



National Labor Relations Board's Ethics Recusal Report

November 19, 2019



United States Government

NATIONAL LABOR RELATIONS BOARD

Office of the Chairman

1015 Half Street, SE

Washington, DC 20570

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I am pleased to present the National Labor Relations Board's Ethics Recusal Report.

When I joined the NLRB as Chairman in April 2018, the Agency was embroiled in a controversy involving Board member recusals that threatened to permanently undermine confidence and trust in the Agency. In response to that controversy, the Board took actions it believed necessary to restore confidence and comply with ethics standards, but its actions only engendered further criticism and mistrust. Confusion over the Board's recusal conduct then generated concerns about the Agency's overall ethics standards and how they were applied. In consultation with the Board, I initiated a comprehensive internal ethics and recusal review consisting of a top-to-bottom analysis of all Agency policies and procedures governing recusal requirements for Board members.

Our comprehensive effort – to our knowledge, the first of its kind in the federal government – concluded that the Agency's ethics program for identifying and handling Board member recusal obligations is strong, effective, and fully compliant with all applicable government ethics requirements. The review identified some potential gaps or areas for improvement in our recusal procedures. Accordingly, the Board has taken action to close those gaps and further enhance the Agency's ethics compliance and culture.

The steps being taken by the Board constitute significant enhancements to an already strong ethics program. I can confidently say that, in light of this review and the actions undertaken as a result of this review, the Board's ethics recusal standards should merit the full confidence of the Agency's stakeholders.

This Report was prepared and issued at my direction as the head of the Agency's ethics program under OGE regulations. I would be remiss if I did not thank my fellow Board members and the Board's staff for their significant work on this project. I am fortunate to work alongside such dedicated colleagues committed to upholding the highest ethical standards at the NLRB.

Sincerely,

John F. Ring
Chairman

NATIONAL LABOR RELATIONS BOARD'S ETHICS RECUSAL REPORT

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Introduction

The National Labor Relations Board (NLRB, Board, or Agency) announced on June 8, 2018, that it would undertake a comprehensive review of its policies and procedures governing ethics and recusal requirements for Board members. The Board undertook this Review to ensure that the NLRB's stakeholders — and the American people — would have full confidence in the integrity of the Board and its recusal process. The Board committed that the Review would culminate with the issuance of a report setting forth findings regarding appropriate procedures for compliance with ethical and recusal obligations and recommended actions to ensure compliance with such obligations. To that end, this Report discusses the steps taken by the Board in conducting the Review as well as its specific findings, recommendations and action items.

I. Background, Purpose, and Objectives

Over the years, the Agency has taken measures to ensure that proper policies and procedures are in place and that ethics and recusal issues are addressed appropriately. As a result, the NLRB has historically enjoyed a positive reputation for its ethics compliance and handling of Board member recusal issues. When isolated ethical or recusal incidents involving the Board or an individual Board member have arisen, the Agency generally has managed them in a manner that instills confidence in the impartiality and fairness of Agency proceedings.

In 2017, significant recusal and ethics issues were raised in connection with the Board's issuance of its decision in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (December 14, 2017) (*Hy-Brand I*). The Board's handling of the recusal concerns in that case and the Board's subsequent response to those concerns exposed possible gaps in the Board's internal ethics and recusal protocol. Ultimately, the unusual situation in *Hy-Brand* prompted an Inspector General investigation, Congressional inquiries, calls for a Board member's removal and

the historic reconsideration and revocation of a Board decision following issuance. More troubling, serious concerns were raised regarding both the procedure and the substance underlying recusal determinations. The circumstances in *Hy-Brand* were undoubtedly rare, but the concerns it raised demonstrated that even rare circumstances have the potential to significantly damage the Agency's reputation. Although this Report is not intended to focus on the events of *Hy-Brand*, it is important to acknowledge that those events were a catalyst for this Review and many of the concerns there were instructive in focusing this comprehensive internal evaluation of the Agency's ethics and recusal requirements.

At the outset of the Review, the Board agreed to the following statement of purpose:

Critical to the Board's mission is ensuring that the NLRB's stakeholders and the American people generally have full confidence in the integrity of the Agency and no doubt that all matters before the Agency will be handled in a fair and impartial manner. This requires internal Board policies and procedures to ensure compliance with all ethical requirements and recusal obligations. Recent events and press reports have surfaced questions about whether the NLRB has in place the proper safeguards necessary to ensure full confidence in the Board's fairness and confidentiality. A thorough review of the Board's ethics and recusal policies and practices is necessary to restore full confidence in the Board.

Within that context, the Board set forth the following actions it intended to pursue in connection with the Review:

1. Review and evaluate all policies regarding the ethical obligations and recusal requirements of Board members and other Agency personnel;
2. Review and evaluate procedures for identifying ethically-required recusals;
3. Review roles and responsibilities of Agency personnel in connection with ethics and recusal issues;
4. Explore the possibility of seeking a general advisory opinion from the Office of Government Ethics (OGE) regarding whether the Board's Designated Agency Ethics Official (DAEO) has authority to make binding recusal determinations regarding presidential appointees;

5. Compare Board policies regarding the above issues with those of similar agencies, including possibly seeking assistance from the Administrative Conference of the United States (ACUS);
6. If and as necessary, revise Board policies and procedures governing ethical issues and recusals; and,
7. As necessary, direct the implementation of new procedures to ensure the Board's full compliance with all ethics and recusal obligations.

II. Review and Evaluation

To answer the questions identified at the outset of the Review, the Board embarked on a determined effort to define the contours of a model government ethics program. Over the course of this extensive investigation, Board staff reviewed Agency and government policies regarding ethics obligations and recusal requirements, the roles and responsibilities of various Agency functions, and the procedures for identifying ethically-required recusals. The Board obtained guidance from OGE, conducted benchmarking with similar agencies and ACUS, and reviewed its own history of recusal decisions. This broad survey gave invaluable perspective on the past and cogently informed recommendations for going forward. The findings are summarized below.

A. Review of Law and Policy Regarding Ethical Obligations and Recusal Requirements

At the initiation of the Review, the Board, working with the Ethics Office and the Board's Solicitor, identified all controlling legal authority regarding Board member recusals:

1. Controlling Legal Ethics Authority

- a. Criminal Conflicts of Interest Statute, 18 U.S.C. § 208 – *Financial Conflicts of Interests* – This law prohibits participation in a particular matter¹ that will have a direct and predictable effect

¹ OGE Memorandum D0-06-029 (October 4, 2006) compares and contrasts the terms “particular matter involving specific parties,” “particular matter,” and “matter” as used in various government ethics rules and statutes. OGE notes that a “[f]ailure to appreciate this distinction can lead to inadvertent violations of the law.” Id. at 5. The memorandum explains that the term “particular matter involving specific parties” is meant to be “the narrowest” of the three types of matters. Id. at 2. Thus, the memorandum states that, “[w]hen 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.’” Id. at 3. OGE has emphasized that this term “typically

upon Board members' own financial interests, as well as the imputed financial interests of the following individuals and organizations: (i) spouse; (ii) minor child; (iii) general partner; (iv) an organization in which a Board member serves as an officer, director, trustee, general partner or employee; or (v) a person or organization with whom a Board member is in negotiation for or has an arrangement concerning prospective employment. In most circumstances, it does not govern a member's relationship with a prior employer or client.

