under Executive Order 13770, if you have not produced a written waiver in response to the data call for documents in the preceding section, describe the following information in a written response:

1. The name and title of the appointee covered by the waiver.
2. The name of the organizational unit and agency in which the appointee was employed at the time of the waiver.
3. The name and title of the individual who issued or approved the waiver.
4. The section(s) and paragraph(s) of the Executive Order waived.
5. Matter(s) covered by the waiver, including the names of relevant parties and a description of the matter(s).

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<sup>10</sup> Exec. Order No. 13770, § 3 (Jan. 28, 2017).

<sup>11</sup> Exec. Order No. 13490, § 3 (Jan. 21, 2009).

B. Executive Order 13490

As to each waiver under Executive Order 13490, if you have not produced a written waiver in response to the data call for documents in the preceding section, describe the following information in a written response:

1. The name and title of the appointee covered by the waiver.
2. The name of the organizational unit and agency in which the appointee was employed at the time of the waiver.
3. The name and title of the individual who issued or approved the waiver.
4. The section(s) and paragraph(s) of the Executive Order waived.
5. Matter(s) covered by the waiver, including the names of relevant parties and a description of the matter(s).

C. 18 U.S.C. § 208(b)(1)

As to each waiver under 18 U.S.C. §208(b)(1), if you have not produced a written waiver in response to the data call for documents in the preceding section, describe the following information in a written response:

1. The name and title of the appointee covered by the waiver.
2. The name of the organizational unit and agency in which the appointee was employed at the time of the waiver.
3. The name and title of the individual who issued or approved the waiver.
4. Matter(s) covered by the waiver, including the names of relevant parties and a description of the matter(s).

D. 5 C.F.R. § 2635.502(d)

As to each authorization under 5 C.F.R. § 2635.502(d), if you have not produced a written authorization in response to the data call for documents in the preceding section, describe the following information in a written response:

1. The name and title of the appointee covered by the authorization.
2. The name of the organizational unit and agency in which the appointee was employed at the time of the authorization.

3. The name and title of the individual who issued or approved the authorization.
4. Matter(s) covered by the authorization, including the names of relevant parties and a description of the matter(s).

E. 5 C.F.R. § 2635.503(c)

As to each waiver under 5 C.F.R. § 2635.503(c), if you have not produced a written waiver in response to the data call for documents in the preceding section, describe the following information in a written response:

1. The name and title of the appointee covered by the waiver.
2. The name of the organizational unit and agency in which the appointee was employed at the time of the waiver.
3. The name and title of the individual who issued or approved the waiver.
4. Matter(s) covered by the waiver, including the names of relevant parties and a description of the matter(s).



UNITED STATES OFFICE OF  
GOVERNMENT ETHICS

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July 6, 2017

Lee J. Lofthus  
Designated Agency Ethics Official  
Department of Justice  
Room 1111  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Mr. Lofthus:

Pursuant to the authorities vested by the Ethics in Government Act in the U.S. Office of Government Ethics (OGE) as the supervising ethics office for the executive branch,<sup>1</sup> OGE is following up with agencies where necessary to gather additional information regarding their responses to a recent data call.<sup>2</sup>

OGE is conducting a review of the issuance of executive branch waivers and authorizations under several authorities related to government ethics.<sup>3</sup> Specifically, where agency submissions triggered a compliance concern, OGE is evaluating procedures employed, adherence to applicable legal standards, and consistency with the norms of the executive branch ethics program for the issuance of waivers and authorizations.<sup>4</sup> OGE is also seeking to identify any systemic issues. To these ends, OGE requests your response to the attached questions regarding the waivers and authorizations your office has issued.<sup>5</sup> Please respond to each item separately and fully in writing.

Please provide the information described in this letter by **July 20, 2017**. If you have questions or need assistance, please contact me at (202) 482-9224 or [dachrist@oge.gov](mailto:dachrist@oge.gov). If

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<sup>1</sup> See 5 U.S.C. app. § 109(18)(D).

<sup>2</sup> On April 28, 2017, OGE issued a data call for copies of ethics information and records related to waivers and authorizations issued under the following legal authorities: (1) Waivers issued or approved under Executive Order 13770; (2) Waivers issued or approved under Executive Order 13490; (3) Waivers issued or approved under 18 U.S.C. § 208(b)(1); (4) Authorizations issued or approved under 5 C.F.R. § 2635.502(d); and (5) Waivers issued or approved under 5 C.F.R. § 2635.503(c).

