[SEQ CHAPTER \h \r 1]**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

UPDATED JANUARY 2018
FOR PAS AND NON-CAREER SES

Ethical Considerations Related to Your Transition Out of EPA

During your federal service, you have been subject to the Standards of Ethical Conduct for Employees of the Executive Branch as well as federal conflict of interest statutes, the STOCK (Stop Trading on Congressional Knowledge) Act and the Trump Ethics Pledge. Although many of these rules will no longer affect you when you leave federal service, you will still be bound by post-employment restrictions and, because you are a political appointee, you will also be bound by the Trump Ethics Pledge that you signed.

This document provides an overview of the most important ethics considerations that you need to know when you transition out of Government service. The relevant statute is 18 U.S.C. § 207, and the implementing regulations are found at 5 C.F.R. Part 2641. Having an understanding of your ethics obligations before and after Government service will help you avoid ethics pitfalls.

THINGS YOU NEED TO KNOW *BEFORE* YOU LEAVE GOVERNMENT SERVICE

1. Your ethics obligations begin when you start looking for a job

You can't participate in official matters that will have a direct and predictable effect on the financial interests of any person or entity with whom you are seeking employment.

"Seeking employment" begins *when you:*

- directly or indirectly make an unsolicited communication regarding possible employment with any person or entity;
- engage in negotiations with a view toward reaching an agreement regarding possible employment;
- receive a response to a job application or employment proposal indicating an interest in employment discussions; or
- make a response, other than rejection, to an unsolicited communication from any person regarding possible employment with that person.

"Seeking employment" ends when:

- you, or the prospective employer, reject the possibility of employment and all discussions of possible employment have terminated; or
- two months have elapsed since you sent an unsolicited resume or employment proposal, and you have not received an interest in employment discussions. *5 CFR 2635.603(b)(2).*

> *Example:* You are contacted by an official of a State Environmental Department. In the call, he asks if you are interested in leaving EPA because they have a spot for you. You're flattered, but say that you are very happy with your job at EPA and are not interested in leaving. You add that you will remember his interest if you ever decide to leave the Government.
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> *Answer:* Because you declined the offer, you have rejected the unsolicited employment overture and have not begun seeking employment.

But just deferring discussions until the foreseeable future may not constitute rejection of an employment possibility. Here are two examples of deferring, with different results:

> *Example:* Let's say you gave a speech to a trade association and afterwards, someone said, "Hey, have you been thinking about what you're going to do when the Trump Administration is over? My company would be very interested in someone like you." You say that you aren't thinking about anything until after January [insert whatever date], so perhaps they can contact you then.
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> *Answer:* This response will be considered a rejection.

> *Another Example:* But let's say instead that you know your region is working on an issue that involves that very company, and you responded to the inquiry by saying you cannot discuss future employment while you are working on that issue but you would like to discuss employment with the company when the issue is resolved.
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> *Answer:* Because you have merely deferred employment discussions until the foreseeable future, you have begun "seeking employment" under the ethics regulations and now cannot work on issue that involves the company. It's not sufficient that you said you won't talk to them until after the project is over. You have to deal with the conflicts issue now.

2. Don't participate in official matters that affect anyone with whom you are seeking employment

When you are seeking employment, you can't work personally and substantially on any particular matter that affects (directly and predictably) the financial interest of the prospective employer(s). You have to be careful about particular matters of general applicability as well as particular matters involving specific parties. The interests of a prospective employer are imputed to you for the purposes of the federal criminal conflict of interest statute, 18 USC § 208.

> *Example:* You are seeking employment with a State, so you can't work on a rulemaking that affects that State specifically or all of the States as a class. The reason is that the rulemaking (which is a particular matter) has a direct and predictable financial effect on all States, including the one with which you are seeking employment.

But you can (under a 2016 revision to the seeking employment rules) participate in a matter of general applicability:

> *Example:* You're still waiting to hear from Smith and Jones, the environmental consulting company, regarding the application you sent in last month. You could work on a bid proposal that might be of potential interest to environmental consulting companies like Smith and Jones. You could also work on rulemaking comments sent in by other environmental consulting firms.