- b. Executive Order 13770 of January 28, 2017 (Ethics Commitments by Executive Branch Appointees) (commonly known as the "Trump Ethics Pledge") – *Covered Relationships* – Under the Trump Ethics Pledge, all presidential appointees must agree, for a two-year period from the date of appointment, to refrain from participation in a "particular matter involving specific parties" in which the Board member's former employer or the member's former client is a party or the representative of a party (includes former clients as well as parents and certain subsidiaries of former clients).
- c. Regulations Implementing the Ethics in Government Act's Standards of Ethical Conduct for Executive Branch Employees, 5 C.F.R. § 2635.502 – *Standards of Conduct "Appearance Test"* – Under the Standards of Conduct, Board members, like all federal employees, must consider whether their impartiality would be questioned whenever their participation might affect their personal or business relationships. In evaluating whether there is an appearance of a conflict of interest, a member must consider whether a reasonable person, with

involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties." 5 C.F.R. § 2640.102(1). For Board recusal purposes, the term "particular matter involving specific parties" includes case adjudications; however, the phrase does not cover matters of general applicability, such as rulemaking. *Id.* at 3-4.

knowledge of the relevant facts, would question the Board member's impartiality in the matter. There are two kinds of "appearance test" conflicts:

- i. *Conflicts Based Upon "Covered Relationships"* (5 C.F.R. § 2635.502(a)(1)) – Requires consideration, in any particular matter involving specific parties, of whether a reasonable person would question the Board member's impartiality in the matter if a person with whom the Board member has a "covered relationship" is or represents a party to the matter. A "covered relationship" includes a member of the employee's household, someone with whom the employee has a close personal relationship, or a relationship with "[a]ny person for whom the [Board member] has, *within the last year*, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee." (Emphasis added.) (This last category, involving former employers and former clients, is also covered by the mandatory *two-year* recusal period in the Trump Ethics Pledge.)
- ii. *Conflicts Under the "Catch-all Provision"* (5 C.F.R. § 2635.502(a)(2)) – Requires consideration of whether, in any particular matter,² "circumstances other than those specifically described in [the Regulations] would raise a question regarding his impartiality..." In determining whether recusal is appropriate under the catch-all

² The term "particular matter" as used in the catch-all is broader in scope than the restrictions respecting covered relationships found in 5 C.F.R. § 2635.502(a)(1). Thus, OGE has stated that the term "particular matter may include matters that do not involve parties and is *not* limited to adversarial proceedings or formal legal relationships." See OGE Memorandum D0-06-029, at 5 (Oct. 4, 2006) quoting *Van Ee v. Environmental Protection Agency*, 202 F.3d 296, 302 (D.C. Cir. 2000). Therefore, the term "particular matter" includes, the categories of matters subsumed in "particular matters involving specific parties" as well as "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." *Id.* at 8. Accordingly, rulemaking could implicate concerns under the catch-all provision as a "particular matter" proceeding if it focuses on a discrete and identifiable class of persons in a particular industry or profession. See OGE Informal Advisory Letter 93 x 25.

provision,³ employees may consider a number of factors related to whether the appearance of a conflict of interest exists. Although other factors not listed may be relevant in certain circumstances, the factors that may be considered include:

1. the nature of the relationship involved;
2. the effect that the resolution of the matter would have upon the financial interests of the person involved in the matter;
3. the nature and importance of the Board member's role in the matter and the extent to which the Board member is called upon to exercise discretion in the matter;
4. the sensitivity of the matter;
5. the difficulty in assigning the matter to another Board member; and
6. any adjustments that may be made in a Board member's duties that would reduce or eliminate the likelihood that a reasonable person would question his/her impartiality.

2. Guidance from the Designated Agency Ethics Official

The DAEO provided the following guidance prior to the Review to assist the Board in evaluating and resolving potential conflicts of interest:

- a. OGE Regulations 5 C.F.R. Section 2638.104(c)(6) and 5 C.F.R. Section 2635.502(c) give the DAEO the authority to make binding *sua sponte* decisions to recuse or disqualify a Board member for matters involving:
 - i. A financial conflict of interest under Section 208; or
 - ii. A covered relationship.
- b. The DAEO's authority to make such determinations regarding "appearance issues" is less clear. Although there is some ambiguity in the regulations, the generally accepted view is that the DAEO cannot make a *binding* recusal determination under the catch-all provision, but may recommend a course of action.

³ This is called the catch-all provision because it captures conflicts not involving a covered relationship but based on some nexus to a party or representative in a matter.

- c. Ethics Guidance on Overruling Precedent (“Red Flag” Issues): Following *Hy-Brand*, the DAEO provided the Board with guidance for situations where (i) there is no initial recusal issue, but (ii) a Board member is recused from a lead case that established a legal standard and that is still open (e.g., on appeal), and (iii) the new case that is pending before the Board raises similar legal issues and may be used to overrule the precedent in the open, lead case.
- i. These are generally “appearance” issues (but also may implicate the Trump Ethics Pledge).
 - ii. Board member is not prohibited from taking judicial notice of another case from which s/he is recused.
 - iii. Board member is not prohibited from considering whether a case from which s/he is recused is controlling in another case.
 - iv. Board member is not prohibited from expressly overturning a standard articulated in a case from which s/he is recused or from finding that the standard in the recused case does not apply to the pending case and/or should be modified under the particular facts of the pending case.
 - v. Board member recused from one or more of the cases in a potential pool of “new lead cases” is not prohibited from participating in a case from which s/he is not recused, even though that case may become the lead case and affect pending case(s) from which the Board member is recused.
 - vi. Potential “red flag” situations that could cause an ethics violation:
 1. Contemplation of a majority decision that incorporates wholesale, or to a very large degree, the dissenting opinion in a case from which the Board member is recused.
 2. Contemplation of a majority decision that applies the new legal standard to the facts of a case from which the Board member is recused.
 3. Proffer or disclosure to a Board member of confidential information, including deliberative process information, from a case from which the

Board member is recused, and to be used for the purpose of adjudicating the new case.

4. Selection of a lead case to overrule a legal standard established in a case from which a member is recused when the parties have not asked the Board to review that legal standard and addressing that issue is not necessary to decide the case.
5. Participation in a matter that arises in an informal way and not through a case assignment from the Office of the Executive Secretary (ES Office) or the Solicitor's Office, both of which screen for conflicts.
6. Adjudication of a case within a limited and rushed timeframe.
7. Knowledge that a Board member's former firm is participating in a matter "behind the scenes" and/or directing the litigation, or establishing the legal theory, even if the firm has not filed a notice of appearance in the matter.
8. Using *amicus* briefs from a case from which a Board member is recused to inform deliberations in a new pending case.

B. Roles and Responsibilities of Agency Personnel

Employees at the NLRB take their ethical responsibilities seriously. As part of the review of the Board's policies and procedures governing ethics and recusal requirements, the Board took a holistic look at employees' existing roles and responsibilities. The findings reveal a strong system of accountability, with multiple layers of review – from presidential appointees to their legal staffs to administrative professionals – working assiduously to prevent conflicts of interest and ethical pitfalls.

1. Board Members

- a. The Chairman is the individual responsible for the Agency's compliance with government ethics requirements. 5 C.F.R. § 2638.107.
- b. All Board members, individually and collectively, are responsible for establishing and maintaining a high ethical standard for the Agency and leading by example, including by complying with Ethics regulations and the Trump Ethics Pledge.
- c. Board members set expectations for high ethical standards and compliance among Agency staff.

d. Board members work closely with the DAEO during the nomination process to identify certain conflicts, receive comprehensive individual briefings from the Ethics Office immediately following their appointment, and participate in annual training to ensure their ongoing compliance with ethical obligations.

e. The Board member's nominee report contains a list of certain recusals. Upon appointment, Board members provide additional individual recusal information to the DAEO, which is used to prepare the complete recusal list. The Ethics Office reviews the final list with the Board member.

f. Board members make recusal determinations regarding whether to participate in a particular matter and seek guidance from the DAEO in doing so.