<sup>3</sup> See PA-17-02 (2017); PA-17-04 (2017).

<sup>4</sup> OGE is responsible for providing overall direction of executive branch policies and monitoring the effectiveness of both individual agency ethics programs and the executive branch ethics program as a whole. See 5 U.S.C. app. § 402(b)(3)-(5), (9)-(11); see also 5 U.S.C. part 2638.

<sup>5</sup> See 5 U.S.C. § 403(a)(2).



Mr. Lee J. Lofthus  
Page 2

you need an extension of time, please send a written request by July 20, 2017. OGE will grant a reasonable extension for good cause shown.

Sincerely,

A handwritten signature in black ink, appearing to read "D.A.C.", written in a cursive style.

Dale A. Christopher, Jr.  
Deputy Director for Compliance

Attachment

# FOLLOW-UP QUESTIONS REGARDING OGE PROGRAM ADVISORY PA-17-02 (2017)

## AGENCY: Department of Justice

Below are follow-up questions in connection with OGE Program Advisory PA-17-02 (2017). Each section relates to a different type of waiver or authorization, as indicated in the heading. Each sub-section relates to one or more specific waivers, which are identified at the beginning of the sub-section. Please respond to each question separately with respect to the identified waivers or authorizations. If part of your response corresponds to a subset of the identified waivers or authorizations, please identify the specific waivers or authorizations to which that part of your response pertains.

### **I. Waivers pursuant to 18 U.S.C. § 208(b)(1)**

The criminal financial conflict of interest statute, 18 U.S.C. § 208(a), prohibits an executive branch employee from participating personally and substantially in any particular matter that has a direct and predictable effect on the employee's own financial interests, as well as the financial interests of certain individuals with whom the employee has ties outside the government. This prohibition, however, may be waived in certain circumstances under 18 U.S.C. § 208(b)(1), upon a determination that the disqualifying financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services to the government.

#### **A. Consultation with OGE.**

*When practicable, agencies must consult with OGE prior to granting a waiver pursuant to U.S.C. § 208(b)(1).*

- Waiver for Noel Francisco

**(1) Was OGE consulted on the waiver listed above prior to the waiver being granted?**

### **II. Authorizations pursuant to 5 C.F.R. § 2635.502(d)**

OGE regulations at 5 C.F.R. § 2635.502(a) provide that an employee should not participate in an official matter if circumstances would cause a reasonable person with knowledge of the relevant facts to question the employee's impartiality in the matter, either because the matter affects the financial interests of a person with whom the employee has a covered relationship or a person with whom the employee has a "covered relationship" or represents a party to the matter. However, under 5 C.F.R. § 2635.502(d), an employee may be authorized to participate in a matter based on a determination, made in light of all relevant circumstances, that the interest of the government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

**A. Signature and delegation of authorizing official.**

*Authorizations issued under 5 C.F.R. § 2635.502(d) must be made by an official delegated authority to make ethics determinations.*

- Authorization for Renata Hesse, dated August 11, 2016

**(1) Who signed the authorization listed above?**

**(2) Was the person who signed the authorization listed above delegated the authority to make ethics determinations?**



## U.S. Department of Justice

JUL 14 2017

Washington, D.C. 20530

Dale A. Christopher, Jr.  
Deputy Director for Compliance  
U.S. Office of Government Ethics (OGE)  
1201 New York Avenue, NW  
Suite 500  
Washington, DC 20005-3919

SUBJECT: Follow-up Questions regarding OGE program advisory PA-17-02 (2017)

Dear Mr. Christopher:

This responds to OGE's July 6, 2017, letter, seeking additional information on the U.S. Department of Justice response to the OGE's June 1, 2017, data call.

Waiver for Noel Francisco: the Department did not consult with OGE prior to granting Mr. Francisco a waiver pursuant to 18 U.S.C. § 208(b)(1) as consultation with OGE was impracticable at the time. As indicated in the waiver, on February 6, 2017, as Acting Solicitor General, Mr. Francisco was deeply engaged in directing the Department's litigation in *Washington v. Trump*, a case in which plaintiffs challenged the President's Executive Order on immigration. Later that evening he discovered that an amicus brief was filed on behalf of companies in which he owned stock totaling in excess of \$25,000. Mr. Francisco's interest exceeded any potentially applicable regulatory exemption limit, but represented only 3% of his entire assets. In light of the importance of the case and Mr. Francisco's involvement in it, as well as the imminent litigation deadline—the case was being argued in the U.S. Court of Appeals for the Ninth Circuit the evening of February 7, 2017—consultation with OGE prior to granting the waiver was impracticable.

