MAR 31 2019

The Honorable Lisa Murkowski
Chairman, Committee on Energy
and Natural Resources
United States Senate
Washington, DC 20510

Dear Chairman Murkowski:

Enclosed you will find my responses to the written questions submitted following the March 28, 2019, hearing on my nomination to be Secretary of the Department of the Interior.

Please feel free to contact me if I can be of further assistance.

Sincerely,

David L. Bernhardt

Enclosure

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Question from Chairman Murkowski

Question: Mr. Bernhardt, as you know, the Interior Department conducted oil exploration in the National Petroleum Reserve-Alaska (NPR-A), leaving behind well sites in need of environmental remediation. As we discuss increased development in the NPR-A, which I fully support, I think it's important that the federal government complete the clean-up of these "legacy wells." If you are confirmed as Secretary, will you commit to working with me to develop a plan to expedite the cleanup of all remaining wells?"

Response: Yes, I look forward to working closely with you to identify the resources necessary to expedite the clean-up of these legacy wells. The Bureau of Land Management will complete an update to the 2013 Legacy Well Strategic Plan during this fiscal year, and the BLM is also actively coordinating with the U.S. Army Corps of Engineers to determine whether the NPR-A or specific well sites are eligible for environmental remediation by the USACE as Formerly Used Defense Sites.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Ranking Member Manchin

Question 1: Hardrock Mining Fees.

The General Mining Law of 1872 continues to mandate the existing patent-claim structure for hard rock mining on Federal lands in the west. Because of this, the Federal government does not collect a royalty for hardrock mining. This just doesn't make sense to me. Furthermore, the way hardrock mining is done today has changed significantly compared to when the law was enacted. I understand coal mining is much different from hardrock mining, but the Federal government has collected a royalty for taxpayers from coal production on Federal lands for decades. For the most part, these funds are shared evenly between the state where the operation took place and the Federal government. It strikes me as fair that taxpayers get a share of the profits in exchange for the privilege of being granted access to conduct operations on Federal lands.

(a) Do you agree it is time to reform the Mining Law? What are your thoughts and concerns?

Response: I believe that most programs, including the General Mining Law of 1872, could be modernized and improved. If confirmed I would look forward to assisting Congress in any effort that ensures that the American public receives an appropriate return for resource development that takes place on federal lands.

(b) Do you support instituting a royalty on hardrock mining?

Response: I support ensuring that the American public receives an appropriate return for resource development that takes place on federal lands. What form that takes in the context of hardrock mining has been the subject of debate for several decades in Congress. I stand ready to assist you and the Committee as you explore changes to the General Mining Law of 1872.

Question 2: Land and Water Conservation Fund.

Both the Senate and the House recently voted to permanently reauthorize the Land and Water Conservation Fund by huge bipartisan majorities in the public lands bill that President Trump signed into law earlier this month. Yet for the past two years, and again in the FY2020 budget proposal, the Administration has proposed drastic cuts in spending for the LWCF program. This year's budget proposal proposes to spend only $8 million on federal land acquisition and no appropriated funds for the LWCF state grant program. These levels are recommended despite the $900 million permanent authorization for the federal and state LWCF programs.

(a) Will you commit to support use of the LWCF?

Response: Yes, I am a supporter of the LWCF and will continue to work with Congress to move this important program forward.

(b) Will you support legislation to make the LWCF available for spending without annual appropriation?

Response: I would be happy to engage in discussions with the Committee on different and creative ways to implement the LWCF.

(c) Will you support some form of permanent funding?

Response: This is a matter for Congress. I stand ready to assist your deliberations in any way I can. The recently achieved permanent reauthorization was a step forward. I would be happy to engage in discussions with the Committee on different and creative ways to implement the LWCF.

Question 3: Conservation in Parks.

The National Park Service Organic Act states that the "fundamental purpose" of the national parks "is to conserve the scenery and the natural and historic objects and the wildlife," and to provide for their enjoyment "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." In its Management Policies, the National Park Service has said that "when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant."

I have concerns that the appropriate balance was not struck during the shutdown. By keeping the national parks open during the recent government shutdown without adequate staff to protect park resources, it seems public access was prioritized over conservation of park resources. You kindly discussed the shutdown with me during our meetings.

(a) Can you please elaborate on those decisions for the committee as well? And share with us some lessons learned?

Response: As you note, the National Park Service has a dual mission, to conserve park resources and provide for their enjoyment. As we discussed during the lapse in appropriation on the phone, I took action to strike an appropriate balance between these two objectives. In my opinion, the National Park Service's initial contingency plan was not achieving those dual purposes in a lengthy period of lapse.

Using retained fees collected under the Federal Lands Recreation Enhancement Act (FLREA), the NPS, in accordance with law, was able to address issues with restrooms and sanitation, trash collection, road maintenance, campground operations, law enforcement and emergency operations, and basic visitor services. Excepted staff that worked on specified allowable activities under FLREA were paid. While many of the smaller sites around the country remained closed, use of these funds allowed the American public to safely visit many of our national parks while providing these treasures additional protection and allowing NPS to meet its dual mandate. Importantly, the use of FLREA funds allowed continued visitor access to some park

units, contributing to the economies of the respective gateway communities. It also meant that those employees who were providing these services were assured that they would receive a timely paycheck, an assurance that was comforting to some.

Congress, in the Fiscal Year 2019 Further Additional Continuing Appropriations Act (Public Law 116-5) that extended appropriations through February 15, 2019, explicitly made such funds cover the prior period during the lapse. Pursuant to this direction, the NPS was able to move obligations incurred during the appropriations lapse from the FLREA fee account to the account for which the charges were originally planned, including the NPS operating account, where most of these obligations would have been charged. The actions taken under these provisions, which were confirmed by the Office of Management and Budget, allowed NPS to fully restore FLREA balances to pre-lapse levels.

I hope that we will not be faced with another lapse of appropriations. However, I believe that this action provides critical direction for similar situations in the future. First, our national parks should not be made the public face of another lapse in funding, and we will be prepared to use these fees, as available, immediately for appropriate staffing, basic services, and other bureau needs in accordance with the authorities provided by law. In addition, we have modified our contingency plans for the NPS and for the other relevant bureaus to ensure that in the event of a future lapse, we are prepared to use these fees for these allowable purposes.

(b) Do you believe that where there is a conflict between public enjoyment and conservation of park resources, the law requires the National Park Service to give priority to resource conservation?

Response: I believe that the law requires that the National Park Service meet its dual mandate, and that it cannot be arbitrary in its actions in a way that ignores either mandate.

Question 4: Public Engagement at BLM.

I believe we can and should be taking a hard look at simplifying, streamlining, and making improvements to the permitting processes for oil and gas leasing on public lands. We can do so in a way that provides for robust public engagement on these important decisions. The Bureau of Land Management issued an instruction memorandum in February 2018 that changed the way the agency conducts land use planning and lease parcel reviews. The changes give BLM the option of soliciting public comments in the NEPA review process, where before it was required. It also reduced the protest period from 30 days and instead imposed a 10-day deadline for public protests of proposed lease sales. Furthermore, BLM issued this memo without any public notice. I understand the courts have prevented the implementation of the memo in parts of the country with sage grouse habitat; however, it is the guidance used by federal land managers in other regions.

This 10-day period strikes me as a bit short especially for those rural areas where BLM operates. It is harder for citizens to access have the same level of resources, such as high speed internet, in order to actually weigh in with their concerns.

(a) What was the reason for reducing the protest period while you also accelerated oil and gas lease parcel reviews?

(b) Do you agree that robust public input is an important part of the BLM decision making process that ensures fairness for those most closely affected who deserve to have an honest chance of airing their grievances?

Response to a and b: The Department values meaningful public participation and an efficient environmental review process in the implementation of its onshore oil and gas program. The BLM observed a trend regarding protests over the past several years in which the percentage of parcels protested from the original sale notice had increased dramatically. This 10 day period is in addition to multiple opportunities for public participation and engagement through the BLM planning process under FLPMA and NEPA processes.

Question 5: Sportsmen and Recreation.

As avid sportsmen, you and I both know the value of hunting and fishing in terms of a way of life but also in terms of dollars to the economies of rural towns. Hunting contributes $270 million to the economy in West Virginia and supports 5,000 jobs. Last month, Senator Murkowksi and I were able to get several long awaited sportsmen provisions included in the Public Lands package, and these were enacted into law two weeks ago. And just last week, you signed Secretarial Order 3733—directing the Bureau of Land Management to consider public access for outdoor recreation, which includes hunting, fishing, and target shooting, in any Federal land transactions. These are important victories that have been long sought by our sportsmen and sportswomen, and I want to do more and would like to discuss with you what you think should be next.

(a) Will you work with us to develop and enact additional legislation that would make it easier for outfitters and the public to access our Federal lands, in addition to securing full funding for the Land and Water Conservation Fund?

Response: As discussed at my hearing, increasing access to outdoor recreation opportunities is a priority for me and for the Department. Outdoor recreation opportunities provide physical and mental health benefits and allow Americans to more fully experience our public lands and waterways. Recreation also creates jobs and economic benefits for local communities. The LWCF has been a powerful tool in increasing recreation opportunities, particularly for states and local communities. If confirmed, I will stand ready to assist Congress in efforts to work on legislation that provides for easier access for outfitters and the public to our federal lands, and I would be happy to engage in discussions with the Committee on different and creative ways to implement the LWCF.

(b) Do you have specific ideas on what should be done regarding outdoor recreation in order to create new jobs, particularly in rural communities?

Response: Outdoor recreation access and facilities are often insufficient to support recreation based tourism in our public land locked rural communities. We should work with state and private partners to develop and maintain recreation access facilities and infrastructure such as multi-use trails, roads, parking lots, boat ramps, entrance stations, and other forms of infrastructure associated with access to recreation sites. For example, the Bureau of Reclamation has an excellent track record in that regard as it seeks out and maintains partnerships with non-Federal government entities such as states, counties, cities, and irrigation districts for recreation opportunities associated with lands and waterways under its jurisdiction. More can and will be done to streamline the processes relating to recreation permitting activities. We want these public recreation resources to be accessible and to present economic opportunities to the gateway communities that surround them.

Question 6: Outer Continental Shelf Production.

The U.S. is producing 11.9 million barrels per day as of February 2019. The Energy Information Administration (EIA) is now predicting that U.S. crude oil production continues to set annual records through 2027 and remains greater than 14 million barrels per day through 2040. The EIA states that Lower 48 onshore production continues to be the "main source of growth in total US crude oil production." Not offshore. About 6% of the Outer Continental Shelf is currently available for leasing. The Bureau of Ocean Energy Management is proposing to open approximately 90% of the OCS. This is an extraordinary increase in access for oil production. And it seems out of alignment with the large amounts of production and the opportunities already available.

Given the administration's push to increase oil and gas production in the OCS, can you tell me today if you anticipate the crude oil that will be produced will be primarily produced for domestic use or for export?

Response: I have no anticipation in either direction. It would be my hope that we are never dependent on foreign sources of oil from unstable regimes in the future. Petroleum production resulting from OCS leasing under the Bureau of Ocean Energy Management's 2019-2024 plan would likely not begin to be realized for several years, given the approximately 7 to 10-year timeframe from leasing to development. Between now and then many onshore reservoirs currently under production will become depleted. Accordingly, other discoveries of oil, including in the OCS, could be needed to offset the loss in production from current oil and gas operations in order to prevent a reduction in overall U.S. production levels.

Question 7: Solicitor's Opinion on Migratory Birds.