But once there's a nibble of interest, then the interests of a prospective employer are imputed to you for the purposes of the federal criminal conflict of interest statute, 18 USC § 208.

> *Example:* You are seeking employment with a State, and they say that they want you to come in for an interview. Now you can't work on a rulemaking that affects that State specifically or all of the States as a class. The reason is that the rulemaking (which is a particular matter) has a direct and predictable financial effect on all States, including the one with which you are seeking employment.

The most common way to resolve conflicts issues is to disqualify – or recuse – yourself from participating in the particular matter. To disqualify from participating in a conflicting matter, you should notify the supervisor who makes assignments to you. Oral notice is sufficient, but written notice is wiser, and you should also notify anyone else who may consult with you on these matters.

The need for ***disqualification begins*** when you agree to discuss the prospect of employment with any person -- contractor, company, firm, or someone affected by your duties -- regardless of who makes the first contact. It is also triggered when you send a targeted resume to any person or entity over which you have responsibility in your official duties.

Disqualification ends when you or the prospective employer reject the possibility of employment and all discussions of employment have terminated. Disqualification will also end if you do not hear from the potential employer for two months after sending out an unsolicited resume. Two months of silence after sending out a resume is deemed rejection.

3. Don't take official records with you

Official records must remain in the custody of the Agency. Within Agency guidelines, you may

be given permission to remove extra copies of records or other work-related, non-record materials. However, copies of records that are classified or otherwise restricted (such as under the Privacy Act or subject to privilege) must be maintained in accordance with Agency requirements. You may remove personal materials, such as family and personal correspondence, but must be careful not to remove any official records. The United States government has specific authority to enforce recovery of any unlawfully removed, altered or destroyed records. Talk to your records officer.

4. Take the post employment ethics online course

See: [HYPERLINK "http://intranet.epa.gov/ogc/ethics/training.htm" \l "leavingfederalservice"]

Internet version at [HYPERLINK "http://www.epa.gov/ogc/LFS/10.html"]

ADDITIONAL THINGS YOU NEED TO KNOW *BEFORE* YOU LEAVE GOVERNMENT SERVICE

5. Once you begin negotiations, you have to contact OGC/Ethics

Under the STOCK Act, you are required to complete the "Notification of Negotiating or Agreement" form and submit it to OGC/Ethics within three business days of entering into agreements or commencing negotiations for future employment after EPA or compensation after EPA with a non-federal entity.

Future employment means any compensated employment that starts after you leave EPA. The notification requirement does not apply to employment or compensated activities that occur while you are still an EPA employee or if you are looking at another federal position.

Negotiation begins when you enter into two-way discussions or communications with another person that is mutually conducted with a view toward reaching an agreement regarding possible employment or compensation. As soon as you take a meaningful step toward reaching an agreement (even if not quite at the point of discussion about actual terms of employment), you have triggered the notification obligation. You have three business days to notify OGC/Ethics.

6. You will have to file a termination OGE-278e Financial Disclosure Form

You will be required to ***submit a termination OGE-278e*** through INTEGRITY within 30 days of your departure. We can (and will) assess a $200 late filing fee, so if you think you need more time, you must ask OGC/Ethics for an extension BEFORE your deadline expires. We can grant two extensions of up to 45 days each, for a maximum of 90 days. Failure to file a termination OGE-278e is punishable by both criminal and civil penalties. In fact, in 2012, DOJ settled a case with a former EPA employee who did not file her termination 278. She had to turn in her form and pay a fine of $15,000.

THINGS YOU NEED TO KNOW
AFTER YOU LEAVE GOVERNMENT SERVICE

Even after you leave federal service, you will still be subject to the criminal provisions of 18 USC § 207 and its implementing regulations at 5 CFR Part 2641. If you were a procurement official, you will be subject to the Procurement Integrity Act at 41 USC § 423(d), 48 CFR § 3.104. Some of the restrictions depend upon your current rate of pay and your type of your appointment. In addition, as a political appointee, you are subject to the Trump Ethics Pledge.