Authorization for Renata Hesse: the August 11, 2016, authorization granted to Ms. Hesse was signed by Christopher Casey, Deputy Associate Attorney General of the Antitrust Division. He signed on behalf of the Acting Associate Attorney General, William Baer. Mr. Baer, the agency designee, had reviewed and approved the authorization but was unavailable to sign the document.

We hope this information is helpful. Please let me know should you have questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lee J. Lofthus".

Lee J. Lofthus  
Assistant Attorney General  
For Administration and  
Designated Agency Ethics Official

UNITED STATES OFFICE OF  
GOVERNMENT ETHICS

July 6, 2017

Katherine D. McManus  
Designated Agency Ethics Official  
Department of State  
Room 6421  
2201 C Street, NW  
Washington, DC 20520

Dear Ms. McManus:

Pursuant to the authorities vested by the Ethics in Government Act in the U.S. Office of Government Ethics (OGE) as the supervising ethics office for the executive branch,<sup>1</sup> OGE is following up with agencies where necessary to gather additional information regarding their responses to a recent data call.<sup>2</sup>

OGE is conducting a review of the issuance of executive branch waivers and authorizations under several authorities related to government ethics.<sup>3</sup> Specifically, where agency submissions triggered a compliance concern, OGE is evaluating procedures employed, adherence to applicable legal standards, and consistency with the norms of the executive branch ethics program for the issuance of waivers and authorizations.<sup>4</sup> OGE is also seeking to identify any systemic issues. To these ends, OGE requests your response to the attached questions regarding the waivers and authorizations your office has issued.<sup>5</sup> Please respond to each item separately and fully in writing.

Please provide the information described in this letter by **July 20, 2017**. If you have questions or need assistance, please contact me at (202) 482-9224 or [dachrist@oge.gov](mailto:dachrist@oge.gov). If

<sup>1</sup> See 5 U.S.C. app. § 109(18)(D).

<sup>2</sup> On April 28, 2017, OGE issued a data call for copies of ethics information and records related to waivers and authorizations issued under the following legal authorities: (1) Waivers issued or approved under Executive Order 13770; (2) Waivers issued or approved under Executive Order 13490; (3) Waivers issued or approved under 18 U.S.C. § 208(b)(1); (4) Authorizations issued or approved under 5 C.F.R. § 2635.502(d); and (5) Waivers issued or approved under 5 C.F.R. § 2635.503(c).

<sup>3</sup> See PA-17-02 (2017); PA-17-04 (2017).

<sup>4</sup> OGE is responsible for providing overall direction of executive branch policies and monitoring the effectiveness of both individual agency ethics programs and the executive branch ethics program as a whole. See 5 U.S.C. app. § 402(b)(3)-(5), (9)-(11); see also 5 U.S.C. part 2638.

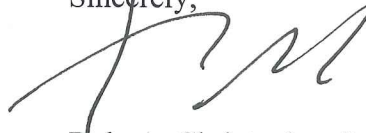
<sup>5</sup> See 5 U.S.C. § 403(a)(2).



Ms. Katherine D. McManus  
Page 2

you need an extension of time, please send a written request by July 20, 2017. OGE will grant a reasonable extension for good cause shown.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Christopher, Jr.", written in a cursive style.

Dale A. Christopher, Jr.  
Deputy Director for Compliance

Attachment

# FOLLOW-UP QUESTIONS REGARDING OGE PROGRAM ADVISORY PA-17-02 (2017)

## AGENCY: Department of State

Below are follow-up questions in connection with OGE Program Advisory PA-17-02 (2017). Each section relates to a different type of waiver or authorization, as indicated in the heading. Each sub-section relates to one or more specific waivers, which are identified at the beginning of the sub-section. Please respond to each question separately with respect to the identified waivers or authorizations. If part of your response corresponds to a subset of the identified waivers or authorizations, please identify the specific waivers or authorizations to which that part of your response pertains.

### **I. Waivers Pursuant to Section 3 of Executive Order 13770**

Section 3 of Executive Order 13770 provides a waiver mechanism which allows participation in specified matters otherwise prohibited under the Executive Order.