On March 28, 2019, Senator Van Hollen sent you a follow-up letter (attached) about your role in Solicitor's Opinion (M-37050) on the Migratory Bird Treaty Act (MBTA). The Solicitor's Opinion, or M-Opinion, on the MBTA was released on December 22, 2017, without any public or scientific input or environmental analysis, abruptly removing

longstanding protections for migratory birds. Please clarify in writing your role in the M-Opinion and the relationship with the Independent Petroleum Association of America (IPAA), and explain how you intend to ensure industry operators implement best practices so that migratory birds do not suffer unnecessary harm.

Response: On December 22, 2017, after reviewing the text, history, and purpose of the MBTA, the Solicitor issued M-37050, which takes into account the positions of various Federal Courts of Appeals.

M-Opinions are issued by the Solicitor and they are some of the most important and serious work undertaken by the Office of the Solicitor. This important legal guidance is to be based on the law, not outside influence. The work to develop an opinion is a thoughtful and studious exercise.

I did not personally review the research or the prior case law before M-37050 was issued. However, I reviewed a draft and possibly drafts of this legal opinion, that would become the legal guidance for the entire Department.

I certainly informed the drafters that I thought they had done a good job analyzing an important legal question.

It is my personal opinion that the direction and need for the Office of the Solicitor to issue an M-Opinion on the Migratory Bird Treaty Act and its application was the direct result of an M-opinion issued on January 10, 2017, which was suspended very early in the Trump Administration. It is my view that the opinion should not have been issued as the Solicitor was walking out the door, a Solicitor who would not be burdened by the responsibility of implementation and defense of that position, particularly in light of contrary case law in multiple Federal Courts of Appeals. Obviously, a broad and diverse set of interests care about the scope of lawful authority of the Migratory Bird Treaty Act and its overall application. Many have views on it, and Congress can impose any liability standard it would like to affirmatively impose.

I was unaware of meetings IPAA had at the Department of the Interior on the MBTA issue until I saw references to such meetings in the media. I have neither a personal or professional relationship with the IPAA or its employees.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Wyden

Question 1: Public lands are truly one of America's shining features -- they provide multiple uses for the American public and are economic engines, particularly in the rural west. The Department of the Interior is the nation's largest land management agency, and is a critical agency for timber towns and ranching communities in every corner of Oregon. However, there has been talk of privatizing these public lands.

Will you commit to not selling off public lands in the United States, and to work to expand recreational access to lands managed by the Department of the Interior?

Response: I have previously indicated my opposition to the sale or wide scale transfer of federal lands. My views have not changed. There are some situations in which commitments have previously been made, inholdings need to be swapped or exchanged, or land banks are well situated to address the needs of growing urban areas. These decisions should be reviewed on a case by case basis. With regard to public access, as I indicated at my hearing last week I believe that access to our public lands for hunting, fishing, and recreating, is critically important. I recently issued a Secretarial Order that requires that before the Bureau of Land Management exchanges or disposes of any land, they must first consider what impact the disposal or exchange of land will have on public access.

Question 2: Please outline your views on the recreation economy in the U.S., and explain your views on the economic potential recreation holds for rural communities.

Response: I have said before that the Department manages about 1 of every 5 acres of land in the United States, supporting almost every aspect of the American economy. Millions of Americans access the lands we manage every year, to hunt, fish, camp, ride and carry out other recreational activities. The Department of Commerce Bureau of Economic Analysis has reported that the outdoor recreation economy accounted for 2.2 percent, $412 billion, of current-dollar GDP in 2016. Recreation visits to Bureau of Land Management and National Park Service lands alone support more than 350,000 jobs. These are numbers that have a significant economic impact many rural communities.

Under President Trump's leadership, the Department has made significant progress to improve the management of our public lands in a way that grows the economy. I talked about several of these things at my hearing. This Administration has opened access to previously unavailable or restricted public lands for all types of recreation; added hundreds of miles to the national recreation trails system; increased access to hundreds of thousands of acres of National Wildlife Refuge land for hunting and fishing; added new NPS sites; and is exploring public/private partnerships to identify new recreation opportunities on public lands so more Americans can enjoy our land. I am also making implementation of the recently enacted bipartisan public lands package a priority.

Question 3: I know how well-versed you are in the laws and policies governing the Department's responsibilities to protect wildlife species. In that context, I was surprised by your comment during our meeting that the BLM's revisions of critically important sage-grouse plans in six states amounted to nothing more than a "sanding of rough edges." I am pleased to see the Department work with Governor Brown of Oregon to uphold the hard work and collaborative efforts of farmers and ranchers in Oregon, and keep the Obama-era plans largely intact in my state.

However, it deeply concerns me that your rollback of protections *elsewhere* may well spur a need to list the species as threatened or endangered *everywhere.* And whether or not you recognize and agree with that concern, I want to make sure the Department under your leadership will meet its responsibilities to manage the sagebrush ecosystem for more than just oil and gas development; to keep the sage-grouse off the endangered species list, to protect the traditional way of life in rural states, and to be transparent with this Committee.

As we consider your nomination, how can we be assured that the BLM will comprehensively monitor impacts of federal-lands oil and gas activity on the sage-grouse and the sagebrush ecosystem, and that Congress will be kept informed of those impacts?

Response: Protecting sage-grouse habitat remains a priority for the Department of the Interior. BLM budgeted approximately $60 million for sage-grouse habitat in 2018 and remains committed to similar funding levels. In each sage-grouse state, governors committed to the goals of either "no net loss" or "net conservation gain" which are reflected in our land use plans. States continue to invest significant resources for sage-grouse conservation. Each Resource Management Planning Amendment was narrowly tailored to align with state plans and contains extensive restrictions and requirements for oil and gas activity. Our goal is to maintain a healthy, working landscape for wildlife and for people. The Department will continue to work in cooperation with western governors and state wildlife agencies to achieve these conservation goals.

Question 4: Can you assure us that the Fish and Wildlife Service will complete a full and unbiased sage-grouse status review in 2020, on time and with all the resources the Service requires, so we can know whether listing becomes necessary as the BLM's revised land-use plans are implemented?

Response: Our state fish and wildlife agency partners are taking the lead in assessing the range-wide status of greater sage-grouse. We are assisting them in their efforts and remain committed to the success of the species.

Question 5: A year ago, Secretary Zinke sat before this Committee for a hearing on the Department's 2019 budget, and I pointed out that promises your former boss made to this Committee during *his* confirmation hearing were immediately and consistently broken as

evidenced by the budgets he brought us. The issue I highlighted then was the Land and Water Conservation Fund, a vital program that secures outdoor recreation lands and access, wildlife habitat, historic sites, and other irreplaceable assets for the American people — which Mr. Zinke promised us he would fully support before basically zeroing it out in his budgets. Now, we recently passed, and the President just three weeks ago signed, landmark legislation permanently reauthorizing LWCF. At the time you noted your own and the administration's support for this popular program — even though I see that the budget you submitted the very next week contained even LESS than zero for LWCF, with proposed spending and rescissions that would cut the program by a net *105 percent.*

What would you do as Secretary to provide *actual* support for LWCF instead of lip service?

Response: I support the Land and Water Conservation Fund, and applaud Congress for permanently reauthorizing this fund as part of the John D. Dingell Jr. Conservation, Management and Recreation Act, which became law just three weeks ago. It is my understanding that LWCF has only been fully funded by Congress twice since its enactment in 1965. Whatever funding level Congress chooses for this program, the Department under my leadership will faithfully execute the goals of LWCF.

Question 6: The Bureau of Reclamation is a key player in the Klamath Basin and for decades has worked to help stakeholders negotiate a Basin-wide solution to ongoing water challenges. Are you familiar with the water-related challenges of Klamath, and the current state-of-play in the Basin?

Response: I have a general familiarity with the Klamath issues.

Question 7: Will you commit to working with me and the other members of the Oregon delegation, and to support the Bureau of Reclamation and their efforts to help solve this complex problem in the Klamath Basin?

Response: It is my general understanding that the Bureau of Reclamation is already working with the Congressional delegation.

Question 8: Controlling the 10-year average cost of fires by freezing it at a certain level, like Congress did when they passed my legislation last year -- the Wildfire Disaster Funding Act -- will result in savings for the Department of the Interior that can then be used to accomplish additional hazardous fuels treatments, forest resiliency work, and increasing the timber program.

Will you commit to using the savings created by the implementation of the Wildfire Disaster Funding Act to accomplish forest restoration and fuels treatments?

Response: I am committed to supporting active forest management, and I am working to implement Secretarial Order 3372, titled "Reducing Wildfire Risks on Department of the Interior Lands through Active Management." Active management is critical to reducing the intensity and number of wildfires, to supporting healthy forests and rangelands, and to protecting homes and important infrastructure. The Administration submitted its FY 2020 budget request and the targeted forest management reform proposals that accompany that request.

Question 9: I'm sure you're aware of the situation that unfolded at the Malheur National Wildlife Refuge in Harney County, Oregon, in 2016. Federal officials coordinated closely with county and state officials to ensure that the community was safe, and the rule of law preserved. However, incidents like this, led by extremists, compromise our public lands and terrify both the public and land managers responsible for maintaining access to these public lands.

If you are confirmed as the Secretary of Interior, you will be in charge of managing National Wildlife Refuges, Wilderness Areas, and recreation lands, in an era where hostility toward federal lands and federal officials is rampant, particularly in rural areas.

What will you do to ensure the protection of not only our incredible public lands that have been set aside by Republican and Democratic Presidents and Congresses, but also the protection of your employees, like the employees at the Malheur Refuge, who are not just federal employees, but Oregonians?

Response: As we fulfill our mission to conserve and manage the Nation's natural resources and cultural heritage, the safety of our employees and our visitors is of paramount importance. The Department is home to over 4,000 federal law enforcement officers. Their duties are as varied as our bureaus' missions. To ensure the continued protection of employees and visitors, the FY 2020 budget increases funding for law enforcement and health and safety programs across the board.

Question 10: Oregonians and all West Coast residents are becoming increasingly concerned about the next major earthquake, which has become a matter of "when" and not "if." Preparation is key, and even just a few seconds of warning is enough to take steps to prevent casualties and mitigate destruction. In a few seconds, supplies of oil, natural gas, and chemicals can be turned off, trains and cars can be slowed or stopped, sensitive data can be secured, and people can get to safe places. This is a bipartisan priority and we need to get warning systems finished. Failing to prepare for these events is not an option, and could have dire consequences for West Coast populations. Given the importance of this technology to provide the kind of warning that exists for hurricane, winter storms, and other extreme events, how would you, if confirmed, work with USGS to ensure ShakeAlert becomes fully operational for the west coast?

Response: Should I be confirmed, I will work to ensure the U.S. Geological Survey continues to prioritize making science and technology available to protect communities from natural hazards, including earthquakes. I appreciate the importance of and the USGS's role in providing reliable early warning systems in protecting people and property from these and other natural hazards. The USGS has committed to improving the fundamental earthquake monitoring infrastructure to ensure that early warning will eventually be possible where it is needed. In the FY 2020 budget the Earthquake Hazards program is funded at $64.3 million and prioritizes funding to maintain robust national earthquake monitoring and reporting capabilities, including $8.2 million for operations and maintenance of existing ShakeAlert Earthquake Early Warning systems in conjunction with State and local partners.

Question 11: Can you assure us that the annual budgets you would propose would back up your stated commitments with actual conservation and maintenance dollars?

Response: You have my commitment that the annual budgets that I will propose, should I be confirmed, will further the President's priorities and, in that context, will comprise funding and programs consistent with the best interests of the Department and its missions.