1. We answer your post employment questions

If you have a post employment question, even after leaving EPA, you may contact your regional ethics counsel or any of us in OGC/Ethics. To reach OGC/Ethics, contact us collectively at [HYPERLINK "mailto:ethics@epa.gov"] or individually as follows:

Kevin Minoli, Designated Agency Ethics Official, (202) 564-8064 or [HYPERLINK "mailto:minoli.kevin@epa.gov"]

Justina Fugh, Senior Counsel for Ethics, (202) 564-1786 or [HYPERLINK "mailto:fugh.justina@epa.gov"]

Jeanne Duross, Ethics Attorney, (202) 564-6595 or [HYPERLINK "mailto:duross.jeanne@epa.gov"]

Shannon Griffo, Ethics Attorney (on detail)(202) 564-7061 or [HYPERLINK "mailto:griffo.shannon@epa.gov"]

Jennie Keith, Ethics Officer, (202) 564-3412 or [HYPERLINK "mailto:keith.jennie@epa.gov"]

Margaret Ross, Ethics Officer, (202) 564-3221 or [HYPERLINK "mailto:ross.margaret@epa.gov"]

2. Remember: you have to file a termination OGE-278e Financial Disclosure Form

You are required to submit a termination OGE-278e in INTEGRITY no later than 30 days after leaving the Agency (unless you are going to another OGE 278e filing position). The coverage period for the termination report will be from January 1, 2016 through your last day of duty (Note: if you filed a new entrant report in 2016, then your reporting period is from your start date through your departure date). We can accept your report no earlier than 15 days before your departure, provided you attest to the fact that there will be no changes. If you need more time, we can give you two 45-day extensions, but you have to ask prior to the deadline and we need to know how to reach you by email and phone. Remember, failure to file can result in a $200 late filing fee and other penalties, including up to $56,916 in fines and/or one year in jail.

3. Post-Employment Restrictions That Apply to All Former Employees

All former federal employees are subject to the permanent bar, the two-year bar, the one-year bar, and procurement integrity restrictions, though whether all of these restrictions apply to you will depend on the facts of your specific situation. In addition, as a political appointee, you are subject to the additional restrictions of the Trump Ethics Pledge.

Here is a brief review of the restrictions that apply to ALL former employees:

a) Permanent Bar, 18 USC § 207(a)(1):

All former employees are prohibited forever from representing a third party in an appearance before or communication to, with the intent to influence, any member of the United States government on a particular matter involving specific parties in which they participated personally and substantially while a government employee if the United States still has an interest in the matter. However, this restriction does not prohibit providing "behind the scenes" assistance (except for attorneys). And please note that, in some cases, the District of Columbia may be considered a federal entity under this provision.

If you worked on a "particular matter involving specific parties," then you can't represent another entity back to the government on that same matter. Examples of such matters include an investigation, application, request for a ruling or determination, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding. The term does not include a rulemaking or other particular matter of general applicability, but would include a notice of intent that is specific to one chemical, for example. Even if a post-employment communication or appearance concerns the same particular matter, the representational bar does not apply unless the United States is a party or has a direct and substantial interest in that matter at the time of the post-employment representation.

"Personal" participation means you and includes the direction or control over a subordinate employee's participation. Your participation is considered "substantial" if your involvement at the time was of significance to the matter. This includes decision-making, review, or recommendation as to the action to be taken.

b) One-Year Bar (Trade or Treaty Negotiations), 18 USC § 207(b)

For one year after leaving Government service, a former employee may not knowingly represent, aid, or advise on the basis of covered information, any other person (except the United States) concerning any ongoing trade or treaty negotiation in which, during his last year of Government service, he participated personally and substantially as an employee.

c) Compensation in matters affecting the Government, 18 U.S.C. § 203

Under this statute, a former employee is prohibited from receiving, either directly or indirectly, any compensation for any "representational services" in connection with any particular matter in which the United States is a party or has a direct and substantial interest. Section 203 applies equally to representational services rendered by you personally or by another person

(provided that you share in the compensation for those services), and also prevents the new employer from paying you for any covered representational services that were provided at a time when you were still a Government employee. It does not matter whether or not you provided those representational services.