#### **A. Timing and format of waivers.**

*According to Section 3 of Executive Order 13770, a waiver takes effect when it is signed by the President or his designee, therefore both the signature and date of signature are important to the effectiveness of the waiver.*<sup>1</sup>

- Waiver for Heather N. Norby

- (1) The waiver listed above is undated. Is there a dated version of this waiver? If so, please provide a copy.**
- (2) On what date was the waiver listed above finalized (i.e., on what date was it last modified)?**
- (3) On what date was the waiver listed above provided to the recipient?**
- (4) What is the effective date of the waiver listed above?**
- (5) Was the waiver listed above intended to have retroactive effect?**

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<sup>1</sup> See OGE DO 10-005 (2010)(clarifying that “waivers and authorizations must be issued prospectively in order to be valid.”).





United States Department of State

*Washington, D.C. 20520*

July 24, 2017

Dale A. Christopher, Jr.  
Deputy Director for Compliance  
U.S. Office of Government Ethics  
1201 New York Ave., NW, Suite 500  
Washington, DC 20005-3917

Dear Mr. Christopher,

I am writing to respond to the follow-up questions regarding Program Advisory PA-17-02 that you transmitted on July 6, 2017. Those questions all relate to the waiver issued by White House Counsel Donald McGahn to Heather Norby pursuant to Section 30 of Executive Order 13770. The questions, and our responses, are as follows:

**(1) The waiver listed above is undated. Is there a dated version of this waiver? IF so, please provide a copy.**

The PDF of the signed waiver that was forwarded to the Department of State did not have a date, and the Department of State does not have a dated version of the waiver. The White House transmitted the waiver to the Department of State on April 13, 2017.

**(2) On what date was the waiver listed above finalized (i.e. on what date was it last modified)?**

The waiver was issued by the White House, and the Department of State does not know the date on which the waiver was finalized or last modified. The Department of State transmitted its request for the waiver to the White House on April 6, 2017.

**(3) On what date was the waiver listed above provided to the recipient?**

Our office forwarded the waiver to Ms. Norby on April 18, 2017.

**(4) What is the effective date of the waiver listed above?**

The waiver was issued by the White House, and the Department of State does not know the effective date with certainty. As noted above, Ms. Norby received the waiver on April 18, 2017. Ms. Norby's first day as a Department of State employee was April 24, 2017.

**(5) Was the waiver listed above intended to have retroactive effect?**

The waiver was issued by the White House, and the Department of State cannot speak to the intentions of the issuer. We note that the waiver was issued, and received by Ms. Norby, before her first day as a Department of State employee.

We hope this information is helpful, and if you have any questions about our responses please feel free to contact me or David Huitema, the Alternate Designated Agency Ethics Official.

Sincerely,



Katherine D. McManus  
Deputy Legal Adviser &  
Designated Agency Ethics Official  
Department of State

UNITED STATES OFFICE OF  
GOVERNMENT ETHICS



July 6, 2017

Rochelle F. Granat  
Designated Agency Ethics Official  
Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

Dear Ms. Granat:

Pursuant to the authorities vested by the Ethics in Government Act in the U.S. Office of Government Ethics (OGE) as the supervising ethics office for the executive branch,<sup>1</sup> OGE is following up with agencies where necessary to gather additional information regarding their responses to a recent data call.<sup>2</sup>

OGE is conducting a review of the issuance of executive branch waivers and authorizations under several authorities related to government ethics.<sup>3</sup> Specifically, where agency submissions triggered a compliance concern, OGE is evaluating procedures employed, adherence to applicable legal standards, and consistency with the norms of the executive branch ethics program for the issuance of waivers and authorizations.<sup>4</sup> OGE is also seeking to identify any systemic issues. To these ends, OGE requests your response to the attached questions regarding the waivers and authorizations your office has issued.<sup>5</sup> Please respond to each item separately and fully in writing.

Please provide the information described in this letter by **July 20, 2017**. If you have questions or need assistance, please contact me at (202) 482-9224 or [dachrist@oge.gov](mailto:dachrist@oge.gov). If

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<sup>1</sup> See 5 U.S.C. app. § 109(18)(D).

<sup>2</sup> On April 28, 2017, OGE issued a data call for copies of ethics information and records related to waivers and authorizations issued under the following legal authorities: (1) Waivers issued or approved under Executive Order 13770; (2) Waivers issued or approved under Executive Order 13490; (3) Waivers issued or approved under 18 U.S.C. § 208(b)(1); (4) Authorizations issued or approved under 5 C.F.R. § 2635.502(d); and (5) Waivers issued or approved under 5 C.F.R. § 2635.503(c).