Question 12: Originally established in 2000 and recently reauthorized in 2016, the Fisheries Restoration and Irrigation Mitigation Act (FRIMA) provides funding in the Pacific Northwest (Oregon, Washington, Idaho, Montana and now California) to carry out fish passage projects and screen irrigation channels to reduce fish mortality. This program was recently reauthorized, but authorized funding was drastically reduced. In fact, since its inception, the program has only received $13.1 million in appropriations, with the last round of funding occurring in fiscal year 2017. Are you familiar with this program, and would you support funding for the implementation of this critical program that benefits farmers and fish?

Response: The Department of the Interior values the role of FRIMA to directly support irrigation districts in addressing fish screening and passage. This aids in securing water delivery in association with aquatic conservation, to benefit multiple interests. I would be glad to work with Congress on this program as we weigh multiple demands on the Federal budget.

Question 13: I value science-based decisions in determining land management outcomes. Recent news reports suggest you may feel otherwise. If confirmed, how will you ensure Interior uses the best science in making transparent land management and policy decisions?

Response: Science plays a critical role in our decision making process as does the law. Within the Department of the Interior over the last two years, the number of formal complaints of breach of scientific integrity have decreased. In addition, to further our application of well-grounded science, I have appointed a career scientist to serve as the Science Advisor to the Acting

Secretary/Deputy Secretary, and if I am confirmed, he will continue to serve in the Immediate Office of the Secretary. There is no question that scientific integrity should underpin agency actions. As I have stated, my view is that an agency's decisions should be predicated on the best information, including an evaluation of science and application of the law.

I believe when scientific data is evaluated on its merits and used as a basis to make legal and policy decisions that incorporate the science, conflicts will be reduced and those decisions will be reliable and legally sound. I believe when the Department picks and chooses between data, it is obligated to articulate a reason why it has done so, and it must be able to connect its conclusions to the facts it finds in a rational manner.Secretary Order 3369 last September promotes open science. This Order is intended to ensure that the Department of the Interior bases its decisions on the best available science and provides the American people with enough information to thoughtfully and substantively evaluate the data, methodology, and analysis used by the Department to inform its decisions.

Question 14: Explain your views on how the Department of the Interior can do more to advance clean energy development on public lands?

Response: I recognize the role renewable energy can play in U.S. energy security and economic growth. For instance, in December, the Department shattered the record for offshore wind leasing, garnering a total of $405 million for wind leasing areas off the coast of Massachusetts. By streamlining our processes and reducing paperwork, all within our statutory responsibilities and without compromising important environmental standards, renewable energy projects will enjoy greater permitting efficiency. This is how we have advanced clean energy development on public lands in the past two years and how I believe we can continue to do so.

Question 15: The state of Oregon is vehemently opposed to offshore drilling occurring off the coast of Oregon. If confirmed, how do you intend to incorporate state input when determining where to site offshore oil and gas exploration?

Response: The Outer Continental Shelf Lands Act prescribes the major steps involved in developing the program, including extensive opportunities for public comment and specific opportunities for input from states. The Department, through the Bureau of Ocean Energy Management, seeks a wide array of input during this process from all stakeholders, including affected states, in the process to determine the size, timing and location of leasing activity on the OCS. Additional public meetings will occur after the publication of the Proposed Program and Draft Programmatic Environmental Impact Statement. If confirmed, I will ensure the states and the public have every opportunity to have their views heard and considered as the Department moves forward with developing the National OCS Program.

16: Do you believe American taxpayers should get a fair return on all natural resources development on public lands?

Response: I believe that American taxpayers should receive fair market value for public resources.

Question 17: Reports show that natural gas companies are venting and flaring hundreds of millions of dollars of methane. The former Methane Rule was designed to reduce the need for flaring, and ensure royalties are paid for gas otherwise vented into the atmosphere or burned off.

Do you believe that the Department's rollback of the methane rule is fair to taxpayers?

Response: Yes, it is my opinion and belief that the government should not issue an unlawful rule. The former Bureau of Land Management Methane Rule imposed many requirements that overlapped with the EPA's regulatory authority and state authorities under the Clean Air Act. Of note, 99% of federal oil and gas production in 10 states is subject to state regulatory provisions regarding venting and flaring of methane.

Question 18: There are a number of tribes in Oregon, and around the country, that were terminated and then subsequently restored who now face significant challenges in securing law enforcement funding through self-determination contracts. They are not currently eligible for funding for basic operations, and yet in many cases are spending significant Tribal resources to provide law enforcement services on their reservations as well as for the larger community. In both the FY18 and FY19 Appropriations bills there was language requiring BIA to work with affected Tribes to assess their law enforcement needs and to submit a report detailing the amounts necessary to provide sufficient law enforcement capacity for these Tribes. Congress has still not received this report.

Will you ensure that BIA completes a comprehensive report detailing the tribes affected, as well as their needs, in a timely manner?

Response: If confirmed, I expect the Bureau of Indian Affairs to comply with its statutory requirements, including completing reports required by Congress. Ensuring adequate law enforcement resources and training in Indian Country is an important responsibility for the Department met by the BIA's Office of Justice Services. They have the lead for the Department on the Opioid Reduction Task Force and in training tribal police and first responders.

Question 19: The Oregon congressional delegation is increasingly concerned about the management of the Chemawa Indian School in Salem, Oregon. Responses to our inquiries have been near impossible to extract from the Department, and incomplete when delivered. School staff, who are also my constituents, have been directed not to communicate with

congressional offices. If confirmed, what steps will you personally take to provide transparency to the issues facing Chemawa?

Will you commit to developing a Chemawa-specific plan to improve the school's performance, its treatment of students and staff, and management of the land surrounding the school?

Response: I am committed to achieving the mission of the Bureau of Indian Education (BIE) to provide a culturally relevant, high-quality education that prepares Indian students with the knowledge, skills, and behaviors needed to flourish in the opportunities of tomorrow, become healthy and successful individuals, and lead their communities and sovereign nations to a thriving future that preserves their unique cultural identities. I also sincerely appreciate your same commitment to our students attending Chemawa Indian School.

It should not have taken until March 15th to receive a formal written reply to the Oregon Delegation's letter dated June 8, 2018. I assure you that DOI as a whole, and Indian Affairs specifically, is committed to reducing internal bureaucratic review processes that inhibit our ability to communicate with all of our stakeholders in a timely manner. Both myself and the entire Indian Affairs senior leadership team are actively working to address the challenges highlighted in the Oregon Delegation's letter.

With regard to school staff communicating with congressional offices, we are working to insure our school staff understand the appropriate internal procedures to respond to inquiries from Congress. This is done to make sure that we can provide fulsome, accurate information to Congress, while at the same time making sure that children under our care do not inadvertently have personal, private information disclosed.

With regard to school improvement, we recently provided the entire Oregon Delegation with a copy of Chemawa's School Improvement Plan which specifically outlines the strategies currently being undertaken by school leadership to ensure students receive a quality education. As additional evidence of our commitment to addressing the challenges faced by Chemawa, in the month of March alone Ms. Tara Sweeney, Assistant Secretary for Indian Affairs, Mr. Mark Cruz, Deputy Assistant Secretary for Policy and Economic Development for Indian Affairs and Mr. Tony Dearman, Director of the Bureau of Indian Education, have made onsite visits to Chemawa, meeting with school leaders, students, and staff. Additionally in March, Mr. John Tahsuda, Principal Deputy Assistant Secretary for Indian Affairs, met with Senator Merkley, Congressman Schrader and Congresswoman Bonamici, and your staff at Chemawa pursuant to your request.

The Department remains committed to increasing the ability of the BIE to improve its services to Indian students, including those attending Chemawa, and I look forward to working with you to ensure that the important mission of the BIE is successfully achieved.

Question 20. I am concerned about the recent reassignment of significant numbers of BIA staff and positions from Washington, DC to New Mexico. Will you confirm how many federal positions within the BIA have been reassigned from the Washington, DC area to other regions within the last two years?

How does this compare to other agencies within the Department?

Response: The Office of Trust Services (OTS) relocation plan is part of the Bureau of Indian Affairs (BIA) commitment to streamline processes and delivery of services in pursuit of efficiency, while maintaining a focus on cost-savings efforts and fulfilling the BIA mission. This plan is in line with the President's Reorganization Executive Order 13781 (EO) and the Director of Management and Budget Memorandum dated April 12, 2017, but is not associated with the Departmental reorganization. By redirecting staff and funding to its field offices where the technical knowledge and experience is located relative to tribal and individual trust assets, OTS' work can best be supported and its mission achieved.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Cantwell

Question 1: Impact of Arctic Drilling on Endangered Polar Bears

I am very concerned that in the apparent rush to jam through Arctic drilling while President Trump is still in office, the Department has ignored its legal obligations to conduct a meaningful analysis of the impacts polar bears will suffer due to industrial development in the pristine Arctic Refuge.

Mr. Bernhardt, do you believe the Endangered Species Act (ESA), the Alaska National Interest Land Conservation Act (ANILCA), and National Wildlife Refuge System Administration Act (Refuge Act) apply to the National Arctic Wildlife Refuge?

Mr. Bernhardt, since polar bears are listed as a threatened species under the ESA, ANILCA and the Refuge Act both require the Secretary to manage the Arctic Refuge primarily to conserve habitat, does the Department of Interior have a legal obligation to provide for conservation of polar bear species within the Refuge?

Mr. Bernhardt, a memo written by Dr. Patrick Lemons, Chief of Marine Mammals Management at the U.S. Fish and Wildlife Service office in Anchorage Alaska details numerous areas where the Interior Department does not have enough information about polar bears to determine whether or not Arctic Refuge drilling will harm or kill polar bears or destroy designated critical habitat. Can you confirm that the analysis conducted by these Department scientists were incorporated into the Draft EIS?

Mr. Bernhardt, will you commit to sharing with the Committee all relevant correspondence that can document the use of this scientific information, how it was incorporated into the Department's deliberations, and any directive Interior Department agencies received from the Secretary or Deputy Secretary of the Interior?

Mr. Bernhardt, last month, the BLM said that they will forgo new seismic studies in Arctic Refuge this winter due to questions raised about the impacts of testing on local polar bear populations. I understand that the firm that was supposed to do the seismic testing, SAExploration, also believed their activities would likely harm arctic refuge polar bears, because they petitioned the U.S. Fish and Wildlife Service for a takings permit. Are you aware that seismic drilling was likely to kill polar bears, primarily through heavy machinery crushing mother bears and their cubs in undetected dens? Is the Department of Interior, at any level, considering authorizing the lethal taking of polar bears during any phase of Arctic Refuge Drilling?

Mr. Bernhardt, the Interior Department seems to be in such a rush to start drilling they are overriding the concerns of their career scientists. You are ignoring the promises made by Senate boosters of arctic drilling that it would be conducted under strict environmental reviews.

You are increasing the likelihood that the Department will not properly follow appropriate environmental laws and just end up tying up this effort in the courts. DOI is even going so far as declaring they will proceed with leasing this year, even without seismic testing, despite the fact that this lack of data will lower lease sales and force successful bidders to conduct their own exploration work before drilling, further delaying oil production in the Refuge. Have you personally directed in any way how the lease sale NEPA process has proceeded, including the schedule, public review, and comment period for the Draft EIS?

Mr. Bernhardt, are you okay with proceeding with Arctic Refuge drilling even if it could seriously harm endangered polar bear populations in the area that are already in alarming decline and facing the perils of melting ice they depend on for their food and life cycle?