"Representational services" means communications to or appearances before Federal entities (not just EPA) with the intent to influence the Government on behalf of a third party. Common examples are legal and consulting services.

> *Example*: A former EPA attorney joined Dewey, Cheatham and Howe, a prominent law firm with an extensive Federal practice. The former EPA attorney may not share in any fees attributable to representational services provided by the firm while the individual was still employed by the government. This means that his or her compensation plan may not include any actual firm profits where such profits derive in any part from covered representational services. In addition, the former EPA attorney may not receive a partnership interest that includes a share of fees generated from covered representational services rendered prior to his or her termination from Government service. Likewise, the former EPA attorney may not receive a bonus that is calculated in any part based upon the firm's receipt of such fees.
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> Similarly, if a former EPA employee joined "K Street Interest Group," a grass-roots lobbying firm, the former employee would have the same restrictions as the attorney in this example.

4. Additional Post-Employment Restriction For Former Supervisors

Two Year Restriction, 18 U.S.C. § 207(a)(2)

This restriction is similar to the permanent bar, except that it applies for only two years and covers only those particular matters involving specific parties that were actually pending under your official responsibility in your last year of federal service. This restriction applies only to actual supervisors, not to team leaders. For the purposes of this restriction, it does not matter whether you worked on the particular matter personally and substantially; this restriction applies if the particular matter was pending during your last year of federal service.

> *Example*: A Regional Administrator recused herself from participation in a contract award to a company because she owns stock in that company. Upon leaving federal service, she takes a position with that company and now wants to make representations back to the federal government on that same contract. Even though she did not work personally and substantially on the contract given her recusal, she is still barred for two years from making representations on the contractor's behalf back to the federal government.

The definition of "official responsibility" is the "direct administrative or operating authority, whether intermediate or final, and whether exercisable alone or with another, and either

personally or through subordinates, to approve, disapprove, or otherwise direct Government action." The scope of your "official responsibility" is determined by those areas assigned by statute, regulation, Executive Order, job description or delegation of authority.

For supervisors, "official responsibility" includes all particular matters under consideration in your office or within the responsibility of any of your employees who participate in the matter within the scope of their duties. For the Agency head, all matters in the Agency are deemed to be within his or her "official responsibility." For a Regional Administrator, all matters in the Region are deemed to be within "official responsibility.

5. Additional Post-Employment Restrictions For Former Senior Employees

Former senior employees are subject to the above restrictions as well as additional restrictions under 18 USC § 207(c) and (f) and, if a political appointee, also subject to the Trump Ethics Pledge. A "***senior employee"*** typically includes members of the Senior Executive Service (SES) -- career and non-career – or other individuals who are paid at a rate of basic pay, before any locality adjustment, that is equal to or greater than 86.5 percent of the rate for level II of the Executive Schedule (this figure changes every January). As of January 2018, the figure is $164,004. In addition, all PAS appointees, irrespective of their salaries, are considered former senior officials. See 5 CFR 2641.104 and 5 USC §§ 5313-5315.[1]

a) One-Year Bar on Communication with EPA, 18 USC § 207(c)

For one year after leaving federal service, former "senior employees" cannot knowingly make, with the intent to influence, any communication to or appearance before their former agency (for us, that's EPA). This prohibition, also known as the "cooling off period," applies if the appearance is made on behalf of another person in connection with any matter in which the former senior employee seeks official action by EPA. Please note that the restriction will apply to "any" matter, which is much broader than any "particular matter involving specific parties."

> *Example:* You leave EPA to go to work for a private company. To celebrate your joining the firm, they offer to host a welcome reception in your honor and suggest that you invite your former EPA colleagues, including the Administrator. You should not contact the Administrator's scheduler to determine when to hold the event so that she will be able to attend. That would be considered making a communication to an EPA official (the scheduler) with the intent to influence official action (the Administrator's calendar) on behalf of another (the company).