<sup>3</sup> See PA-17-02 (2017); PA-17-04 (2017).

<sup>4</sup> OGE is responsible for providing overall direction of executive branch policies and monitoring the effectiveness of both individual agency ethics programs and the executive branch ethics program as a whole. See 5 U.S.C. app. § 402(b)(3)-(5), (9)-(11); see also 5 U.S.C. part 2638.

<sup>5</sup> See 5 U.S.C. § 403(a)(2).



Ms. Rochelle F. Granat  
Page 2

you need an extension of time, please send a written request by July 20, 2017. OGE will grant a reasonable extension for good cause shown.

Sincerely,

A handwritten signature in black ink, appearing to be "D.A. Christopher, Jr.", written in a cursive style.

Dale A. Christopher, Jr.  
Deputy Director for Compliance

Attachment

# FOLLOW-UP QUESTIONS REGARDING OGE PROGRAM ADVISORY PA-17-02 (2017)

## AGENCY: Department of the Treasury

Below are follow-up questions in connection with OGE Program Advisory PA-17-02 (2017). Each section relates to a different type of waiver or authorization, as indicated in the heading. Each sub-section relates to one or more specific waivers, which are identified at the beginning of the sub-section. Please respond to each question separately with respect to the identified waivers or authorizations. If part of your response corresponds to a subset of the identified waivers or authorizations, please identify the specific waivers or authorizations to which that part of your response pertains.

### **I. Waivers Pursuant to Section 3 of Executive Order 13770**

Section 3 of Executive Order 13770 provides a waiver mechanism which allows participation in specified matters otherwise prohibited under the Executive Order.

#### **A. Timing and format of waivers.**

*According to Section 3 of Executive Order 13770, a waiver takes effect when it is signed by the President or his designee, therefore both the signature and date of signature are important to the effectiveness of the waiver*<sup>1</sup>

- Waiver for Anthony Sayegh, and
- Waiver for Brian Callanan.

- (1) The waivers listed above are undated. Are there dated versions of these waivers? If so, please provide copies.**
- (2) On what date were each of the waivers listed above finalized (i.e., on what date were they last modified)?**
- (3) On what date were each of the waivers listed above provided to the recipients?**
- (4) What is the effective date of each of the waivers listed above?**
- (5) Which, if any, of the waivers listed above were intended to have retroactive effect?**

---

<sup>1</sup> See OGE DO 10-005 (2010)(clarifying that “waivers and authorizations must be issued prospectively in order to be valid.”).



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

July 13, 2017

Dale A. Christopher, Jr.  
Deputy Director for Compliance  
Office of Government Ethics  
1201 New York Avenue, NW  
Washington, DC 20005

Dear Mr. Christopher:

This is in response to your letter of July 6, 2017. Below please find answers to your follow-up questions on the submission of the Department of Treasury to the April 28, 2017 data call.

The response follows the specific questions outlined in the attachment to your letter, relating to information on the limited waivers of paragraph 6 of the Ethics Pledge (Section 1 of Executive Order 13770) issued to Anthony Sayegh and Brian Callanan.

**(1) Are there dated versions of these waivers? If so provide copies.**

**Answer:** The date on each waiver memorandum reflects the date the request was sent to the Office of the White House Counsel. Each approved memorandum was returned via email from Stefan Passantino on the following dates:

Sayegh: March 14, 2017  
Callanan: March 28, 2017

**(2) On what date were each of the waivers listed above finalized (i.e., on what date were they last modified)?**

**Answer:** The text of each memorandum was finalized as of date it was initialed and dated by the DAEO and sent to the White House Counsel: Sayegh on March 9, 2017, and Callanan on March 24, 2017. No modifications have been made except for the initials indicating White House Counsel's approval.

**(3) On what date were each of the waivers listed above provided to the recipients?**

**Answer:** Sayegh: March 15, 2017  
Callanan: March 29, 2017

**(4) What is the effective date of each of the waivers listed above?**

**Answer:** Sayegh: March 14, 2017  
Callanan: March 28, 2017

(5) Which, if any, of the waivers listed above were intended to have retroactive effect?

**Answer:** Neither one.

Please contact me at 202-622-6052 or Elizabeth Horton at 202-622-9794 if you have any further questions.