Response: I disagree with the factual premises of your question, and I will not approve any leasing program which the Department's environmental analysis determines is inconsistent with the significant legal protections that exist for the polar bear. As I indicated in my response to you on this matter at my confirmation hearing, I will bring to our meeting the information we discussed. In general, however, the Department and the Bureau of Land Management are complying with the requirements of the authorizing legislation, the Tax Cuts and Jobs Act of 2017, the National Environmental Policy Act, and other relevant statutes, as we move toward conducting lease sales and providing for responsible development of these important resources.

The Bureau of Land Management has been successfully managing polar bear impacts over the course of the last four decades in implementing the oil and gas leasing program for the nearby National Petroleum Reserve in Alaska, and is applying that experience to the ANWR Coastal Plain in coordination with biologists from the Fish and Wildlife Service and U.S. Geological Survey. The analysis in the Draft Coastal Plain Leasing EIS incorporates the substantial body of known and relevant scientific literature on the polar bear, including literature published by Department biologists and Dr. Lemons.

Question 2: Climate Science

On November 23, 2018, thirteen federal agencies, including the Department of Interior, with input from hundreds of government and non-governmental experts, jointly issued the Congressionally- mandated quadrennial National Climate Report.

Mr. Bernhardt, do you agree or disagree with the finding from the National Climate Report that *"Climate change is transforming where and how we live and presents growing challenges to human health and quality of life, the economy, and the natural systems that support us."*

Mr. Bernhardt, do you agree or disagree with the finding from the National Climate Report that *"There are no credible alternative human or natural explanations supported by the observational evidence."*

Mr. Bernhardt, do you agree or disagree with the finding from the National Climate Report that *"Future impacts and risks from climate change are directly tied to decisions made in the present."*

Mr. Bernhardt, as the Energy and Natural Resources Committee grapples with how to best undertake our responsibility to respond to this pending crisis, how do you think the Interior Department can help us craft these urgently needed policies?

Mr. Bernhardt, as someone very familiar with the fossil fuel industry, how soon do you think we need to wean ourselves from fossil fuels before we really start getting hit with the effects of climate change and the extreme weather it brings?

Response: As I indicated at my hearing in response to a similar question, I recognize that the climate is changing, man is contributing to that change, and the science indicates there is uncertainty in projecting future climate conditions. The Department of the Interior's role is to follow the law in carrying out our responsibilities using the best science. Congress has not directed us to regulate carbon emissions. The laws governing Interior - such as the Federal Land Policy and Management Act - require us to manage our onshore federal resources on the basis of multiple use and sustained yield, which includes energy development. We are carrying out that statutory mission and will do so until Congress directs us differently.

Question 3: Interior Department's Climate Policy

Mr. Bernhardt, you signed Secretarial Order 3360, which deleted the Department's 2012 climate policy. What is the current climate policy of the Interior that has taken the place of Secretarial Order 3360?

Mr. Bernhardt, do you agree or disagree with the requirement in Order 3360 that the Department should "use the best available science to increase understanding of climate change impacts [and] inform decision-making?"

Mr. Bernhardt, do you agree or disagree with the requirement in Order 3360 that the Department should "integrate climate change adaptation strategies into its policies, planning, programs and operations?"

Mr. Bernhardt, with the deletion of the Department's 2012 climate policy, what ensures can you provide that the Department is using the best available science to coordinate appropriate responses to climate change impacts we are increasingly seeing on the public lands that the Interior Department is responsible for?

Mr. Bernhardt, did your personal views on climate change and the role of human activity in causing it influence your decision to delete the Department's 2012 climate policy?

Response: Secretary's Order 3360, which I signed on December 22, 2017, rescinded several policies and documents that were based on authorities revoked by the President, as a result of Executive Order 13783, and the Secretary, through Secretary's Order 3349. I agree that the climate is changing and that man has an effect, and that the Department's role is to follow the law in carrying out our responsibilities using the best science. We do evaluate the climate impacts of proposed actions. The USGS scientists have told me there is no "best" climate model, that each has its strengths and weaknesses. My personal views have played no role in the rescission of the 2012 policy.

Question 4: USGS Resource Assessment & Scientist Resignations

I would like to better understand why two top scientists from the U.S. Geological Survey, Dr. Murray Hitzman and Dr. Larry Meinert resigned a little over a year ago. In his resignation letter, Dr. Hitzman said he was protesting USGS providing the final results of the energy assessment for the National Petroleum Reserve to Secretary Zinke several days in advance of the information's public release.

Mr. Bernhardt, did Secretary Zinke request to see the final results of that assessment before its public release?

Mr. Bernhardt, did you also request to see those results before they were released?

I understand that the USGS scientific integrity policy states that these assessments are not disclosed to anyone prior to release because they can move financial markets, resulting in unfair advantages or the perception of an unfair advantage.

Mr. Bernhardt, do you believe that the Secretary is not covered by the scientific integrity policy when it says these reports should not be shared ahead of time?

Response: The Scientific Integrity Office for the Office of the Secretary did not view the review of data to be inconsistent with the scientific integrity policy. In fact, the Department's scientific integrity officer and a career scientist that I have subsequently appointed to serve as science advisor to the Acting Secretary and Deputy Secretary, said:

> I do not believe that current or proposed practices for the notification of DOI leadership constitutes a loss of scientific integrity. I do not see the issue outlined as one of scientific integrity. In fact, at no time was USGS asked to change or alter any of the findings for the assessment.

The Director of the U.S. Geological Survey acts under the authority of the Secretary of the Interior, who is ultimately responsible for the management and oversight of the Department and its bureaus. The Department's leadership thus has the authority to review data, draft reports, or other publications, and a responsibility to be knowledgeable about Interior information that will be released to the public. As a general rule, I take the longstanding position of the Office of the

Solicitor. It is my view then and now that employee policies included in Departmental manuals do not restrict the Secretary of the Interior. The Secretary of the Interior can change a departmental manual whenever he wants because he possesses the authority to do so.. Moreover, in regard to this particular matter, I have been informed that the USGS had also determined that it needed to change its policy before any issue arose on this particular assessment.

Question 5: BLM Assessment of Oil and Drilling Operations

A GAO report released on March 11 found that BLM was inadequately staffed to assess oil and gas drilling operation on federal lands during the analyzed period of 2012 to 2016.

Mr. Bernhardt, are you aware this GAO report, do you agree with its findings, and if you do you think these inspection shortfalls resulted in any avoidable environmental degradation on public lands?

Mr. Bernhardt, do you believe the inspection shortfalls found by GAO investigators still exist? If so, what are you plans to address this situation? What level of funding would be needed to fully found these staffing needs and how does that level compare to the President's FY 2020 Budget Request?

Response: I am aware of the GAO report, and that the report concluded that the BLM did not conduct periodic internal control reviews of its field offices in accordance with current guidance at the time. The BLM is revising its policy regarding internal control reviews of the inspection and enforcement program that will ensure the BLM conducts adequate internal control reviews. Since FY 2016, the BLM has completed 100 percent of its high-priority drilling inspections and improved how they are tracked. In FY 2019, the inspection and enforcement program is funded at $48.4 million. The President's FY 2020 Budget requests $48.9 million for the program.

Question 6: Recusals From Former Lobbying Clients
Numerous public interest groups have raised concerns about your role in crafting policy changes that may have benefited or may be benefitting former clients while you served as counsel at Brownstein Hyatt Farber Schreck LLP.

Mr. Bernhardt, can you provide a list of those all your former clients and is this list identical to the entities or organizations on the note card you reportedly carry with you listed your former clients?

Mr. Bernhardt, if you are confirmed, do you plan to continue to recuse yourself from participating in particular matters affecting any of these former clients for your entire tenure as Secretary of Interior?

Response: Information regarding former clients is contained in the Statement for Completion by Presidential Nominees that I completed and submitted for this nomination and my previous

nomination to be Deputy Secretary of the Department of the Interior. In addition, my 278, which was also submitted to the committee contains a list of former clients. However, for the Department of the Interior, my participation in certain particular matters involving specific parties is limited by my existing recusals, so it is the most relevant document to address your question. I have included my recusal along with some supplemental information from the Office of Government Ethics that may be helpful to your query. As I stated at my hearing, I am fully committed to following all ethics laws, regulations, and the ethics pledge. I will also continue to consult with the career ethics experts within the Department of the Interior, and seeking the guidance of career ethics experts. In addition, I am committed to not participating in any particular matter on which I lobbied or in the specific issue area in which that particular matter falls, as determined by the ethics pledge.

Attachment to Response

to Sen. Cantwell

Question 6

THE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

AUG 15 2017

To: Secretary
Acting Solicitor
Acting Assistant Secretaries
Acting Bureau Directors
Associate Deputy Secretary
Chief of Staff
Deputy Chief of Staff
Designated Agency Ethics Official (DAEO)

From: Deputy Secretary

Subject: Ethics Recusal

The purpose of this letter is to inform you that in accordance with my ethics agreement (attached) of May 1, 2017, as required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(l), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former employer or client of mine is a party or represents a party for a period of one year after I last provided service to that employer or client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

As a Trump Administration political appointee, I have signed the Ethics Pledge (Exec. Order No. 13770) and I understand that I will be bound by the requirements and restrictions therein in addition to the commitments that I have made in this and any other ethics agreement. Accordingly, I will not participate personally and substantially, for two years after appointment, in any particular matter involving specific parties in which a former employer or client of mine is or represents a party, if I served that employer or client during the two years prior to my appointment,

unless first authorized to participate, pursuant to Section 3 of Exec. Order No. 13770. Moreover, this two-year prohibition forbids my participation in any meeting or other communication with these entities unless (1) there are five or more different stakeholders present and (2) no particular matters involving specific parties are discussed.

I am aware that I am prohibited by 30 U.S.C. § 1211(f) from holding a financial interest in any surface or underground coal mining operation. Additionally, I am aware that my position is subject to the prohibitions against holding any financial interest in federal lands or resources administered or controlled by the Department of the Interior extended to me by supplemental regulation 5 C.F.R. § 3501.103.

In addition to a copy of my ethics agreement, I have attached a list of my current recusals under the Ethics Pledge and 5 C.F.R. § 2635.502. This list will be updated as necessary. Additionally, to facilitate the implementation of best ethics practices, I have included a document entitled "Guidance for Recusal Analysis" to assist in screening matters before the Department to determine whether they are subject to my recusal requirements.

Particular matters involving specific parties, in which an entity included in my list of current recusals is a party or represents a party, are not to be referred to me and are to be resolved without my participation. Such matters include, but are not limited to, litigation, permits, grants, licenses, and agreements. Anyone having a question about my recusal agreement should bring the matter to the attention of Assistant Deputy Secretary Willens for a determination. In order to help ensure that I do not inadvertently participate in matters from which I should be recused, he will seek the assistance of an agency ethics official as appropriate. Matters from which I am recused will be appropriately delegated for handling. If you have any questions, please be reminded that ethics advice must come from the DAEO or designee acting on the DAEO's behalf, as only a designated ethics official can make ethics determinations on which Department employees may authoritatively rely for safe harbor.

In consultation with an agency ethics official, I will revise and update this memorandum whenever that is warranted by changed circumstances. In the event of any changes to this screening arrangement, I will provide you a copy of the revised screening arrangement memorandum.