2. Board Member Staff

a. All Board staff are responsible for the highest standards of ethics compliance.

b. In cases where there is no initial recusal issue, but the drafting of the Board's decision includes arguments or references that give rise to a possible recusal issue, the Board member's Chief Counsel or Deputy Chief Counsel will seek the advice of the DAEO regarding whether recusal of the Board member is required.

c. All Board staff are responsible for identifying and raising potential recusal issues.

3. Designated Agency Ethics Official

a. OGE regulations require each federal agency to appoint a Designated Agency Ethics Official (DAEO), who has "primary responsibility for directing the daily activities of the agency's ethics program and coordinating with the Office of Government Ethics." 5 C.F.R. § 2638.104(a).

b. OGE requires agencies to appoint DAEOs with the expertise and skills necessary to manage a complex ethics program and “generate support for building and sustaining an ethical culture.” The Board’s current DAEO – a member of the Senior Executive Service with decades of ethics and NLRB experience –satisfies these requirements.

c. Subject to the Chairman’s role as head of the Agency’s ethics program, the DAEO is responsible for the myriad programmatic responsibilities necessary to fulfill the NLRB’s commitment to maintaining an ethical culture. These responsibilities, listed at 5 C.F.R. Section 2638.104(c), include:

- i. Providing advice and counseling to current and former Agency employees, including Board members, on their responsibilities under government ethics laws and regulations;
- ii. Taking appropriate action to resolve conflicts of interest and the appearance of conflicts of interest, through recusals, divestitures, waivers, authorizations, reassignments, and other appropriate means;
- iii. Carrying out a robust and effective ethics education program for the Agency;
- iv. Identifying potential conflicts of interest through the Agency’s financial disclosure program; and
- v. Working with the Inspector General and the Department of Justice as needed on investigation and enforcement of criminal conflict of interest laws.

d. With the DAEO’s oversight, the Ethics Office has primary responsibility for Board member recusal lists, which the Office prepares initially in consultation with the Board member, and later reviews and updates, as necessary, in consultation with the Office of the Executive Secretary, the Solicitor, and the Board member’s office.

e. The DAEO makes recusal determinations and/or provides guidance to Board members regarding recusal determinations on a case-by-case basis, as needed.

4. Office of the Executive Secretary

a. In consultation with the DAEO, the Office of the Executive Secretary (ES Office) maintains current Board member recusal information and updates this information in consultation with the Board member as changes occur.

b. When a new Board member joins the Agency, the ES Office works with the Ethics Office and the Office of the Chief Information Officer (OCIO) to identify all currently pending cases from which the new Board member must be recused.

c. The ES Office reviews all incoming cases for recusal issues prior to assignment to a Board member office for processing, and to a panel for consideration.

5. Office of the Solicitor

a. In consultation with the DAEO and members, the Solicitor provides legal advice and assistance to Board members on ethical obligations, the implications of those obligations for decision-making, and due process issues.

b. The Solicitor's Office also reviews all cases it prepares for Board consideration for recusal issues prior to circulation to Board members for votes.

6. Office of the Inspector General

a. OGE regulations recognize that "an agency's Inspector General has authority to conduct investigations of suspected violations of conflict of interest laws and other government ethics laws and regulations" and has the general discretion to make reports relating to the administration of the programs of the applicable agency. 5 C.F.R. § 2638.106.

b. The IG may provide OGE with notice of referrals to the Department of Justice and may consult with the Director of OGE or the DAEO for guidance on the application of government ethics laws and regulations.

c. Neither OGE regulations nor the Inspector General Act gives an Inspector General the authority to provide general ethics advice to agency employees, a responsibility that is specifically vested in the DAEO.

C. Procedures for Identifying Ethically-Required Recusals

The Board, working with the DAEO, the Solicitor and the Executive Secretary, identified all existing internal procedures covering Board member recusals. Those procedures are detailed below.

1. ES Memo 18-1 (January 30, 2018) – Office of the Executive Secretary’s Handling of Board Member Recusals

ES Memo 18-1 (see Appendix 1) provides the specific steps that the ES Office takes during the case assignment process to identify, designate, and track cases that require Board member recusals. This memorandum lists the resources used to identify recusals, sets forth the method by which cases requiring recusal will be designated in the Agency’s electronic case management system, and identifies the means by which designated recusal cases will be tracked.

Specifically, in the identification stage, ES Memo 18-1 explains that the Ethics Office works with a newly-joining Board member to prepare that member’s initial recusal list. That list designates the duration of recusal and includes entities and organizations for which Board member recusal would be required (i) under the Ethics Pledge if that organization were a party to a case or represented a party to a case (to include the Board member’s former employer(s) and clients for two years prior to the date of the Board member’s appointment); and (ii) based on a financial conflict (to include a financial holding or a spouse’s employer). Once this list is created, a search is conducted to identify all cases then-pending before the Agency where recusal may be required. Prior to

assigning a case to a Board staff for processing, the ES Office reviews each new case that comes to the Board to identify whether a recusal issue exists, either because a party or legal representative appears on a Board member's recusal list, or a Board member's former law firm is or was a participant in that case. The ES Office reviews the recusal list and the list of participants in a case to ensure that a Board member is not assigned to participate in a case in which that member is recused.

The recusal list prepared by the Ethics Office is also posted on an internal Board-side website so that all Board personnel can access that recusal list, which ensures full transparency of potential recusal issues across the Board staff.

When a recusal issue is identified for a particular case, the ES Office enters a designation in the Board's electronic case management system, within the file specific to that case, reflecting the Board member's recusal.

Based on the recusal designations, the ES Office can track all pending cases in which a recusal has been noted. This is particularly important in the circumstance of panel changes, because it ensures transparency, which in turn ensures that a recused member does not participate in a case from which they have been recused.

2. ES Memo 18-2 (April 4, 2018) – Specific Procedures for Identifying and Designating Board Member Recusals

ES Memo 18-2 (see Appendix 2) supplements ES Memo 18-1, providing further detail regarding steps taken by the ES Office and the Solicitor's Office to handle matters in which a Board member is potentially recused.

For the identification phase of the recusal review, ES Memo 18-2 sets forth that the ES Office checks all company names, to include any identified d/b/a names. It also states that in reviewing case participants, the ES Office checks whether an identified law firm filed an amicus brief in the case or was a former case participant as well as whether there are any open "related cases"

where the member's former law firm is a party or is the legal representative of a party or case participant. These circumstances may require consultation with the Ethics Office to determine whether recusal may be required.

ES Memo 18-2 includes additional detail as to the method used by the ES Office to enter the recusal designations in the particular fields in the Agency's case management system. It also sets forth the practice for exceptions for cases that do not require automatic recusal, but where the potential of a conflict could require additional research and the steps to be taken to conduct such review, to include consultation with the Ethics Office.

Lastly, this memorandum sets forth the recusal review steps to be followed for cases that are received directly by the Solicitor's Office without going through the ES Office assignment process. Those steps parallel the steps otherwise taken by the ES Office, to include reviewing the recusal list for named employer(s) and any d/b/a names, case participant review, related case review and possible parent/subsidiary review.

All of these steps are taken to ensure a recused Board member does not access a case file, participate in a case, or have discussions about any case from which they are recused.