Sincerely,



Rochelle F. Granat  
Assistant General Counsel  
(General Law, Ethics and Regulation) and  
Designated Agency Ethics Official

UNITED STATES OFFICE OF  
GOVERNMENT ETHICS

July 6, 2017

Stefan C. Passantino  
Designated Agency Ethics Official  
The White House  
1600 Pennsylvania Avenue, NW  
Washington, DC 20500

Dear Mr. Passantino:

Pursuant to the authorities vested by the Ethics in Government Act in the U.S. Office of Government Ethics (OGE) as the supervising ethics office for the executive branch,<sup>1</sup> OGE is following up with agencies where necessary to gather additional information regarding their responses to a recent data call.<sup>2</sup>

OGE is conducting a review of the issuance of executive branch waivers and authorizations under several authorities related to government ethics.<sup>3</sup> Specifically, where agency submissions triggered a compliance concern, OGE is evaluating procedures employed, adherence to applicable legal standards, and consistency with the norms of the executive branch ethics program for the issuance of waivers and authorizations.<sup>4</sup> OGE is also seeking to identify any systemic issues. To these ends, OGE requests your response to the attached questions regarding the waivers and authorizations your office has issued.<sup>5</sup> Please respond to each item separately and fully in writing.

Please provide the information described in this letter by **July 20, 2017**. If you have questions or need assistance, please contact me at (202) 482-9224 or [dachrist@oge.gov](mailto:dachrist@oge.gov). If

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<sup>1</sup> See 5 U.S.C. app. § 109(18)(D).

<sup>2</sup> On April 28, 2017, OGE issued a data call for copies of ethics information and records related to waivers and authorizations issued under the following legal authorities: (1) Waivers issued or approved under Executive Order 13770; (2) Waivers issued or approved under Executive Order 13490; (3) Waivers issued or approved under 18 U.S.C. § 208(b)(1); (4) Authorizations issued or approved under 5 C.F.R. § 2635.502(d); and (5) Waivers issued or approved under 5 C.F.R. § 2635.503(c).

<sup>3</sup> See PA-17-02 (2017); PA-17-04 (2017).

<sup>4</sup> OGE is responsible for providing overall direction of executive branch policies and monitoring the effectiveness of both individual agency ethics programs and the executive branch ethics program as a whole. See 5 U.S.C. app. § 402(b)(3)-(5), (9)-(11); see also 5 U.S.C. part 2638.

<sup>5</sup> See 5 U.S.C. § 403(a)(2).

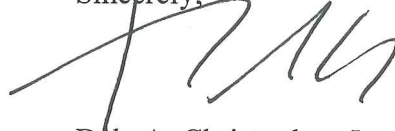




Stefan C. Passantino  
Page 2

you need an extension of time, please send a written request by July 20, 2017. OGE will grant a reasonable extension for good cause shown.

Sincerely,

A handwritten signature in black ink, appearing to read 'D.A. Christopher, Jr.', written over a horizontal line.

Dale A. Christopher, Jr.  
Deputy Director for Compliance

Attachment

# FOLLOW-UP QUESTIONS REGARDING OGE PROGRAM ADVISORY PA-17-02 (2017)

## AGENCY: White House Office

Below are follow-up questions in connection with OGE Program Advisory PA-17-02 (2017). Each section relates to a different type of waiver or authorization, as indicated in the heading. Each sub-section relates to one or more specific waivers, which are identified at the beginning of the sub-section. Please respond to each question separately with respect to the identified waivers or authorizations. If part of your response corresponds to a subset of the identified waivers or authorizations, please identify the specific waivers or authorizations to which that part of your response pertains.

### **I. Waivers Pursuant to Section 3 of Executive Order 13770**

Section 3 of Executive Order 13770 provides a waiver mechanism which allows participation in specified matters otherwise prohibited under the Executive Order.

#### **A. Delegation of authority to a “designee” under section 3 of Executive Order 13770.**

*According to Section 3 of Executive Order 13770, only the President or his designee has authority to grant a waiver.*

- Waiver for appointees in the Executive Office of the President;
- Waiver for commissioned officers in the White House Office;
- Waiver for Michael Cantanzaro;
- Waiver for Kellyanne Conway;
- Waiver for Daniel Epstein;
- Waiver for Charles Herndon;
- Waiver for Shahira Knight;
- Waiver for Claire Murray;
- Waiver for Andrew Olmem; and
- Waiver for Joshua Pitcock.