Attachments

May 1, 2017

Melinda Loftin
Designated Agency Ethics Official
and Director, Ethics Office
U.S. Department of the Interior
1849 C Street, NW, MS 7346
Washington, DC 20240

Dear Ms. Loftin:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Deputy Secretary of the Department of the Interior.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Upon confirmation, I will withdraw from the partnership of Brownstein Hyatt Farber and Schreck, LLP, and all related entities. Pursuant to the 2012 Equityholders Agreement of Brownstein Hyatt Farber and Schreck, LLP, and BHFS-E PC, I will receive a *pro rata* partnership distribution based on the value of my partnership interests for services performed in 2017 through the date of my withdrawal. This payment will be based solely on the firm's earnings through the date of my withdrawal from the partnership. I currently have a capital account with the firm. If the firm will not refund the account before I enter into Federal service, I will forfeit the account. For a period of one year after my withdrawal, I also will not participate personally and substantially in any particular matter involving specific parties in which I know the firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

My term with the Virginia Board of Game and Inland Fisheries has expired and I have resigned from my position with the Center for Environmental Science Accuracy and Reliability. For a period of one year after termination of my position with each of these entities, I will not participate personally and substantially in any particular matter involving specific parties in

which I know that entity is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

I will divest my interest in the T. Rowe Price Virginia Tax-Free Bond Fund, within 90 days of my confirmation. Until I have completed this divestiture, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of any holding of the T. Rowe Price Virginia Tax-Free Bond Fund that is invested in the Virginia municipal bonds sector, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), or obligations of the United States.

I understand that I may be eligible to request a Certificate of Divestiture for qualifying assets and that a Certificate of Divestiture is effective only if obtained prior to divestiture. Regardless of whether I receive a Certificate of Divestiture, I will ensure that all divestitures discussed in this agreement occur within the agreed upon timeframes and that all proceeds are invested in non-conflicting assets.

If I am confirmed as Deputy Secretary of the Department of the Interior, I am aware that I am prohibited by 30 U.S.C. § 1211(f) from holding a financial interest in any surface or underground coal mining operation. Additionally, I am aware that my position is subject to the prohibitions against holding any financial interest in federal lands or resources administered or controlled by the Department of the Interior extended to me by supplemental regulation 5 C.F.R. § 3501.103.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order no. 13770) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

I will meet in person with you during the first week of my service in the position of Deputy Secretary in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will document my compliance with this ethics agreement by notifying you in writing when I have completed the steps described in this ethics agreement.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,

David L. Bernhardt

David Bernhardt

List of Recusals[1]

1. Ethics Pledge Recusals

Until August 3, 2019, absent a waiver under Section 3 of Executive Order No. 13770, I am recused from particular matters involving specific parties in which any of the following entities either is a party or represents a party to the matter. Such matters include, but are not limited to, litigation, permits, grants, licenses, applications, and agreements. For the purposes of the Ethics Pledge, this also prohibits my participation in any meeting or other communication with these entities unless (1) there are five or more different stakeholders present and (2) no particular matters involving specific parties are discussed.

Active Network LLC

BHFS-E PC

Brownstein Hyatt Farber and Schreck, LLP

Cadiz, Inc.

Center for Environmental Science Accuracy and Reliability (CESAR)

Cobalt International Energy

Eni Petroleum, North America

Halliburton Energy Services, LLC

Hudbay

Independent Petroleum Association of America (IPAA)

Klees, Don (individual)

National Ocean Industry Association (NOIA)

Noble Energy Company LLC

NRG Energy Inc.

Rosemont Copper Company

[1] Note that the scopes of the recusal requirements for the Ethics Pledge and 5 C.F.R. § 2635.502 are not the same. Accordingly, the lists of recusals for the Ethics Pledge and 5 C.F.R. § 2635.502 are not identical.

August 15, 2017

Sempra Energy

Statoil Gulf Services LLC

Statoil Wind LLC

Targa Resources Company LLC

Taylor Energy Company LLC

UBE PC

U.S. Oil and Gas Association

2. 5 C.F.R. § 2635.502 Recusals

Until the date indicated for the specific entity, unless first authorized to participate by the DAEO under 5 C.F.R. § 2635.502(d), I am recused from particular matters involving specific parties in which any of the following entities either is a party or represents a party to the matter. For the purposes of 5 C.F.R. § 2635.502, such matters include, but are not limited to, litigation, permits, grants, licenses, applications, and agreements.

Active Network LLC	8-1-18
BHFS-E PC	8-1-18
Brownstein Hyatt Farber and Schreck, LLP	8-1-18
Cadiz, Inc.	5-1-18
Center for Environmental Science Accuracy and Reliability (CESAR)	3-24-18
Cobalt International Energy	8-1-18
Eni Petroleum, North America	8-1-18
Forest County Potawatomi *Community*	3-1-18
Garrison Diversion Irrigation District	8-1-18
Halliburton Energy Services, LLC	7-29-18
Hudbay	8-1-18

Klees, Don (individual)	8-1-18
National Ocean Industry Association (NOIA)	7-29-18
Noble Energy Company LLC	12-1-17
NRG Energy Inc.	8-1-18
Rosemont Copper Company	8-1-18
Santa Ynez River Water Conservation District, Improvement District No. 1	11-1-17
Sempra Energy	4-1-18
Statoil Gulf Services LLC	8-1-18
Statoil Wind LLC	8-1-18
Targa Resources Company LLC	8-1-18
Taylor Energy Company LLC	7-29-18
UBE PC	8-1-18
U.S. Oil and Gas Association	7-29-18
Westlands Water District	8-1-18

Guidance for Recusal Analysis

In his ethics agreement, the Deputy Secretary agreed that, for one year after his withdrawal from his firm, he would not participate personally and substantially in any particular matter involving specific parties in which he knows his former firm is or represents a party, unless authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). He also agreed not to participate personally and substantially in any particular matter involving specific parties in which he knows a former client of his is or represents a party for a period of one year after he last provided service to that client, unless he is first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d)." In addition, per the Ethics Pledge, the Deputy Secretary agreed that he will not for a period of two years from the date of his appointment participate in any particular matter involving specific parties in which a former employer or client of his is or represents a party, if he served that former employer or client during the two years prior to his appointment, absent a waiver under Section 3 of Executive Order No. 13770. This includes recusal from any meeting or other communication with such a former employer or client unless (1) there are five or more different stakeholders present and (2) no particular matters involving specific parties are discussed

To assist the Deputy Secretary in complying with his ethics agreement and the Ethics Pledge, sufficient information needs to be secured before the Deputy Secretary participates in a matter to determine whether the matter meets the criteria described above.

To determine whether the Deputy Secretary may participate in a given matter, we must first determine whether that "matter" is a broad policy directed to the interests of a large and diverse group of persons or one of the two types of "particular matters" -- a "particular matter of general applicability" or a "particular matter involving specific parties."

In the context of the ethics rules, the unmodified term "matter" refers to virtually all Government work. It includes the consideration of broad policy options that are directed to the interests of a large and diverse group of persons. For instance, health and safety regulations applicable to all employers or a legislative proposal for tax reform. It also includes more narrowly defined "particular matters."

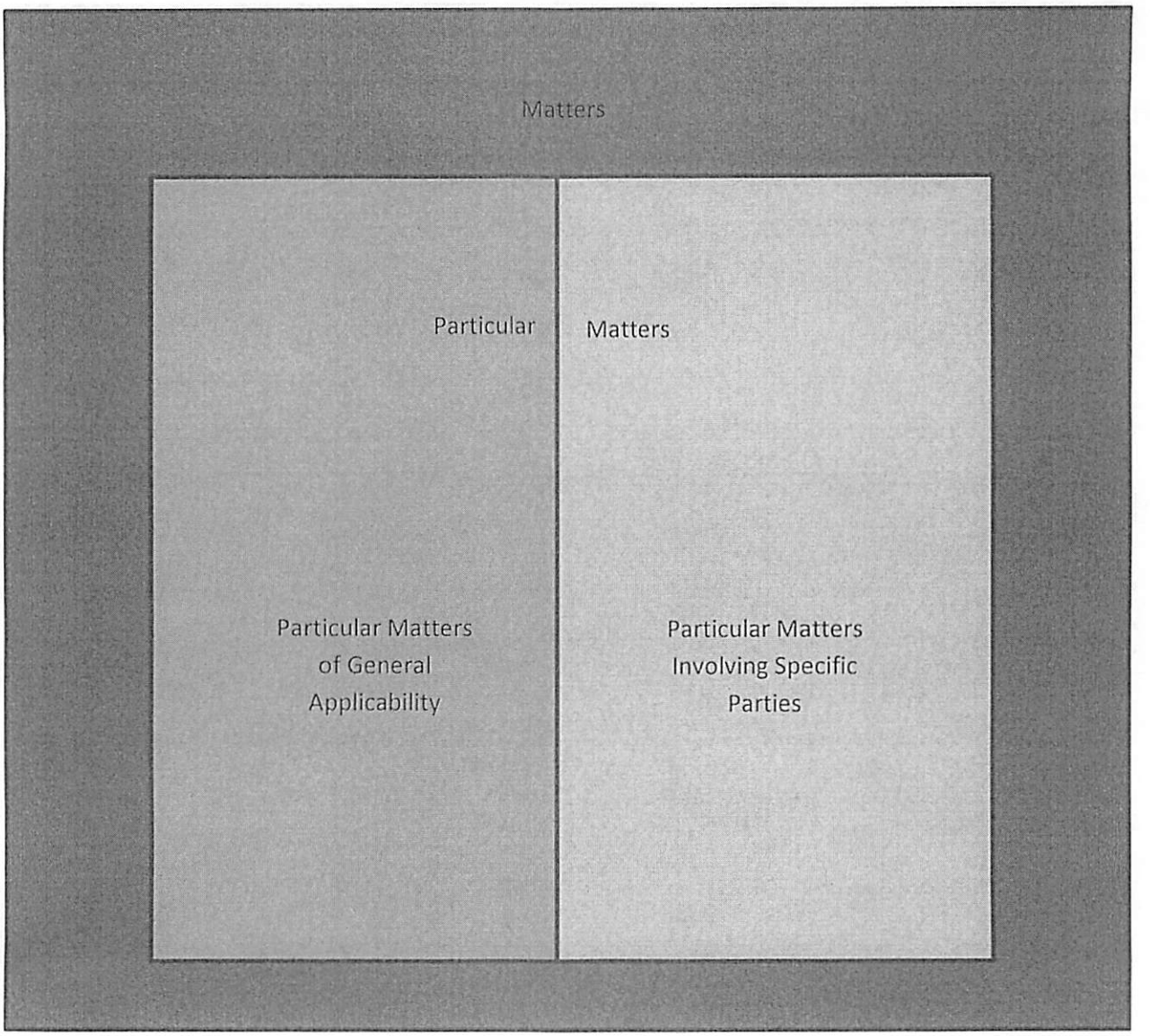
The term "particular matter" means any matter that involves deliberation, decision, or action that is focused on the interests of (1) specific persons or (2) a discrete and identifiable class of persons. These two types of particular matters are defined separately as "particular matters involving specific parties" and "particular matters of general applicability." (See attached diagram.)

A "particular matter involving specific parties" typically involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties." Examples include contracts, grants, licenses, investigations, litigation, and partnership agreements. This is the narrowest type of matter.

A "particular matter of general applicability" does not involve specific parties but at least focuses on the interests of a discrete and identifiable class, such as a particular industry or profession. Examples include rulemaking, legislation, or policy-making of general applicability that affect a particular industry or profession. For instance, a regulation prescribing safety standards for operators of oil rigs in the Gulf of Mexico or a regulation applicable to all those who have grazing permits on DOI public lands. On the other hand, a land use plan covering a large geographic area and affecting a number of industries (*e.g.*, agriculture; grazing; mining; timber; recreation; wind, solar, and/or geothermal power generation; etc.) would not constitute a "particular matter of general applicability" but, rather, would still fall within the broader definition of "matter," as it constitutes a broad policy directed to the interests of a large and diverse group of persons.