3. Ethics Office Advice Request Form for Board Staffs

In 2019, the Ethics Office created a standardized form for Board offices to seek guidance regarding potential recusal issues, recognizing that potential recusal obligations do not always fall neatly into the typical processes identified below. The form – used by members and all other employees – ensures that the Ethics Office receives all relevant information regarding the inquiry and includes a new checklist and process to police these issues. The Ethics Office also developed internal Agency support to ensure the ability to research and identify parent/subsidiary organizational constructs for the purpose of recusal reviews.

D. Practice of Board Members Acting on Own Recusal Motions

For this ethics Review, the Board analyzed how it had traditionally handled motions to recuse members. Identifying prior decisions in which a party filed a motion to recuse was a challenging task, however. Most Board cases where recusals occurred simply recite that a member was recused or note that the member otherwise did not participate in the decision without explaining *why* the member(s) sat out or *what prompted* them to do so. The Board believes that most of these cases involve the Board's normal processes working as they should – identifying conflicts and recusing disqualified members efficiently, effectively, and without disputes.

Many prior cases, however, do contain substantive discussion of recusal issues, but they reveal no standard practice on how parties should address recusal motions or how the Board should handle them. For example, in numerous instances, an individual Board member addressed potential recusal issues; in these cases, the Board member made the decision to either recuse himself or herself, or to decline to do so.⁴ Similarly, the Board has sometimes referred a motion or request for recusal to the relevant Board member to address.⁵ By contrast, in certain cases, many of which addressed frivolous or previously decided recusal issues, the Board itself ruled on a request for

⁴ See, e.g., *FedEx Home Delivery, an Operating Division of FedEx Ground Package Systems, Inc.*, 361 NLRB 610, 610 fn. 9 (2014) (Member Miscimarra recused himself); *Regency Heritage Nursing & Rehabilitation Center*, 360 NLRB 794, 794 fn. 1 (2014) (Member Hirozawa determined not to recuse himself, despite Respondent's request that he do so); *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234, 238 (2010) (Member Becker declined to recuse himself); *Southern Saddlery Co.*, 90 NLRB 1205, 1205 fn. 1 (1950) ("Board Member Paul L. Styles has disqualified himself from participating in this case, because the complaint herein was originally issued under his signature as Regional Director of the Tenth Region").

⁵ See, e.g., *Robbins Motor Transportation*, 225 NLRB 761, 761 fn. 1 (1975) (Board referred disqualification motion to Member Walther to address, without Board addressing motion itself); *West India Fruit & Steamship Co.*, 130 NLRB 343, 345 fn. 6 (1961) (Board referred disqualification motions to Member Jenkins and affirmed his decision to deny motions, finding that grounds presented were legally insufficient).

recusal.⁶ Finally, in a fourth variation, both the Board and the individual Board member have addressed the same recusal request.⁷

In sum, although the Board's past practice in this regard has been inconsistent, typically the relevant Board member has addressed any potential recusal questions. The Board's lack of a transparent and clear process for handling these motions, however, has led to confusion among internal players and external constituencies, undermining case processing and Board efficiency.

E. Guidance from OGE

The Board worked with the DAEO to seek clarifications on ethics rules and regulations, and the DAEO engaged with the Office of Government Ethics (OGE) to address those questions. Through these communications, OGE confirmed that the Standards of Conduct (5 C.F.R § 2635.502) apply to all presidential appointees without exception and that the sources of controlling conflict of interest legal authority are the financial conflict of interest statute (18 U.S.C. § 208), Paragraph 6 of the Trump Ethics Pledge, the covered relationships provision of the Standards of Conduct (5 C.F.R § 2635.502(a)(1)), and the "catch-all" appearance issue provision (5 C.F.R § 2635.502(a)(2)). OGE confirmed the DAEO's authority to make determinations, including *sua*

⁶ See, e.g., *Standard Parking et al. d/b/a ABM Parking Services et al.*, 360 NLRB 1191, 1191 fn. 1 (2014) (Board denied Union's motion to disqualify Member Miscimarra as moot because he did not participate in consideration of the case); *New Vista Nursing & Rehabilitation, LLC*, 22-RC-013204, 2011 WL 1576899 (2011) (Board denied Respondent's motion to recuse Member Becker, consistent with principles set forth in *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234 (2010)); *Columbia Pictures Corp.*, 85 NLRB 1085, 1086 fn. 6 (1949) (Board denied motions to disqualify the Board based on arguments relating to unnamed current and former members).

⁷ See, e.g., *1621 Route 22 West Operating Co.*, unpublished order in Case 22-RC-013139, fn. 2, 2011 WL 5822387 (2011) (denying motion for reconsideration, Board stated the issue of Member Becker's recusal is addressed in his separate statement, and there are no extraordinary circumstances warranting reconsideration; Member Becker addressed recusal motion in separate statement); *St. Joseph Hospital*, 224 NLRB 270, 270 fn. 1 (1976) (Board denied Union's motion to disqualify Member Penello from participating, and Member Penello also individually considered the motion and found no basis for disqualifying himself). See also *Hy-Brand Indust. Contr.*, 366 NLRB No. 93, slip op. at 5 fn. 4 (2018) (Members Pearce and McFerran, concurring) (summarizing the Board's varying approaches to resolving motions to recuse members).

sponte, on financial conflict of interest and covered relationship recusal matters. On appearance issues, the member either can make his or her own assessment as to recusal or can ask the DAEO for a non-binding recommendation. The DAEO also can *sua sponte* make a recommendation to the member or can make a *sua sponte* determination that governmental interests outweigh appearance concerns. With respect to whether a potential conflict violates the Trump Ethics Pledge, the DAEO has the authority to make that determination based on OGE legal advisories and in consultation with OGE and the White House, as necessary, with only the White House having the authority to grant a Pledge waiver.

Through subsequent discussions, OGE identified the enforcement mechanisms that come into play when a Board member disagrees with a DAEO recusal determination. These mechanisms allow the Board member the ability to challenge that determination by seeking a higher-level review. The Standards of Conduct (5 C.F.R. §§ 2638.501-504) provide that where a DAEO decision is challenged, certain notifications are required. Internally, the Chairman must be notified, as the head of the Agency. Where a Board member pursues his or her dispute of a DAEO recusal determination beyond the head of the Agency, that continued disagreement would require external reporting to OGE and potentially to the Department of Justice and/or the White House.

F. Benchmarking with Similar Government Agencies and Other Guidance

The Board engaged in a significant effort to benchmark with other federal agencies about best practices for identifying recusal obligations and preventing conflicts of interest. In selecting agencies for benchmarking, the Board worked to identify solid comparators from other multi-member commissions that engage in adjudication or litigation. The Review focused on independent agencies composed of three to five presidential appointees with Senate confirmation, staggered terms, bipartisan compositions, and diverse backgrounds in government, academia, and industry. Over the course of several months, senior NLRB leadership – including its DAEO, Solicitor,

Executive Secretary, and Chief of Staff – met with ethics officials and legal counsel from the following eight independent agencies:

- Commodity Futures Trading Commission
- Equal Employment Opportunity Commission
- Federal Communications Commission
- Federal Trade Commission
- Merit Systems Protection Board
- National Mediation Board
- Occupational Safety and Health Review Commission
- Securities and Exchange Commission

Benchmarking revealed that the Board’s processes for identifying and resolving conflicts of interest meet the same high standards as those of our fellow agencies.