- (1) **Did the President make a delegation of authority to any appointee in the White House to serve as the President’s “designee,” as that term is used in section 3 of Executive Order 13770? If so, please provide a copy of the delegation of authority.**
- (2) **If so, did the person to whom such authority was delegated issue the waivers identified above?**

**B. Timing and format of waivers.**

*According to Section 3 of Executive Order 13770, a waiver takes effect when it is signed by the President or his designee, therefore both the signature and date of signature are important to the effectiveness of the waiver*<sup>1</sup>

- Waiver for appointees in the Executive Office of the President;
- Waiver for commissioned officers in the White House Office;
- Waiver for Michael Cantanzaro;
- Waiver for Kellyanne Conway;
- Waiver for Daniel Epstein;
- Waiver for Charles Herndon;
- Waiver for Shahira Knight;
- Waiver for Claire Murray;
- Waiver for Andrew Olmem; and
- Waiver for Joshua Pitcock.

**(1) The waivers listed above are unsigned and undated. Are there signed and/or dated versions of these waivers? If so, please provide copies.**

**(2) On what date were each of the waivers listed above finalized (i.e., on what date were they last modified)?**

**(3) On what date were each of the waivers listed above provided to the recipients?**

**(4) What is the effective date of each of the waivers listed above?**

**(5) Which, if any, of the waivers listed above were intended to have retroactive effect?**

**C. Coverage of waivers.**

*Effective agency ethics program compliance dictates that it must be clear to both an affected employee and to the ethics officials charged with monitoring that employee's ethics compliance, who is covered by a waiver.*<sup>2</sup>

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<sup>1</sup> See OGE DO 10-005 (2010)(clarifying that “waivers and authorizations must be issued prospectively in order to be valid.”).

<sup>2</sup> See e.g. OGE Adv. Op. 07x04 (2007) (expressing, in the context of waivers issued under 18 U.S.C. § 208(b), OGE's position that “blanket” waivers are inappropriate).

- Waiver for appointees in the Executive Office of the President; and
- Waiver for commissioned officers in the White House Office.

**(1) Approximately how many appointees are covered by each the waivers listed above?**

**(2) Is the issuer of the waivers listed above also a recipient of the waivers (i.e., is the issuer included in the covered class of appointees)? If so, please explain.**

## **II. Authorizations pursuant to 5 C.F.R. § 2635.502(d)**

OGE regulations at 5 C.F.R. § 2635.502(a) provide that an employee should not participate in an official matter if circumstances would cause a reasonable person with knowledge of the relevant facts to question the employee's impartiality in the matter, either because the matter affects the financial interests of a person with whom the employee has a covered relationship or a person with whom the employee has a "covered relationship" is or represents a party to the matter. However, under 5 C.F.R. §2635.502(d), an official who has been delegated authority to make ethics determinations may authorize an employee to participate in a matter based on a determination, made in light of all relevant circumstances, that the interest of the government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

### **A. Timing and format of authorizations.**

*Authorizations issued under 5 C.F.R. §2635.502(d) by the agency designee shall be documented in writing at the agency designee's discretion or when requested by the employee. As with waivers, the date of issuance is critical because authorizations must be prospective.*

- Authorization for Daniel Epstein;
- Authorization for Charles Herndon;
- Authorization for Claire Murray; and
- Authorization for Andrew Olmem.

**(1) The authorizations listed above are unsigned and undated. Are there signed and/or dated versions of these authorizations? If so, please provide copies.**

**(2) On what date were each of the authorizations listed above finalized (i.e., on what date were they last modified)?**

**(3) On what date were each of the authorizations listed above provided to the recipients?**

**(4) What is the effective date of each of the authorizations listed above?**

**(5) Which, if any, of the authorizations listed above were intended to have retroactive effect?**

**B. Overlapping coverage of Executive Order 13770 and 5 C.F.R. § 2635.502.**

*Under 5 C.F.R. §2635.502(b)(1)(iv), an individual has a “covered relationship” with any person for whom the individual has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.*

- Waiver for appointees in the Executive Office of the President

**(1) The waiver listed above covers matters involving, or communications with, former employers and clients. However, this waiver does not address 5 C.F.R. § 2635.502. Did any of the individuals covered by this waiver also receive authorizations pursuant to 5 C.F.R. § 2635.502(d)?**

**(2) If so, please indicate:**

- a. **The name and title of the appointee covered by the authorization.**
- b. **The name of the organizational unit and agency in which the appointee was employed at the time of the authorization.**
- c. **The name and title of the individual who issued or approved the authorization.**
- d. **The matter(s) covered by the authorization, including the names of relevant parties and a description of the matter(s).**