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b) One-Year Bar Related to Foreign Entities, 18 USC § 207(f)

For one year after leaving federal service, former "senior employees" may not knowingly represent a foreign entity before any employee of a federal department or agency with the intent to influence a decision of such employee in carrying out his or her official duties. In addition, the former senior employee is restricted for one year from aiding or advising a foreign entity with the

[1] The statute lists the following specific EPA positions: Administrator, Deputy Administrator, Assistant Administrator for Toxic Substances, Assistant Administrator for Solid Waste, Assistant Administrators, Chief Financial Officer, Chief Information Officer. For the purposes of this statute, OGC Ethics assumes that the General Counsel is included.

intent to influence a decision of any officer or employee of a federal department or agency in carrying out official duties. This restriction is not limited to one's former agency, but rather extends to all federal agencies. And, unlike other post-employment restrictions, the Department of Justice has opined that you cannot make such representations before Congress.

6. Additional Post-Employment Restrictions For Lawyers

Special Note for Lawyers (even if you didn't work at EPA as a lawyer)

Lawyers are reminded to consult their state bar rules which may differ from 18 USC § 207. Even if you were not working at EPA as an attorney, if you are admitted to practice, then you should review your bar rules. Though the federal post-employment laws permit "behind the scenes" conversations, the American Bar Association (ABA) restricts such communication. ABA Model Rule 1.11(a) permits a former government employee to represent a client in connection with a matter in which the lawyer participated personally and substantially as a "public officer or employee" only if he first obtains consent from the appropriate government agency.

The DC Bar is even more restrictive than the ABA. DC Bar rule 1.11(a) prohibits the former employee from accepting employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee. Under this rule, there is no waiver possibility, and the former government lawyer is not permitted even to provide "behind the scenes" work.

For these rules to apply, you do not need to have been classified as an attorney in the government; rather, you need only to have been a government employee who is licensed to practice law. So if you are lawyer working in a non-lawyer job in a program office and decide to leave federal service, you may have additional restrictions set forth by your State bar.

If you were in an attorney position, then please remember that you will have an obligation to abide by Rule 1.9, Duties to Former Clients, and cannot "switch sides" in the same specific party matter nor reveal client secrets.

7. Additional Post-Employment Restrictions For Procurement Officials

One-Year Bar in the Procurement Integrity Act, 41 USC § 423(d) and 48 CFR § 3.104

Certain former officials cannot accept compensation from a contractor as an employee, officer, director, or consultant of the contractor within one year after serving as: (1) the procurement contracting officer; (2) the source selection authority; (3) a member of the source selection board; or (4) the chief of the financial or technical evaluation panel of a contract involving payment or claims of over $10 million.

In order for these rules to apply, you need to have had a formal role in the process. This would include being in a position to make a recommendation or to substantially influence the selection of a contractor or the type of work to be done by the contractor.

8. Additional Post-Employment Advice for Officials Involved in Grants

If you were involved in any grant competition activities while at EPA, then you need to pay attention to post employment implications under EPA's Grants Competition Conflicts of Interest

and Competitive Advantage policies. While not strictly statutory or regulatory prohibitions, these policies ensure that EPA can preserve the integrity of its competitions. Applicants competing for EPA awards cannot have an unfair competitive advantage or even the appearance of an unfair advantage.

In considering grant applications, EPA takes into account any familial or other types of relationships with current or former EPA personnel, including those who may have had involvement in the competition while at EPA. If you were involved in certain grant activities, including but not limited to the development, review and preparation of solicitations, then you, your family members or your new employer may be constrained in competing for grants under the solicitations in which you participated.

For more information about grants conflicts of interest and competitive advantage policies, contact Bruce S. Binder, Senior Associate Director for Grants Competition, at [HYPERLINK "mailto:binder.bruce@epa.gov"].

9. Post Employment Exceptions and Waivers

There are some exceptions and waivers, but because they depend on specific sets of facts, we recommend that you confer with OGC/Ethics about your own situation. Typical exceptions include:

Acting on behalf of the US Government

Former employees can make representations back if they are carrying out official duties on behalf of the United States. For example, the post-employment restrictions do not apply to a former employee who is re-employed by the United States or is called as a witness by Congress. The restrictions do apply, however, to former employees who work for a federal contractor. That work is not deemed to be "an activity on behalf of the United States."