Most importantly, the Board learned that its screening procedures for developing recusal lists and evaluating appearance questions (as summarized in *Findings and Recommendations*, Section III.A, below) comports with the best practices of independent agencies. Like the Board, sister agencies engage their presidential leadership during the nomination process to begin identifying potential conflicts of interest under Section 208, the Presidential Ethics Pledge, and the Standards of Conduct, using the nominee’s financial disclosure statement and White House vetting materials to kick-start the process. Upon confirmation and appointment, like at the NLRB, the agencies’ ethics offices provide the required initial ethics briefing and work with the presidential appointee to further develop their recusal list and identify black-letter⁸ and appearance conflicts. Once the list is final, the agencies typically put a screening arrangement in place and designate a gatekeeper – often the clerk

⁸ The phrase “black-letter conflicts” is used to refer to conflicts that are specifically identified in law, rule, or regulation, such as the prohibitions under 18 U.S.C. Section 208, the Trump Ethics Pledge, or 5 C.F.R. Section 2635.502(a) (“covered relationships”).

of the agency (like the Board’s ES Office) or a designated person on the member’s staff – to screen cases before they reach the member’s desk. For closed cases involving black-letter recusal obligations and on all appearance questions, members work directly with ethics staff, employing an “interactive process” to reach a result consistent with the agency’s ethical culture.

During benchmarking discussions, the Board also probed how other independent agencies handled motions to recuse individual members and how they resolved conflicts between the DAEO and presidential leadership. Regarding motions seeking recusal, most agencies reported that such motions were rare, and that they were typically handled informally. Only two of the agencies the Board benchmarked against maintain formal rules governing aspects of recusal for presidential appointees.⁹ Typically, when such motions are filed with comparator agencies, the presidential appointee and his or her staff work closely with the DAEO to evaluate the request, receive guidance, and make a decision. Proving that the Board’s experience during *Hy-Brand* entered true uncharted territory, not a single agency with which Board staff benchmarked recalled a situation in which a presidential appointee, after consulting with the DAEO and engaging in interactive discussions, ultimately disagreed with a DAEO’s determination on black-letter conflicts or a DAEO’s recommendation on appearance issues, either when raised *sua sponte* or through a motion to recuse.

In sum, input gathered from other agencies confirmed that utilizing an “interactive process” between the DAEO and the presidential appointee (or the appointee’s designee) is the best practice for reaching a consensus decision. This is generally the process used at the NLRB and, as noted

⁹ See *Disqualification of Commissioners*, Federal Trade Commission, 16 C.F.R. § 4.17 (presenting motions for disqualification to the individual Commissioner, and then to the Commission as a whole for decision if the Commissioner declines to recuse); *Qualification to Participate in Particular Matters*, Securities and Exchange Commission, 17 C.F.R. § 200.60 (placing responsibility for deciding whether to participate in a matter “with that individual member”); see also *Disqualifying a Judge*, Merit Systems Protection Board, 5 C.F.R. § 1201.42 (setting forth procedure for seeking recusal of administrative judge; the process could also apply to MSPB members).

below, the Board intends to incorporate that process into its written protocols for handling disputes between a Board member and the DAEO.

G. Discussion of Work with ACUS

The Executive Secretary, as the Agency's liaison to the Administrative Conference of the United States (ACUS), actively engaged with ACUS representatives regarding the Agency's ethics and recusal Review. An ACUS representative assisted the Executive Secretary with identifying other similarly-situated federal agencies with which it would be instructive to have benchmarking discussions. This information was critical to the benchmarking portion of the Review conducted by the Board.

In addition, ACUS undertook a project in late 2018 to develop a recommendation for administrative agencies regarding "Recusal Rules for Administrative Adjudicators." The Executive Secretary participated in this project and had the opportunity to engage on various issues that arise not only for non-presidential appointee agency adjudicators, but also for those whose roles more closely resemble that of Board members. Through this initiative, the Executive Secretary also met with representatives from multiple federal agencies who shared specialized knowledge about this topic. The participants in the committee meeting included, among others, the General Counsel of OGE, the General Counsel of the Occupational Safety and Health Review Commission, and a Commissioner of the Equal Employment Opportunity Commission who, as a presidential appointee herself at the time, was directly affected by the types of recusal issues the NLRB was reviewing.

The ACUS project on recusal rules was not originally intended to apply to agency heads, but through significant discussion amongst the committee members, it was recognized that recusal issues for agency heads can raise many, if not all, of the same issues affecting the recusal of administrative adjudicators. As a result of these discussions, the following language was added to the ACUS recommendation: "Although this Recommendation does not apply to adjudications

conducted by agency heads, agencies could take into account many of the provisions in the recommendation when establishing rules addressing the recusal of agency heads.” The ACUS recommendation was adopted by the full ACUS assembly in December 2018.

The ACUS recommendation regarding “[Recusal Rules for Administrative Adjudicators](#)” states that Agencies should adopt rules for recusal of adjudicators who preside over adjudications governed by the Administrative Procedures Act, and sets forth standards and considerations for agencies when establishing such rules. The ACUS recommendations, and importantly the discussions surrounding the development of those recommendations, were extremely helpful and instructive in connection with the Review.

III. Findings and Recommendations

A. Current Practices for Identifying Conflicts, Establishing Screening Arrangements, and Obtaining DAEO Advice on Potential Appearance Questions Reveal Strong Protections Against Conflicts of Interest

This comprehensive Review provided an opportunity for the Board to examine every aspect of its compliance with ethical requirements related to Board member recusals. The Board examined all existing policies and procedures for identifying potential conflicts of interest that might require recusal. The Board also reviewed its procedures for the necessary screening that ensues when a recusal situation has been identified. The Review considered the DAEO’s role and participation in these procedures as well as the practices for seeking DAEO advice regarding potential recusals. Although the Board identified certain areas for improvement (discussed below), the Review disclosed that the Agency’s ethics program for handling Board member recusals is strong, fully compliant with all applicable government ethics requirements, and should have the full confidence of the Agency’s stakeholders.

The Board has a rigorous and well-developed process for identifying potential conflicts that may require recusal. As discussed above, the primary tool for compiling all identified conflicts is the official Board member's recusal list that is prepared by the Ethics Office. Board member recusal lists are closely reviewed and monitored for accuracy and routinely updated by the Ethics Office, in consultation with the ES Office, the Solicitor, and the Board member's office. Compilation of the recusal list begins before a Board member assumes his/her position. Working with the prospective new Board member, the DAEO's office first identifies certain recusals from the prospective Board member's nominee report. Following the Board member's appointment, the Ethics Office obtains further information that is used to prepare the recusal list, which reflects conflicts based on former employers, former clients, and financial assets. The Ethics Office updates the list following review of the Board member's annual financial disclosure report; for example, a Board member may have a new financial interest that creates a disqualifying conflict. The recusal lists are also updated to reflect changed circumstances, such as a change in a corporate organizational structure that results in an additional recusal obligation. In addition to supplementing a member's recusal list after their appointment, the Ethics Office routinely updates these lists based on questions brought to it, whether from the ES Office, the Solicitor's Office, Board staffs, or based on information provided by members in their annual financial disclosure forms.