To assist the Deputy Secretary in complying with his ethics recusal requirements, one must gather sufficient information regarding a matter before the Department to determine whether the matter constitutes a particular matter involving specific parties, a particular matter of general applicability, or falls into the category of broad policy options that are directed to the interests of a large and diverse group of persons. In the event that a determination is made that the matter before the Department constitutes the narrowest type of matter, a particular matter involving specific parties, one must then reference the Deputy Secretary's List of Recusals to determine whether he is recused from participating in that matter.

Attachment


Matters
Particular Matters
Particular Matters of General Applicability
Particular Matters Involving Specific Parties

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

October 4, 2006

DO-06-029

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"

Perhaps no subject has generated as many questions from ethics officials over the years as the difference between the phrases "particular matter involving specific parties" and "particular matter." These phrases are used in the various criminal conflict of interest statutes to describe the kinds of Government actions to which certain restrictions apply. Moreover, because these phrases are terms of art with established meanings, the Office of Government Ethics (OGE) has found it useful to include these same terms in various ethics rules. A third term, "matter," also has taken on importance in recent years because certain criminal post-employment restrictions now use that term without the modifiers "particular" or "involving specific parties."

It is crucial that ethics officials understand the differences among these three phrases. OGE's experience has been that confusion and disputes can arise when these terms are used in imprecise ways in ethics agreements, conflict of interest waivers, and oral or written ethics advice. Therefore, we are issuing this memorandum to provide guidance in a single document about the meaning of these terms and the distinctions among them.

Because the three phrases are distinguished mainly in terms of their relative breadth, the discussion below will proceed from the narrowest phrase to the broadest.

Particular Matter Involving Specific Parties

The narrowest of these terms is "particular matter involving specific parties." Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but the meaning remains the same, focusing primarily on the presence of specific parties.

1. Where the Phrase Appears

This language is used in many places in the conflict of interest laws and OGE regulations. In the post-employment statute, the phrase "particular matter . . . which involved a specific party or parties" is used to describe the kinds of Government matters to which the life-time and two-year representational bans apply. 18 U.S.C. § 207(a)(1), (a)(2). Occasionally, ethics officials have raised questions because section 207 includes a definition of the term "particular matter," section 207(i)(3), but not "particular matter involving specific parties"; however, it is important to remember that each time "particular matter" is used in section 207(a), it is modified by the additional "specific party" language.[1]

In addition to section 207(a), similar language is used in 18 U.S.C. §§ 205(c) and 203(c). These provisions describe the limited restrictions on representational activities applicable to special Government employees (SGEs) during their periods of Government service.[2]

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[1] For a full discussion of the post-employment restrictions, see OGE DAEOgram DO-04-023, at https://www.oge.gov/Web/oge.nsf/Resources/DO-04-023:+Summary+of+18+U.S.C.+§+207.

[2] These restrictions on SGEs are discussed in more detail in OGE DAEOgram DO-00-003, at https://www.oge.gov/Web/oge.nsf/Resources/DO-00-003:+Summary+of+Ethical+Requirements+Applicable+to+Special+Government+Employees.

As explained below, 18 U.S.C. § 208 generally uses the broader phrase "particular matter" to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as "a specific party or parties." 18 U.S.C. § 208(b)(4); see OGE Informal Advisory Letter 00 x 12. Moreover, OGE has issued certain regulatory exemptions, under section 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Likewise, the distinction between particular matters involving specific parties and broader types of particular matters (i.e., those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under section 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g).

Finally, OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain SGEs. 5 C.F.R. § 2635.807(a)(2)(i)(4).

2. What the Phrase Means

When this language is used, it reflects "a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate." Bayless Manning, Federal Conflict of Interest Law 204 (1964). Therefore, OGE has emphasized that the term "typically involves a specific

proceeding affecting the legal rights of the parties, or an isolatable transaction or related se t of transactions between identified parties." 5 C.F.R. § 2640.102(1). [3] Examples of particular matters involving specific parties include contracts, grants, licenses, product approval applications, investigations, and litigation. It is important to remember that the phrase does not cover particular matters of general applicability, such as rulemaking, legislation, or policy-making of general applicability.[4]

Ethics officials sometimes must deci de when a particular matter first involves a specific party. Many Government matters evolve, sometimes starting with a broad concept, developing into a discrete program, and eventually involving specific parties. A case-by-case analysis is required to determine at which stage a particular matter has sufficiently progressed to involve

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[3] This definition, found in OGE's regulations implementing 18 U.S.C. § 208, differs slightly from the definition found in the regulations implementing a now-superseded version of 18 U.S.C. § 207, although this is more a point of clarification than substance. Specifically, the old section 207 regulations referred to "identifiable" parties, 5 C.F.R. § 2637.201(c)(1), whereas the more recent section 208 rule refers to "identified" parties. As explained in the preamble to OGE's proposed new section 207 rule: "The use of 'identified,' rather than 'identifiable,' is intended to distinguish more clearly between particular matters involving specific parties and mere 'particular matters,' which are described elsewhere as including matters of general applicability that focus 'on the interests of a discrete and identifiable class of persons' but do not involve specific parties. [citations omitted] The use of the term 'identified,' however, does not mean that a matter will lack specific parties just because the name of a party is not disclosed to the Government, as where an agent represents an unnamed principal." 68 Feder al Register 7844, 7853-54 (February 18, 2003).

[4] Usually, rulemaking and legislation are not covered, unless they focus narrowly on identified parties. See OGE Informal Advisory Opinions 96 x 7 ("rare" example of rulemaking that involved specific parties); 83 x 7 (private relief legislation may involve specific parties).

specific parties. The Government sometimes identifies a specific party even at a preliminary or informal stage in the development of a matter. E.g., OGE Informal Advisory Letters 99 x 23; 99 x 21; 90 x 3.

In matters involving contracts, grants and other agreements between the Government and outside parties, the general rule is that specific parties are first identified when the Government first receives an expression of interest from a prospective contractor, grantee or other party. As OGE explained recently in Informal Advisory Letter 05 x 6, the Government sometimes may receive expressions of interest from prospective bidders or applicants in advance of a published solicitation or request for proposals. In some cases, such matters may involve specific parties even before the Government receives an expression of interest, if there are sufficient indications that the Government actually has identified a party. See OGE Informal Advisory Letter 96 x 21.

Particular Matter

Despite the similarity of the phrases "particular matter" and "particular matter involving specific parties," it is necessary to distinguish them. That is because "particular matter" covers a broader range of Government activities than "particular matter involving specific parties." Failure to appreciate this distinction can lead to inadvertent violations of law. For example, the financial conflict of interest statute, 18 U.S.C. § 208, generally refers to particular matters, without the specific party limitation. If an employee is advised incorrectly that section 208 applies only to particular matters that focus on a specific person or company, such as an enforcement action or a contract, then the employee may conclude it is permissible to participate in other particular matters, even t hough the la w prohibits such participation.

1. Where the Phrase Appears

In addition to 18 U.S.C. § 208, several other statutes and regulations use the term "particular matter." [5] The representational restrictions applicable to current employees (other than SGEs), under 18 U.S.C. §§ 203 and 205, apply to particular matters.[6] As mentioned above, section 207 also contains a definition of "particular matter." [7] However, where the phrase is used in the post-employment prohibitions in

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[5] The relevant language in 18 U.S.C. § 208(a) is "a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" (emphasis added).

[6] The prohibition in 18 U.S.C. § 205(a)(2) actually uses the phrase "covered matter," but that term is in turn defined as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter," 18 U.S.C. § 205(h)(emphasis added).

[7] The definition in 18 U.S.C. § 207(i)(3) provides: "the term 'particular matter' includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." This language differs slightly from other references to "particular matter" in sections 203, 205 and 208, in part because the list of matters is not followed by the residual phrase "or other particular matter." However, OGE does not believe that the absence of such a general catch-all phrase means that the list of enumerated matters exhausts the meaning of "particular matter" under section 207(i)(3). The list is preceded by the word "includes," which is generally a term of enlargement rather than limitation and indicates that matters other than those enumerated are covered. See Norman J. Singer, 2A Sutherland on Statutory Construction 231-232 (2000).

section 207(a)(1) and (a)(2), it is modified by the "specific parties" limitation.[8]

The phrase "particular matter" is used pervasively in OGE's regulations. Of course, the term appears throughout 5 C.F.R. part 2640, the primary OGE rule interpreting and implementing 18 U.S.C. § 208. Similarly, it is used in 5 C.F.R. § 2635.402, which is the provision in the Standards of Conduct that generally deals with section 208. The phrase also is used throughout subpart F of the Standards of Conduct, which contains the rules governing recusal from particular matters affecting the financial interest of a person with whom an employee is seeking non-Federal employment. 5 C.F.R. §§ 2635.601-2635.606. Moreover, the phrase appears in the "catch-all" provision of OGE's impartiality rule, 5 C.F.R. § 2635.502(a)(2). See also 5 C.F.R. 2635.501(a).[9] Various other regulations refer to "particular matter" for miscellaneous purposes. E.g., 5 C.F.R. § 2635.805(a)(restriction on expert witness activities of SGEs); 5 C.F.R. § 2634.802(a)(1)(written rec usals pursuant to ethics agreements).

2. What the Phrase Means

Although different conflict of interest statutes use slightly different wording, such as different lists of examples of particular matters, the same standards apply for determining what is a particular matter under each of the relevant statutes

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[8] At one time, the post-employment "cooling-off" restriction for senior employees in 18 U.S.C. § 207(c) applied to particular matters, but the language was amended (and broadened) in 1989 when Congress removed the adjective "particular" that had modified "matter." See 17 Op. O.L.C. 37, 41-42 (1993).

[9] Generally, section 2635.502 focuses on particular matters involving specific parties, as noted above. However, section 2635.502(a)(2) provides a mechanism for employees to determine whether they should recuse from other "particular matters" that are not described elsewhere in the rule. In appropriate cases, therefore, an agency may require an employee to recuse from particular matters that do not involve specific parties, based on the concern that the employee's impartiality reasonably may be questioned under the circumstances.

and regulations. See 18 Op. O.L.C. 212, 217-20 (1994). Particular matter means any matter that involves "deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1)(emphasis added). It is clear, then, that particular matter may include matters that do not involve parties and is not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000).

Essentially, the term covers two categories of matters: (1) those that involve specific part ies (described more fully above), and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession. OGE regulations sometimes refer to the second category as "particular matter of general applicability." 5 C.F.R. § 2640.102(m). This category can include legislation and policymaking, as long as it is narrowly focused on a discrete and identifiable class. Examples provided in OGE rules include a regulation applicable only to meat packing companies or a regulation prescribing safety standards for trucks on interstate highways. 5 C.F.R. §§ 2640.103(a)(1)(example 3); 2635.402(b)(3)(example 2). Other examples may be found in various opinions of OGE and the Office of Legal Counsel, Department of Justice. E.g., OGE Informal Advisory Letter 00 x 4 (recommendations concerning specific limits on commercial use of a particular facility); 18 Op. O.L.C. at 220 (determinations or legislation focused on the compensation and work conditions of the class of Assistant United States Attorneys).

Certain OGE rules recognize that particular matters of general applicability sometimes may raise fewer conflict of interest concerns than particular matters involving specific

parties.[10] Therefore, while both categories are included in the term "particular matter," it is often necessary to distinguish between these two kinds of particular matters. Of course, in many instances, the relevant prohibitions apply equally to both kinds of particular matters. This is the case, for example, in any application of 18 U.S.C. § 208 where there is no applicable exemption or waiver that distinguishes the two.