Acting As An Elected Official

Former employees can make representations back to the federal government if they are carrying out their official duties as an elected official of a State or local government. Please note, however, that this exception applies only to elected officials and not to all employment of State or local governments.

Employee of A Tribe

Former employees who are employees of (not contractors) or elected or appointed officials of a tribal organization or inter-tribal consortium can represent the tribe back to the United States, provided that they submit adequate notice to the EPA Administrator and OGC/Ethics. For more information, contact OGC/Ethics.

Scientific or Technological Information or Expertise

In some instances (but not for EPA), a former employee may make communications or appearances back to the federal government solely for the purpose of furnishing scientific or technological information in accordance with procedures set forth by the agency or agencies involved. The exception does not extend to nontechnical disciplines such as law, economics or political science.

Unfortunately, at this time EPA does not have any procedures in place to apply this

exception. Therefore, to apply this exception, the Administrator would have to publish a certification in the Federal Register stating that the individual has outstanding qualifications in a scientific, technological, or other technical discipline, is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the former employee's participation. To our knowledge, EPA has never invoked this exception.

Testimony

A former employee may give testimony under oath or make statements required to be made under penalty of perjury. Unless expert opinion testimony is given pursuant to court order, or he is called as a witness by the United States, a former employee may not provide such testimony on a matter on behalf of any other person except the United States or Congress if he is subject to the lifetime prohibition contained in 18 USC §207(a)(1).

Additional Exceptions for Former "Senior Officials"

Former "senior officials" are bound by the one year cooling-off period with EPA (under the statute). Notwithstanding this cooling-off period with the Agency, you can communicate with or make an appearance before EPA in the following instances. Remember, though, that these exceptions do not apply to the permanent bar or to the two-year cooling off bar for specific party matters pending in your area of responsibility!

As an employee of a state, local government or hospital

A former senior employee may contact EPA on a new matter in order to carry out official duties as an employee of an agency or instrumentality of a State or local government, an accredited degree-granting institution of higher learning, or an approved hospital or medical research organization. *5 CFR 2641.301(c)*

Imparting Special Knowledge.

A former senior employee may make a statement that is based on his or her own special knowledge in the particular area that is the subject of the statement, provided that no compensation is received for making the statement. *5 CFR 2641.301(d)*

Political Parties and Campaign Committees

A former senior employee can make communications or appearances solely on behalf of a candidate in his or her capacity as a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party. *18 U.S.C. §207(j)(7)(A) and 5 CFR 2641.301(g).*

The exception does not apply if, at the time of the communication or appearance, the former senior employee is working for a person or entity other than: (a) a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party; or (b) a person or entity who represents, aids, or advises only such persons or entities. *18 U.S.C. §207(j)(7)(B) and 5 CFR 2641.301(g).*

Post-Employment Restrictions of the Trump Ethics Pledge
OGC/Ethics Summary
April 2018

Restrictions related to "lobbying activities"

Under Paragraph 1 of the Trump Ethics Pledge, political appointees cannot engage in lobbying activities with respect to *EPA* for five years. And pursuant to Paragraph 3, appointees cannot engage in lobbying activities with respect to any covered executive branch official[1] or non-career SES appointee for the remainder of the Administration.

	Paragraph 1	Paragraph 3
Basic Prohibition	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.	In addition to abiding by the limitations of paragraphs 1 and 2, 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.
Length of Restriction	5 years	Remainder of the Administration
Commencement of Restriction	Termination of employment as an appointee	Termination of government service
With Whom Appointees are Restricted	Covered executive branch officials at the former appointee's former agency ("with respect to that agency")	Covered executive branch officials throughout the executive branch; Non-career senior executive service appointees throughout the entire executive branch

Section 2(n) of Executive Order 13770 states that "lobbying activities" has "the same meaning as that term has in the Lobbying Disclosure Act (LDA), except that the term does not include communicating or appearing with regard to: a judicial proceeding; a criminal or civil law enforcement inquiry, investigation, or proceeding; or any agency process for rulemaking, adjudication, or licensing, as defined in and governed by the Administrative Procedures Act, as amended, 5 U.S.C. 551 *et seq*."