Board members' recusal lists are utilized throughout a Board member's term to screen for recusal issues before any case is assigned. The ES Office manually checks Board member recusal lists before each case assignment, and recusals are noted in the individual case file within the Agency's electronic case management system of record. Additionally, all Board member staffs are required to be vigilant in spotting and reporting any otherwise latent recusal issues. All Board member recusal lists are available on a Board-wide intranet site so that all Board staff have access to the information. Any questions or concerns about screening a Board member are directed to the

DAEO. To facilitate questions being brought to them, the Ethics Office has created a standard form for submitting potential conflicts for review, which lends consistency and predictability to the process and ensures that all relevant information is captured. The DAEO's office has established a very user-friendly approach, encourages inquiries and questions, and generally responds in a very timely fashion.¹⁰

While the recusal lists provide information necessary for screens involving covered relationships (under 18 U.S.C. § 208 and the Trump Ethics Pledge), the DAEO provides guidance and advice to Board members for “catch-all” appearance issues (under 5 C.F.R. § 2635.502(a)(2)). Importantly, beginning the first weeks after a member takes the oath of office, the DAEO provides training to Board members, their Chief Counsel and Deputy Chief Counsel on identifying conflicts of interest, including appearance issues. Upon request of a Board member, the Board member's staff or, *sua sponte*, the DAEO will review a potential appearance-based conflict and provide guidance. Upon notification and review of the issue, the DAEO provides written analysis regarding the potential appearance concerns, typically including recommendations. The benchmarking conducting during the Review revealed that the NLRB's process comports with parallel processes at other agencies.

Notably, the NLRB has a robust ethics program and a strong ethical culture. The NLRB's Ethics Office administers a combined ethics program that disseminates guidance to all Agency employees on both legal ethics and government ethics inquiries. The Ethics Office ascribes to a philosophy of blending values-based ethics with compliance-based ethics. The DAEO, as the highest ranking official in the Ethics Office, provides daily oversight and supervision to both the legal ethics and government ethics programs.

¹⁰ This is not to suggest that the Ethics Office hurries its responses. Although always timely in their responses, the Ethics Office may take additional time to complete its response, as necessary, if a recusal question presents a novel issue and/or requires consultation with OGE.

The Ethics Office, under the DAEO's supervision, administers the Agency's government ethics program to ensure compliance with all relevant government ethics rules and regulations. The DAEO, on the behalf of the Agency, acts as the primary liaison with OGE through the OGE assigned desk officer. The Ethics Office provides counseling to all Agency employees respecting government ethics matters such as conflicts of interest, acceptances of gifts and payments from outside sources, use of government resources, Hatch Act compliance, outside employment activities, filing of financial disclosures and post-employment guidance. The Ethics Office provides annual training that is mandatory for Board members and financial disclosure filers. The same training is given to all NLRB supervisors and managers. Supported by Agency management, the Ethics Office provides periodic newsletters, updates and job aids to all Agency employees, including Board members and staff.

The NLRB's government ethics program received favorable ratings by OGE in its audit, which collects and assesses ethics program compliance data. In the most-recent audit completed on June 25, 2019, OGE identified no vulnerabilities in the Board's ethics program. To maintain this culture, the Ethics Office routinely meets the NLRB's performance goals of providing timely resolution of ethics inquiries. For example, in fiscal year 2019, it resolved 88.9% of all ethics inquiries within 5 business days. The Ethics Office also complies with all OGE directives and deadlines.

Demonstrating the strength of the NLRB's ethics program and procedures for preventing conflicts of interest, since 1941, no case has been identified in which a court of appeals has reversed an NLRB decision because a member improperly participated.¹¹ Although even a single ethical

¹¹ See *Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 2345 (3d Cir. 1941). Indeed, just over the last 10 years, the courts of appeals have unanimously rejected every conflict of interest challenge to a Board member decision to participate in a case. See *1621 Route 22 W. Operating Co., LLC v. NLRB*, 725 F. App'x 129, 136 (3d Cir. 2018); *NLRB v. New Vista Nursing & Rehab.*, 870 F.3d 113, 125 (3d Cir. 2017); *1621 Route 22 W. Operating Co., LLC v. NLRB*, 825 F.3d 128, 143 (3d Cir. 2016); *NLRB v. Regency Heritage Nursing &*

breach in the Board's 84-year history is one breach too many, 78 consecutive years without judicial reversal of a recusal determination is an admirable track record.

B. Improved Identification of Potential Recused Parties

Currently, the Agency identifies potential recusals of Board members based on a manual review of the most-current recusal list. Any analysis of corporate relationships or other parent/subsidiary analysis is also performed manually, to the extent that such relationships are known. Furthermore, the DAEO has arranged to enhance this process by improving the Board's research capabilities. While this manual system has been effective, there obviously are some gaps. In some cases, a change in corporate status is only known if it has been publicized or otherwise brought to the Agency's attention. Additionally, the Board regularly adjudicates matters in which employers are identified by operating entities under a different corporate name ("doing business as"). Moreover, the complexities of both corporate and union structure, ownerships, and relationships has increased significantly.

After significant consideration, the Board concluded that the most effective way to correctly identify corporate relationships that may warrant recusal is to require organizational disclosure certification by all parties litigating in front of the Board, as is used in federal and state courts. Such a system would provide a more-structured and transparent approach for analyzing parent/subsidiary relationships for purposes of Board member recusals. Accordingly, the Board will develop and adopt a new requirement in its Rules and Regulations modeled on Federal Rule of Civil Procedure 7.1 and Federal Rule of Appellate Procedure 26.1, requiring all parties appearing before it to file an organizational disclosure statement. The statement will require identification of any parent entity and any publicly held corporation that owns 10% or more of its stock or require the employer to

Rehab. Ctr., 657 F. App'x 129, 133 (3d Cir. 2016); *NLRB v. Regency Grande Nursing & Rehab. Ctr.*, 453 F. App'x 193, 197 (3d Cir. 2011); *NLRB v. Regency Grande Nursing & Rehab. Ctr.*, 441 F. App'x 948, 954 (3d Cir. 2011).

state that there is no such corporation. For unions, the statement will require identification of any parent and/or subsidiary entity. The rule will also impose an affirmative obligation on parties to update their disclosure as necessary while a case is pending before the Board. This requires the party in the best position to identify any potential conflicts to bring those matters to the Board's attention promptly.

C. Public Disclosure of Member Recusal Lists

The Board has historically maintained members' recusal lists as confidential within the Agency. The lists are maintained and updated by the Ethics Office in consultation with the ES Office, Board member, and/or their offices. Recusal lists are posted on the Board's intranet site for access by Board members and their staff in the event there is a question about a Board member's recusal.

The Board has received numerous requests for greater transparency of Board members' recusal lists and, in particular, suggestions that Board member recusal lists be made available to the public. One of the reasons provided for maintaining confidentiality was to prevent parties or the public from knowing which Board members were assigned to a particular matter, which the Board viewed as shielded by the deliberative process privilege. Others have opposed public disclosure of Board member recusal lists because of concern that the lists may not contain the most updated and complete recusal information. For example, if a Board member's list contains the name of a parent company, but not its wholly-owned subsidiary that might cause recusal, the list could be viewed as misleading.

On the other hand, public disclosure of recusal lists would provide stakeholders maximum transparency and ensure that the public is aware of the most accurate recusal information. Currently, Board members provide a partial recusal list during the Senate confirmation process, which reflects former employers as well as former clients who were billed at or above the \$5,000

threshold set forth in financial disclosure forms. Those lists are released to the public but are not publicly updated following appointment to include additions made by the DAEO reflecting all former clients, including those who were billed below the established financial threshold. The preliminary nomination lists also do not include additions or deletions made during the course of the Board member's term. Additionally, there have been "leaks" of recusal lists and other internal documents relating to recusals. These "leaks" have disclosed interim, incorrect or incomplete information about Board members' current recusal obligations, which may have undermined trust and confidence in the Agency. If the Board's official recusal records are made public, the correct information will be publicly available.