It is important to emphasize that the term "particular matter" is not so broad as to include every matter involving Government action. Particular matter does not cover the "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2640.103(a)(1). For example, health and safety regulations applicable to all employers would not be a particular matter, nor would a comprehensive legislative proposal for health care reform. 5 C.F.R. § 2640.103(a)(1)(example 4), (example 8). See also OGE Informal Advisory Letter 05 x 1 (report of panel on tax reform addressing broad range of tax policy issues). Although such actions are too broadly focused to be particular matters, they still are deemed "matters" for purposes of the restrictions described below that use that term.

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[10] As noted above, OGE's imparti ality rule generally focuses on particular matters involving specific parties. See OGE Informal Advisory Letter 93 x 25 (rulemaking "would not, except in unusual circumstances covered under section 502(a)(2), raise an issue under section 502(a)"). Furthermore, as also discussed above, several of the regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2) treat particular matters of general applicability differently than those involving specific parties. The preamble to the original proposed regulatory exemptions in 5 C.F.R. part 2640 explains: "The regulation generally contains more expansive exemptions for participation in 'matters of general applicability not involving specific parties' because it is less likely that an employee's integrity would be compromised by concern for his own financial interests when participating in these broader matters." 60 Federal Register 47207, 47210 (September 11, 1995). Of course, Congress itself has limited certain conflict of interest restrictions to the core area of particular matters that involve specific parties. E.g., 18 U.S.C. § 207(a)(1), (a)(2).

A question that sometimes arises is when a matter first becomes a "particular matter." Some matters begin as broad policy deliberations and actions pertaining to diverse interests, but, later, more focused actions may follow. Usually, a particular matter arises when the deliberations turn to specific actions that focus on a certain person or a discrete and identifiable class of persons. For example, although a legislative plan for broad health care reform would not be a particular matter, a particular matter would arise if an agency later issued implementing regulations focused narrowly on the prices that pharmaceutical companies could charge for prescription drugs. 5 C.F.R. § 2640.102(a)(1)(example 8). Similarly, the formulation and implementation of the United States response to the military invasion of an ally would not be a particular matter, but a particular matter would arise once discussions turned to whether to close a particular oil pumping station or pipeline operated by a company in the area where hostilities are taking place. 5 C.F.R. § 2640.102(a)(1)(example 7).

Matter

The broadest of the three terms is "matter." However, this term is used less frequently than the other two in the various ethics statutes and regulations to describe the kinds of Government actions to which restrictions apply.

1. Where the Phrase Appears

The most important use of this term is in the one-year post-employment restrictions applicable to "senior employees" and "very senior employees." 18 U.S.C. § 207(c), (d). In this context, "matter" is used to describe the kind of Government actions that former senior and very senior employees are prohibited from influencing through contacts with employees of their former agencies (as well as contacts with Executive Schedule officials at other agencies, in the case of very senior employees). The unmodified term "matter" did not appear in these provisions until 1989, when section 207(c) was amended to replace "particular matter" with "matter" and section 207(d) was first enacted. Pub. L. No. 101-194, § 101(a), November 30, 1989. OGE also occasionally uses the term "matter" in ethics regulations, for example, in the description of teaching,

speaking and writing that relates to an employee's official duties. 5 C.F.R. § 2635.807(a)(2)(E)(1).

2. What the Phrase Means

It is clear that "matter" is broader than "particular matter." See 17 Op. O.L.C. at 41-42. Indeed, the term is virtually all-encompassing with respect to the work of the Government.[11] Unlike "particular matter," the term "matter" covers even the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. Of course, the term also includes any particular matter or particular matter involving specific parties.

Nevertheless, it is still necessary to understand the context in which the term "matter" is used, as the context itself will provide some limits. In 18 U.S.C. § 207(c) and (d), the post-employment restrictions apply only to matters "on which [the former employee] seeks official action." Therefore, the only matters covered will be those in which the former employee is seeking to induce a current employee to make a decision or otherwise act in an official capacity.

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[11] A now-repealed statute, 18 U.S.C. § 281 (the predecessor of 18 U.S.C. § 203), used the phrase "any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter" (emphasis added). One commentator noted that the term "matter" in section 281 was "so open-ended" that it raised questions as to what limits there might be on the scope. Manning, at 50-51. Manning postulated that some limits might be inferred from the character of the matters listed before the phrase "or other matter." Id. at 51. Whatever the force of this reasoning with respect to former section 281, the same could not be said with respect to 18 U.S.C. § 207(c) or (d), as neither of these current provisions contains an exemplary list of covered matters.

LA-17-03: Guidance on Executive Order 13770

U.S. Office of Government Ethics
Advanced Practitioner Webinar
Thursday, April 27, 2017

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LA-17-03: Guidance on E.O. 13770

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

March 20, 2017
LA-17-03

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to

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What is Covered in LA-17-03? (Past Guidance)

- Elaboration on Guidance in LA-17-02
  - Extent to which past guidance is applicable to EO 13770
  - Extent to which past guidance is NOT applicable or NOT relevant to EO 13770

3

What is Covered in LA-17-03? (New Guidance)

- LA-17-03 also addresses recusal obligations for recent lobbyists (pledge paragraph 7)
- Post-government employment restrictions
  - 5-year restriction under pledge paragraph 1
  - Administration-length restriction under pledge paragraph 3
  - Citations to – but not interpretations of – the Lobbying Disclosure Act (LDA)

4

What is Not Covered in LA-17-03?

- Section 3 of the new Executive Order concerning pledge waivers
- Paragraph 4 concerning post-government restrictions and the Foreign Agents Registration Act of 1938
- Paragraph 8 concerning employment decisions
- The continued applicability of EO 13490

5

Language Common to E.O. 13770 and E.O. 13490

6

LA-17-02: Executive Order 13770

"With respect to Executive Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding Executive Order 13490 to the extent that such guidance addresses language common to both orders."

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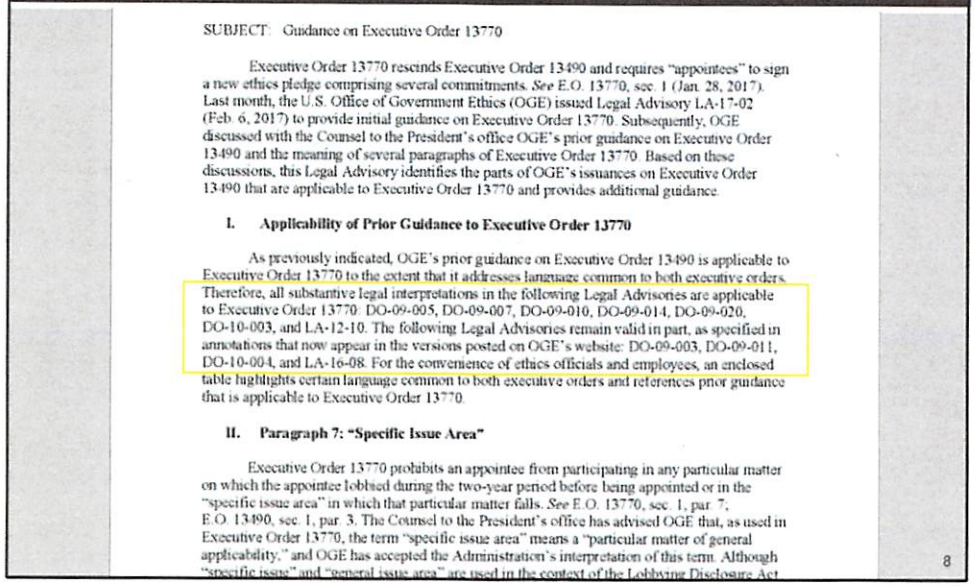
LA-17-03: Guidance on E.O. 13770



SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to Executive Order 13770 to the extent that it addresses language common to both executive orders. Therefore, all substantive legal interpretations in the following Legal Advisories are applicable to Executive Order 13770: DO-09-005, DO-09-007, DO-09-010, DO-09-014, DO-09-020, DO-10-003, and LA-12-10. The following Legal Advisories remain valid in part, as specified in annotations that now appear in the versions posted on OGE's website: DO-09-003, DO-09-011, DO-10-004, and LA-16-08. For the convenience of ethics officials and employees, an enclosed table highlights certain language common to both executive orders and references prior guidance that is applicable to Executive Order 13770.

II. Paragraph 7: "Specific Issue Area"

Executive Order 13770 prohibits an appointee from participating in any particular matter on which the appointee lobbied during the two-year period before being appointed or in the "specific issue area" in which that particular matter falls. *See* E.O. 13770, sec. 1, par. 7; E.O. 13490, sec. 1, par. 3. The Counsel to the President's office has advised OGE that, as used in Executive Order 13770, the term "specific issue area" means a "particular matter of general applicability," and OGE has accepted the Administration's interpretation of this term. Although "specific issue" and "general issue area" are used in the context of the Lobbying Disclosure Act

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Example:

DO-09-010: Who Must Sign the Ethics Pledge?

Note: All substantive legal interpretations in this advisory are applicable to Executive Order 13770, sec. 1. *See* LA-17-02 and LA-17-03.

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

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Example:

DO-09-011: Revolving Door Ban—All Appointees Entering Gov't

NOTE: All substantive legal interpretations in this advisory concerning Pledge paragraph 2 (E.O. 13490) and the terms used in Pledge paragraph 2 are applicable to Executive Order 13770, sec. 1, par. 6. All substantive legal interpretations pertaining to waivers of the Ethics Pledge are not applicable to Executive Order 13770, sec. 3. *See* LA-17-02 and LA-17-03.

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

10

Example:

DO-10-004: FAQs on Post-Employment under the Ethics Pledge

Note: Please see the attached addendum for the applicability of substantive legal interpretations in this advisory to Executive Order 13770. *See also* LA-17-02 and LA-17-03.