OGE Legal Advisory [HYPERLINK "https://www.oge.gov/web/oge.nsf/0/CE52BD5FD1149C85852580EA005E039A/$FILE/LA-17-03.pdf"] discusses how E.O. 13770 relies partly on the definition of "lobbying activities" found in the LDA, which defines this term to include both "lobbying contacts" and behind-the-scenes efforts in support of such

[1] For the purposes of E.O. 13770, "covered executive branch official" means: the President; the Vice President; any official in the Executive Office of the President; any Executive Schedule official (EL I-V); any uniformed officer at pay grade 0- 7 or above; and any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character….", including Schedule C employees. 2 U.S.C. § 1602(3). *See* E.O. 13770, sec. 2(c).

contacts.[2] "Lobbying contacts" are limited to written or oral communications with covered officials that are made on behalf of a client.[3] The term "client" means any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity.[4]

OGE notes in [HYPERLINK "https://www.oge.gov/web/oge.nsf/0/CE52BD5FD1149C85852580EA005E039A/$FILE/LA-17-03.pdf"] that the LDA's definition of "lobbying contacts" is limited to certain types of communications and excludes 19 types of communications.[5] For example, the definition excludes "a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official."[6] Also, Section 2(n) of E.O. 13770 specifically excludes additional types of communications, including any agency process for rulemaking, adjudication or licensing. Therefore, it appears that former political appointees could lobby their former agency or covered officials on these types of matters.

For purposes of the Pledge, [HYPERLINK "https://www.oge.gov/web/oge.nsf/0/CE52BD5FD1149C85852580EA005E039A/$FILE/LA-17-03.pdf"] states that "lobbying activities" includes the following:

(a) any oral or written communication to a covered executive branch official or non-career Senior Executive Service appointee; or
(b) efforts that are intended, at the time of performance, to support a covered lobbying contact to such person.

It is important to note that "lobbying activities" is a broad term that covers not just actual lobbying contacts that may trigger lobbyist registration under the LDA, but it also includes behind-the-scenes activity such as background preparation and strategic advice. Thus, these restrictions reach those individuals who are engaged in activities requiring lobbyist registration as well as other activities by non-registered lobbyists. OGE also highlights in [HYPERLINK "https://www.oge.gov/web/oge.nsf/0/CE52BD5FD1149C85852580EA005E039A/$FILE/LA-17-03.pdf"] that an activity is considered a "lobbying activity" whether or not a former appointee is required to register as a lobbyist. Therefore, there is no minimum requirement to engage in lobbying activities before the restrictions apply (i.e., no 20% service threshold). To date, OGE has issued no other guidance on these lobbying restrictions.

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[2] The term "lobbying activities" means "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time, for use in contacts, and coordination with the lobbying activities of others." 2 U.S.C. § 1602(7).

[3] 2 U.S.C. § 1602(8)(A).

[4] 2 U.S.C. § 1602(2).

[5] *See* 2 U.S.C. § 1602(8)(B)(i)-(xix) for the 19 exemptions.

[6] 2 U.S.C. § 1602(8)(B)(v).

Foreign Agents Registration Act (FARA) and FARA covered activities

Paragraph 4 prohibits political appointees, upon leaving government, from working for any foreign government[7] or foreign political party[8] that would require registering under the Foreign Agents Registration Act (FARA).[9] Note that this provision appears to be a lifetime ban and restricts appointees from engaging in any activity that would require them to register under FARA.

FARA is a complicated, ambiguous statute and OGC/Ethics is by no means an expert on what constitutes a FARA covered activity. What triggers registration under FARA is highly fact dependent and requires each former political appointee to carefully examine the nature of his/her work for a foreign government or a foreign political party. That being said, OGC/Ethics has provided a brief summary below of FARA, its definitions, activities, and exemptions, to better assist you with your determination of whether an activity requires registration under FARA.