The lists will include a notation explaining that updates will be made as new obligations are discovered. This process will address concerns that the lists are not complete because, for example, of changes to corporate relationships that create additional recusal obligations. Additionally, with the use of the corporate disclosure form, the Board will routinely obtain better and more complete information about corporate structures that might cause recusals, which will be added to the public list in real time.

After careful consideration, the Board has determined to make the official Ethics Office Board member recusal lists publicly available and post the most-current recusal lists on the NLRB's public website. The Board has directed the ES Office to take the necessary steps to implement this change.

D. Board Member Sign-Off of Recusal Lists

Currently, the official Board member recusal lists are compiled by the Ethics Office with the cooperation of the Board member, particularly in compiling the initial version at the start of the Board member's term. As discussed earlier, the recusal lists are updated by the Ethics Office in consultation with the ES Office, the Solicitor, and the Board member's front office, and, as

appropriate, supplemented. Although in most circumstances, a Board member is aware of changes to their recusal lists, this Review identified the fact that Board members were not always formally advised of changes to their recusal lists.

In recognition of the fact that recusal ultimately is the Board member's responsibility, with DAEO guidance, Board members will now sign-off on their initial recusal lists and any subsequent modifications. This will ensure the Board member has knowledge of all recusals. To implement final Board member sign off of the recusal lists, the Board has directed the ES Office to develop a procedure for this purpose.

E. Retroactive Recusals Based on Board Deliberative Process

Another unique ethics issue that arose in connection with the *Hy-Brand* case involved the retroactive recusal determination of a Board member based on the deliberative process undertaken in deciding that particular matter. In *Hy-Brand*, there was no recusal issue identified at the outset of the case, but a Board member was recused from a different case involving the same legal issues, *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (*Browning-Ferris*), *pet. for review granted in part, denied in part*, 911 F.3d 1195 (D.C. Cir. 2018), which was on appeal. *Hy-Brand* raised similar legal issues as those raised in *Browning-Ferris* and ultimately was decided in a way that overturned the precedent established in *Browning-Ferris*.

Although reasonable minds could disagree with the theory regarding the effective consolidation of the two cases, there is no disputing that cases raising the same legal issues require more attention to ethical issues, particularly those “appearance” issues that may raise questions of a member’s impartiality. To this end, the DAEO has provided the Board with a list of potential “red flag” situations that could cause an ethics violation in those types of cases (see “red flag” situations listed in *Guidance from the DAEO*, Section II.A.2.c, above). The Board will incorporate these “red flag” situations into its regular ethics training so these lessons are captured going forward.

The DAEO has advised that these “red flag” situations should be avoided, although noting that, if the Board finds itself in one of these situations, it would not necessarily mean there was or is a violation, but rather, that extra caution should be utilized.

F. Written Recusal Motion Protocol

Through the Review, the Board attempted to survey every case where a party sought the recusal of a Board member. As noted previously, in the vast majority of cases, Board decisions simply state that a member was recused or did not participate in the adjudication of the case without any discussion of whether recusal occurred on a party’s motion. Recusal almost always occurs on the Board’s own initiative and without the need for a motion, which demonstrates the strength of the NLRB’s internal ethics program.

In cases where the decision made clear that a party specifically sought a member’s recusal, the Board’s approach – while inconsistent – generally favored referring the motion to the member at issue for his or her individual decision. Even in cases where the Board collectively decided a recusal motion, it typically relied on a member’s prior individual opinion denying a similar recusal issue or simply found a motion moot because the member had already decided not to participate in the case.

This uneven approach to handling recusal motions fails to provide Board members and staff with a well-defined process to follow and denies parties before the Board a clear understanding of how the Board will process their motions. Thus, the Board has committed to adopting a transparent and public protocol to govern its handling of motions to recuse a member.

Furthermore, the Board believes that protocol should refer motions to recuse to the member whose disqualification is sought. Doing so would be consistent with the Board’s predominant historical approach to recusal questions. It is also consistent with the practices of other federal agencies. During the benchmarking process, agency ethics officials consistently reported that presidential appointees worked directly with their ethics offices to resolve issues related to conflicts

of interest. Indeed, the Securities and Exchange Commission has adopted a specific regulation referring motions to recuse to individual Commissioners for decision.¹² See 17 C.F.R. § 200.60. Finally, it is consistent with the approach of the federal judiciary. See, e.g., 28 U.S.C. §§ 144, 455; *see generally* *Federal Judicial Center*, JUDICIAL QUALIFICATION: AN ANALYSIS OF FEDERAL LAW 72 (2d ed. 2010).

Moreover, vesting the decision to recuse with the member ensures that the decision is made by the person (with assistance from the NLRB's ethics officials and cognizant of statutory, regulatory, and legal ethics requirements) in the best position to evaluate the complex factors that go into a recusal decision. Especially as to recusal motions asserting an appearance of partiality (as opposed to a violation of black-letter law), the Board finds it notable that courts review an agency adjudicator's decision to participate only for abuse of discretion. As Judge Green explained thirty-five years ago:

Absent an abuse of discretion, the decision with regard to recusal is that of the official who is directly involved. That is entirely appropriate because, however much the law has shifted in recent years toward a more objective standard, there remain, of necessity, elements of subjectivity. Individuals differ in the degree to which they might be influenced by various kinds of economic or social relationships as well as in the degree to which they feel they might be influenced by such contacts. Except to the extent that disqualification is mandated by law or by a delineated ethical standard, these are subtle matters which for that reason are governed, at least initially, by individual subjective considerations. That being so, it is appropriate that discretion should be vested in the first instance in the individual whose recusal is at issue, and that his decision should be overturned by a court only for an abuse of that discretion.

¹² To the extent that the Federal Trade Commission (FTC) maintains a rule vesting authority to decide motions to recuse with the Commission itself, it gives the individual Commissioner the first pass at any recusal requests. And, as the FTC's published opinions on this matter reveal, the FTC in practice has uniformly deferred to its individual Commissioners' decisions. See, e.g., *In re Lab MD, Inc.*, No. 9357 (Aug. 14, 2015) (available at <https://www.ftc.gov/system/files/documents/cases/150814commopinionseconddisqualify.pdf>).

Ctr. for Auto Safety v. FTC, 586 F. Supp. 1245, 1250–51 (D.D.C. 1984). See also *1621 Route 22 W. Operating Co., LLC v. NLRB*, 825 F.3d 128, 144 (3d Cir. 2016) (holding that then-Chairman Pearce did not abuse his discretion in declining to recuse and observing that an abuse of discretion standard is appropriate for recusal motions “when the matter under review was decided by someone who is thought to have a better vantage point than we on the Court of Appeals to assess the matter”) (internal quotations omitted).

Thus, to avoid any dispute about how a recusal motion should be handled, the Board will develop and adopt written procedures for handling recusal motions that vest the decision to participate with the member in the first instance, working with Agency ethics officials and OGE, if necessary.

G. Board Member Recusal Procedures

In connection with the *Hy-Brand* matter, the controlling legal principles for Board member recusals became a significant question. In particular, it was unclear whether the DAEO has the independent authority to enforce a recusal disqualification of a Board member. As a corollary issue, it was also unclear whether the DAEO’s recusal determination regarding a Board member was binding on all other Board members such that they would violate their own ethics obligations if they failed to adhere to the DAEO’s recusal determination by, for example, themselves participating with a disqualified Board member in a matter.

Through its Review, the Board confirmed that there was general confusion and ambiguity over the question of DAEO authority to enforce a recusal determination. Based on the guidance from the DAEO and OGE, the Board initially understood there to be different ways the DAEO approaches recusal determinations:

- For financial conflict of interest and “covered relationship” recusals, the DAEO has authority to make a *sua sponte* decision to recuse and disqualify a Board member.