United States

Addendum (March 20, 2017)
DO-10-004: Post-Employment Under the Ethics Pledge: FAQs

The following substantive legal interpretations in this advisory are **applicable** to Executive Order 13770:

- Part A: Post-employment cooling-off period. *See* E.O. 13770, sec. 1, par. 2
  - Q2. Which appointees are subject to the restriction
  - Q3. How the restriction affects very senior employees
  - Q4. Which officials may not be contacted under this restriction
  - Q5. Applicability of exceptions under 18 U.S.C. § 207(c) to the restriction
- Part B: Post-employment lobbying ban. *See* E.O. 13770, sec. 1, par. 3
  - Q1. Relationship of the lobbying ban to other restrictions
  - Q2. Whether the lobbying ban applies to appointees who are not senior employees
  - Q5. Duration of the lobbying ban
  - Q11. Whether exceptions to the restriction exist

The following substantive legal interpretations in this advisory are **applicable in part** to Executive Order 13770, to the extent that they address the core questions listed below. However, because the post-employment ban in Executive Order 13490 restricts "lobbying," while the corresponding ban in Executive Order 13770 restricts "lobbying activities," the substantive legal interpretations of

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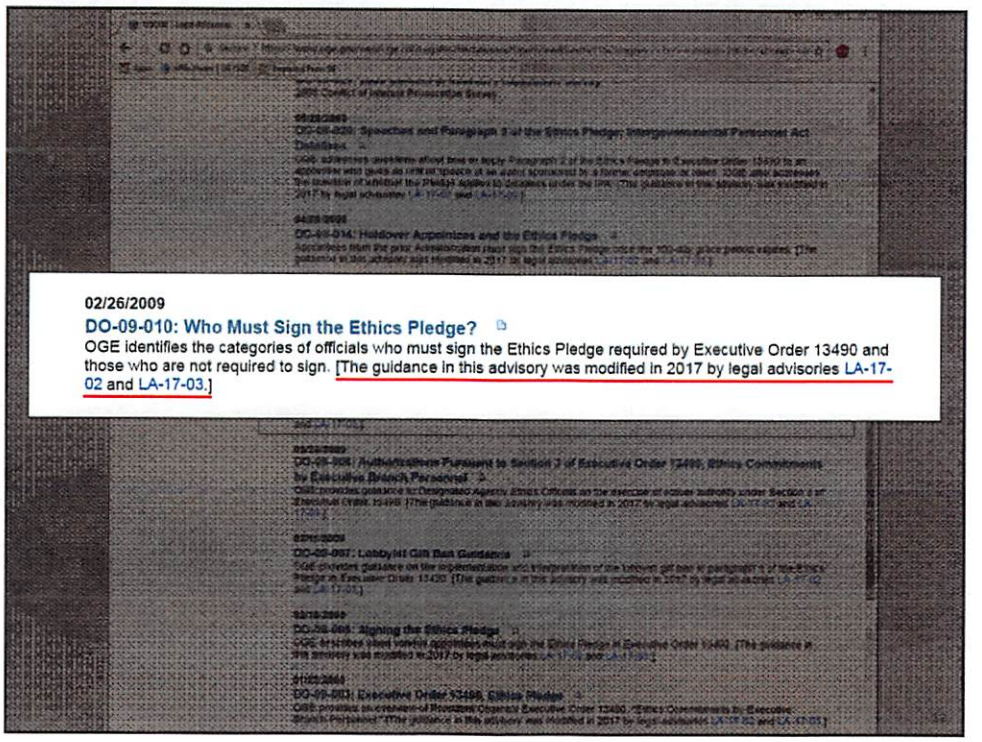
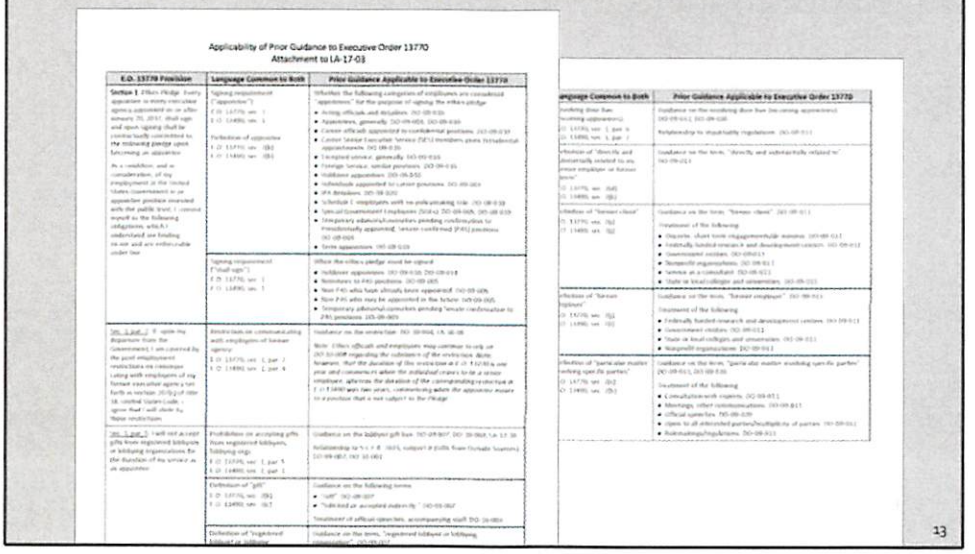


02/26/2009

DO-09-010: Who Must Sign the Ethics Pledge?

OGE identifies the categories of officials who must sign the Ethics Pledge required by Executive Order 13490 and those who are not required to sign. [The guidance in this advisory was modified in 2017 by legal advisories LA-17-02 and LA-17-03.]

Attachment to LA-17-03



Applicability of Prior Guidance to Executive Order 13770
Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1 When I Pledge. Every appointee in every executive agency appointed on or after January 20, 2017, shall sign and upon signing shall be contractually committed to the following pledge upon becoming an appointee: In consideration, and in consideration, of my employment in the United States Government in an appointee 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:	Signing requirement ("appointee") E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee E.O. 13770, sec. 3(b) E.O. 13490, sec. 3(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge • Acting officials and detailees (DO-09-010) • Appointees, generally (DO-09-003, DO-09-010) • Career officials appointed to confidential positions (DO-09-010) • Career Senior Executive Service (SES) members given Presidential appointments (DO-09-010) • Excepted service, generally (DO-09-010) • Foreign service, similar positions (DO-09-010) • Holdover appointees (DO-09-002) • Individuals appointed to career positions (DO-09-003) • IPA detailees (DO-09-009) • Schedule C employees with no policymaking role (DO-09-010) • Special Government Employees (SGEs) (DO-09-005, DO-09-010) • Temporary placements/transfers pending confirmation to Presidentially appointed, Senate-confirmed (PAS) positions (DO-09-004) • Term appointees (DO-09-010)
	Signing requirement ("mail-ups") E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed • Holdover appointees (DO-09-010, DO-09-013) • Nominees to PAS positions (DO-09-005) • Non-PAS who have already been appointed (DO-09-005) • Non-PAS who may be appointed in the future (DO-09-005) • Temporary placements/transfers pending Senate confirmation to PAS positions (DO-09-004)
Sec. 1 par. 2 "I agree that I will abide by the following restrictions: 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."	Restrictions on communicating with employees of former agency E.O. 13770, sec. 1, par. 2 E.O. 13490, sec. 1, par. 4	Guidance on the restriction (DO-09-004, LA-16-08) Note: Ethics officials and employees may continue to rely on DO-93-008 regarding the substance of the restriction. Note, however, that the duration of this restriction is 2 (E.O. 13770) vs. one year and commences when the individual ceases to be a senior employee, whereas the duration of the corresponding restriction is 1 (E.O. 13490) was two years, commencing when the appointee ceases to a position that is not subject to the Pledge
Sec. 1 par. 3 "I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee."	Prohibition on accepting gifts from registered lobbyists, lobbying orgs E.O. 13770, sec. 1, par. 3 E.O. 13490, sec. 1, par. 1	Guidance on the lobbyist gift ban (DO-09-007, DO-16-06)(LA-17-16) Relationship to 5 C.F.R. 2635, subpart B (Gifts from Outside Sources) (DO-09-007, DO-10-001)
	Definition of "gift" E.O. 13770, sec. 3(c) E.O. 13490, sec. 3(c)	Guidance on the following terms • "Gift" (DO-09-007) • "Solicited or accepted indirectly" (DO-09-007) Treatment of official speeches, accompanying staff (DO-16-06)
	Definition of "registered lobbyist or lobbying organization"	Guidance on the terms, "registered lobbyist or lobbying organization" (DO-09-007)

Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Rule 1 par. 1 "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."	Guidance on the revolving door ban (DO-09-011, DO-09-013) Relationship to impartiality regulations (DO-09-011)
Definition of "directly and substantially related to my former employer or former clients" E.O. 13770, sec. 3(d) E.O. 13490, sec. 3(b)	Guidance on the term, "directly and substantially related to" (DO-09-011)
Definition of "former client" E.O. 13770, sec. 3(a) E.O. 13490, sec. 3(a)	Guidance on the term, "former client" (DO-09-011) Treatment of the following: • Deposits, short-term engagements/de minimis (DO-09-011) • Federally funded research and development centers (DO-09-011) • Government entities (DO-09-011) • Non-profit organizations (DO-09-011) • Service as a consultant (DO-09-011) • State or local colleges and universities (DO-09-011)
Definition of "former employer" E.O. 13770, sec. 3(a) E.O. 13490, sec. 3(a)	Guidance on the term, "former employer" (DO-09-011) Treatment of the following: • Federally funded research and development centers (DO-09-011) • Government entities (DO-09-011) • State or local colleges and universities (DO-09-011) • Non-profit organizations (DO-09-011)
Definition of "particular matter involving specific parties" E.O. 13770, sec. 3(e) E.O. 13490, sec. 3(c)	Guidance on the term, "particular matter involving specific parties" (DO-09-011, DO-09-013) Treatment of the following: • Consultations with experts (DO-09-011) • Meetings, other communications (DO-09-011) • Official speeches (DO-09-019) • Open to all interested parties/feasibility of parties (DO-09-011) • Rulemakings/regulations (DO-09-011)

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Language Common to Both

E.O. 13370, sec. 1, par. 6

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.

E.O. 13490, sec. 1, par. 2

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.

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Language Common to Both

E.O. 13370, sec. 2(b)

"Appointee" means 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.

E.O. 13490, sec. 2(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.

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Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1. *Ethics Pledge.* Every appointee in every executive agency appointed on or after January 20, 2017, 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 an appointee 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:	Signing requirement ("appointee"): E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee: E.O. 13770, sec. 2(b) E.O. 13490, sec. 2(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge: • Acting officials and detailees: DO-09-010 • Appointees, generally: DO-09-003, DO-09-010 • Career officials appointed to confidential positions: DO-09-010 • Career Senior Executive Service (SES) members given Presidential appointments: DO-09-010 • Excepted service, generally: DO-09-010 • Foreign Service, similar positions: DO-09-010 • Holdover appointees: DO-09-010 • Individuals appointed to career positions: DO-09-003 • IPA detailees: DO-09-020 • Schedule C employees with no policymaking role: DO-09-010 • Special Government Employees (SGEs): DO-09-005, DO-09-010 • Temporary advisors/counselors pending confirmation to Presidentially appointed, Senate-confirmed (PAS) positions: DO-09-005 • Term appointees: DO-09-010
	Signing requirement ("shall sign"): E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed: • Holdover appointees: DO-09-010, DO-09-014 • Nominees to PAS positions: DO-09-005 • Non-PAS who have already been appointed: DO-09-005 • Non-PAS who may be appointed in the future: DO-09-005 • Temporary advisors/counselors pending Senate confirmation to PAS positions: DO-09-005

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Paragraph 7:
Particular Matter & Specific Issue Area

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . .
I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7: Specific Issue Area

"Specific issue area" is not defined in LDA or Executive Orders 13490 or 13770

EO 13490

- Also contained a two-year prohibition on individuals seeking or accepting employment with executive agencies they lobbied

EO 13770

- No employment ban for former lobbyists

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Paragraph 7: PMGA

As used in Executive Order 13770, the term "specific issue area" means a "**particular matter of general applicability**"

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 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

Lobbied on:	→	Recusal:
Particular Matter	→	Same Particular Matter

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

Lobbied on:	→	Recusal:
Particular Matter	→	Same Particular Matter
Matter	→	No Recusal to that Matter

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

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 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Ethics Pledge: Restrictions for Incoming Appointees

Paragraph 6 *Not limited to registered lobbyists*	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.
Paragraph 7 *Limited to registered lobbyists*	If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraphs 1 and 3:
Post-Employment Lobbying Activity Restrictions

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Ethics Pledge: Post-Employment Restrictions

Paragraph 1	I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.
Paragraph 2	If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with appointees 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.
Paragraph 3	I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.
Paragraph 4	I will not, at any time after the termination of my employment in the United States Government, engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2017, would require me to register under the Foreign Agents Registration Act of 1938, as amended.

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

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Paragraph 1

I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

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Paragraph 3

I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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