FARA requires individuals acting within the United States as agents of "foreign principals" to register and file certain reports with DOJ.[10] The term "agent of a foreign principal" means:

> any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major party by a foreign principal, and who directly or through any other person – (i) engages within the United States in political activities for or in the interests of such foreign principal; (ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal; (iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such

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[7] "Foreign government" means the "government of a foreign country," as defined in section 1(e) of the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611(e). E.O. 13770, Section 2(g).

[8] "Foreign political party" has the same meaning as that term has in section 1(f) of the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611(f). E.O. 13770, Section 2(h).

[9] Paragraph 4 of the Ethics Pledge: "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 of foreign political party which, were it undertaken after January 20, 2017, would require me to register under the Foreign Agents Registration Act of 1938, as amended."

The "Foreign Agents Registration Act of 1938, as amended" means sections 611 through 621 of title 22, United States Code. E.O. 13770, Section 2(f).

[10] "Foreign principal" includes a government of a foreign country and a foreign political party. 22 U.S.C. § 611(b).

foreign principal; or (iv) within the United States represents the interests of such foreign principal before any agency of official of the Government of the United States...[11]

Therefore, under the Ethics Pledge, former political appointees cannot engage in "political activities" or act as a "public relations counsel, publicity agent, information-service employee or political consultant" on behalf of a foreign government or foreign political party since these activities registration under FARA. Please note that the listed activities triggering registration are written broadly and there is no *de minimus* threshold for a certain activity.

"Political activities" is defined as an activity that influences "any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party."[12] Note that this applies to influencing any agency or official, including career civil servants in all executive branch agencies. This is broader than the "lobbying activities" covered under Paragraphs 1 and 3 which is limited to direct lobbying communications to "covered" executive branch officials. Also note that the definition includes influencing "any section of the public within the United States" with reference to public policies or relations with a foreign government (e.g., grassroots lobbying).

Other FARA covered activities requiring registration include acting as a public relations counsel,[13] publicity agent or a political consultant. Under FARA, "political consultant" means "any person who engages in informing or advising any other person with reference to the domestic or foreign policies of the United States or the political or public interest, policies, or relations of a foreign country or of a foreign political party."[14]

There are exemptions from FARA registration that do not apply to certain agents of foreign principals.[15] For example, FARA exempts persons whose activities are of a purely commercial nature ("private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal") or solely of a religious, scholastic, academic, scientific or fine arts nature.[16] Lawyers engaged in legal representation of foreign principals before courts or Agencies of the United States Government are exempt, so long as the attorney does not try to "influence or persuade agency personnel or officials other than in the course of judicial proceedings, criminal or civil law enforcement inquiries,

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[11] 22 U.S.C. § 611(c).

[12] 22 U.S.C. § 611(o).

[13] The term "public-relations counsel" includes "any person who engages directly or indirectly in informing, advising, or in any way representing a principal in any public relations matter pertaining to political or public interests, policies, or relations of such principal." 22 U.S.C. § 611(g).

[14] 22 U.S.C. § 611(p).

[15] *See* 22 U.S.C. §§ 613(a)-(h).

[16] 22 U.S.C. §§ 613(d) and (e).

investigations or proceedings, or agency proceedings..."[17] FARA also exempts from registration any agent who is engaged in lobbying activities and is registered under the LDA, so long as the representation is not on behalf of a foreign government or foreign political party.[18]

One year cooling-off period with EPA

Paragraph 2 of the Ethics Pledge states that "If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions." Under 18 U.S.C. § 207(c), former "senior employees" cannot knowingly make, with the intent to influence, any communication to or appearance before their former agency for one year after leaving federal service. This prohibition, also known as the "cooling-off period,' applies if the appearance is made on behalf of another person in connection with any matter in which the former senior employee seeks official action by EPA. Please note that the restriction will apply to "any" matter, which is much broader than any "particular matter involving specific parties" and it is broader than the lobbying ban in Paragraph 3 of the Ethics Pledge since it applies to contacts with any employee as opposed to only covered officials and non-career SES appointees.

[17] 22 U.S.C. § 613(g).

[18] 22 U.S.C. § 613(h).