**THE WHITE HOUSE**  
**WASHINGTON**

July 20, 2017


Dale Christopher  
Deputy Director for Compliance  
U.S. Office of Government Ethics  
1201 New York Ave NW # 500  
Washington, DC 20005

Dear Mr. Christopher:

This is in response to your letter of July 6, 2017, in which you request information regarding a recent data call. The White House takes seriously the need for appointees to resign, recuse and divest where required. The White House Counsel's Office worked closely with the Office of Government Ethics and White House officials to avoid conflicts arising from their former places of employment or investment holdings. To the furthest extent possible, counsel worked with each staffer to ensure recusal from conflicting conduct rather than granting waivers, which has led to the limited number of waivers being issued. To the extent White House officials have had questions about their pledge obligations or conduct prior to, or after, issuance of a waiver, those individuals have been in frequent consultation with White House ethics officers.

As you know, the White House has publicly released the duly authorized waivers issued under the President's Executive Order 13770. We look forward to working with OGE's Acting and permanent Directors. If you have any questions regarding this matter or have any additional issues you wish to discuss, please do not hesitate to contact me.

Sincerely,



STEFAN C. PASSANTINO  
Deputy Counsel to the President, Compliance & Ethics  
Office of the White House Counsel

THE WHITE HOUSE  
WASHINGTON

August 28, 2017

David Apol  
Acting Director  
U.S. Office of Government Ethics  
1201 New York Ave NW # 500  
Washington, DC 20005

Dear Mr. Apol:

As we advised earlier this week, the White House is providing additional information in response to your office's letter of July 6, 2017 and in response to OGE Program Advisory PA-17-02 (April 28, 2017).

1. The Office of Government Ethics has inquired whether the President made a delegation of authority to any appointee in the White House to serve as the President's "designee," as that term is used in section 3 of Executive Order 13770. The President authorized White House Counsel Donald F. McGahn, Deputy Counsel Stefan C. Passantino, and Senior Associate White House Counsel James D. Schultz to serve as the President's "designees" for the purpose of issuing waivers on January 28, 2017. All White House waivers issued to date have been issued in writing, distributed to waiver recipients, and signed pursuant to that authority. All information originally sought by OGE pertaining to those waivers in its data call of April 28, 2017 has been made available on [www.whitehouse.gov](http://www.whitehouse.gov) and will be supplemented in the event additional waivers are issued.<sup>1</sup>
2. The Office of Government Ethics has inquired about the status of EOP appointees who may have participated in meetings with news and/or political organizations regarding broad policy matters before such time as they were issued a limited waiver authorizing such conduct. Executive Order 13770 was not drafted with the intention of placing restrictions on such communications, and thus no waiver would be necessary. However, following a meeting with OGE where the issue was discussed, and after news reports of potential relevant communications, the White House Office elected to resolve all doubt by issuing the two waivers. Further, because the White House concluded that the public interest was being served by authorizing the conduct for which waiver authorizing communications with the news media was granted (and which was not prohibited in the

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<sup>1</sup> Specifically, OGE's April 28, 2017 data call sought the following information: (1) The name and title of the appointee covered by the waiver; (2) the name of the organizational unit and agency in which the appointee was employed at the time of the waiver; (3) the name and title of the individual who issued or approved the waiver; (4) the section(s) and paragraph(s) of the Executive Order waived; and (5) the matter(s) covered by the waiver, including the names of relevant parties and a description of the matter(s). (See, OGE Program Advisory PA-17-02, April 28, 2017).

first instance), the White House Office did not impose disciplinary action against White House appointees who may have had such communications.

3. The Office of Government Ethics has inquired whether authorizations pursuant to 5 C.F.R. §2635.502(d) were issued prospectively or retroactively. The White House understands that authorizations pursuant to section 2635.502(d) are to be prospective and each authorization was issued so that the employee could participate in the described particular matters involving specific parties prospectively. In granting each 502(d) waiver, the White House Office determined that the employee's participation in those matters outweighed any concern that a reasonable person may question the integrity of the White House Office's programs and operations.

We look forward to working with OGE's acting and permanent Directors. While we are aware that the Office of Government Ethics did not conduct a White House Program Review during the Obama Administration, we would be willing to discuss such a program similar to that conducted during the Administration of President George W. Bush. If you have any questions regarding this matter or have any additional issues you wish to discuss, please do not hesitate to contact me.

Sincerely,



STEFAN C. PASSANTINO  
Deputy Counsel to the President, Compliance & Ethics  
Office of the White House Counsel