- For catch-all “appearance issues,” the DAEO has authority to make a disqualification determination on appearance issues when asked to do so by the Board member in question; the DAEO can also make a recommendation *sua sponte*.

In situations where the DAEO made a recusal disqualification determination, however, the Board initially understood that the DAEO’s determination was binding on the disqualified member as well as on the fellow Board members. With respect to other Board members, the Board had been advised that permitting the recused member to participate in a matter in which s/he had been recused would result in an ethics violation by the other members. Nearly all guidance received from the DAEO and OGE suggested that the DAEO’s recusal determinations were effectively self-enforcing. That is, the DAEO could require a Board member subject to a recusal disqualification determination to not participate in a matter, as well as to require all other Board members to comply with that recusal determination.

This explanation of DAEO authority is generally consistent with the OGE regulations, and most pertinently, with 5 C.F.R. Section 2635.502 and the Trump Ethics Pledge. In particular, 5 C.F.R. Section 2635.502(c) contains affirmative language stating that the “employee *will be disqualified* from participation in the matter” (emphasis added) upon such a determination, absent an authorization to participate, regardless of whether the DAEO’s independent determination was initiated *sua sponte* or by the employee pursuant to the process described in the regulation for seeking guidance.

However, the Ethics in Government Act provides no explicit authority for the DAEO to enforce a disqualification determination. Rather, it contemplates the ability of a government officer or employee to challenge a DAEO decision through non-compliance and places the power to police non-compliance with ethics determinations with an employee’s supervisor (which, for a presidential appointee, is the President). Specifically, the Ethics in Government Act establishes notice

requirements and procedural steps with increasing degrees of severity for the DAEO, Agency Head, and the Director of OGE to undertake in the event a government officer or employee challenges a DAEO determination. For instance, 5 U.S.C. App. 4 Section 402(f) (iii) provides that:

if the [OGE] Director finds that an officer or employee is violating any rule, regulation, or Executive Order relating to conflicts of interest or standards of conduct, the [OGE] Director – (I) may order the officer or employee to take specific action (such asrecusal...) to end such violation; and (II) shall, if the officer or employee has not complied with the order under subclause (I) within a reasonable period of time, notify, in writing, the head of the officer's or employee's agency of the officer's or employee's noncompliance, except that if the employee involved is the agency head, the notification shall instead be submitted to the President.¹³

Further, in Section 402(f)(iv), the statute continues,

if the [OGE] Director finds that an officer or employee is violating, or has violated, any rule, regulation, or Executive Order relating to conflicts of interest or standards of conduct, the [OGE] Director – (I) may recommend to the head of the officer's or employee's agency that appropriate disciplinary action (such as reprimand, suspension, demotion or dismissal) be brought against the officer or employee, except that if the employee involved is the agency head, any such recommendations shall instead be submitted to the President; and (II) may notify the President in writing if the Director determines that the head of the agency has not taken appropriate reasonable disciplinary action within a reasonable period of time after the Director recommends such action.

In addition to these external notification and enforcement procedures, the Ethics in Government Act provides a Board member who disagrees with a DAEO disqualification determination the opportunity to request an investigation and hearing, in which the Board member's position presumably would be fully reviewed. Specifically, Section 402 requires the OGE Director to conduct an investigation and make findings concerning possible violations of ethics rules by an officer or employee. Before the Director makes any such findings, notice must be given to the employee or officer of the alleged violation and an opportunity must be provided for them to

¹³ Under OGE regulations, the Chairman of the Board is the "agency head" for ethics purposes. 5 C.F.R. § 2638.603. But the Board notes that the policies underlying Presidential notification for agency head noncompliance apply equally to all Board members, who do not report to the Chairman in any traditional sense, but to the President, and often collectively serve as a head of department for administrative purposes. See *WestRock Servs., Inc.*, 366 NLRB No. 157, slip op. at 1 (2018).

comment on and respond to the allegation. Specifically, the OGE regulations provide that before any action is ordered against an officer or employee, the officer or employee must be provided an opportunity for a hearing, which must be conducted on the record. 5 U.S.C. App. 4 § 402(f)(2)(B).

During and following the *Hy-Brand* situation, there has been considerable debate over the DAEO's authority to disqualify a Board member with emphatic positions taken on either side. Some argued that the ethics laws provided the DAEO authority to make binding, self-enforcing recusal determinations that the Board had no right or ability to challenge.¹⁴ Others argued that DAEO determinations were advisory, but that Board members retained the right to determine for themselves whether to self-recuse in a particular matter.¹⁵

Through this Review and with the concurrence of OGE and the DAEO, the Board has been able to resolve this issue and answer this complex legal ethics question as follows: The DAEO's expert guidance and disqualification determinations are worthy of respect and should be presumptively followed by all agency employees, including Board members. However, there may be unusual circumstances in which an individual Board member disagrees with a DAEO's recusal determination. In that rare case, although the DAEO's determination is considered "binding," it is not self-enforcing, which means that the Board member can invoke statutory process to challenge the DAEO's recusal determination, and, ultimately, insist on participating in the matter.

The decision to challenge the DAEO's determination and participate in a matter over the DAEO's contrary finding may have serious implications for the Board member. As noted previously, while the Board member is contesting the DAEO's recusal determination, the DAEO

¹⁴ See, e.g., *"To Recuse...or Not to Recuse..." Board Member Conflict of Interest and Recusal Determinations*, Nancy Schiffer, American Bar Association, Committee on Practice and Procedure Under the National Labor Relations Act, Midwinter Meeting, March 1, 2019 (copy on file with the Board's ES Office).

¹⁵ See, e.g., *NLRB Recusal Issues – The Importance of Fairness, Transparency, and Stability*, Phillip A. Miscimarra and Lauren M. Emery, American Bar Association, Committee on Practice and Procedure Under the National Labor Relations Act, Midwinter Meeting, March 1, 2019 (copy on file with the Board's ES Office).

can refer the refusal to comply with the recusal decision to the Director of OGE or to the Inspector General, and, if a violation of the criminal conflict of interest statute or the Trump Ethics Pledge, the DAEO and the IG can jointly make a referral to the Department of Justice (DOJ). In addition, if the member insists on participating in the matter notwithstanding the opposition of OGE, the DAEO, and potentially the IG and DOJ, the Chairman of the Agency will notify the President (who has supervisory authority over the Board members) and may inform the Agency's Congressional oversight committees.¹⁶ Of course, the member may be correct, and if OGE agrees with the member that the DAEO's determination was incorrect, there will be no need for Presidential or Congressional oversight.

The Review also resolved the question regarding the obligation of other Board members who participate in a matter with a Board member who is challenging a DAEO disqualification determination. According to OGE, the Agency institutionally has certain ethics "objectives and obligations," which include providing Board members with ethics guidance and notifying OGE of any noncompliance with ethics rules. Therefore, Board members could have an individual obligation to report a fellow Board member's non-compliance. OGE has advised that these guidance and notice obligations can be satisfied for the Agency as well as for individual Board members if the Board adopts a recusal procedure that includes notification to OGE of a Board member's decision to participate in a matter despite the DAEO's recusal determination. However,

¹⁶ The fact that the DAEO does not have self-executing enforcement authority, and that the enforcement processes are external, does not undercut the validity of the DAEO's authority or make the DAEO determinations less binding, since there are serious consequences for noncompliance. An employee's compliance with ethics requirements is, fundamentally, a matter of personal responsibility. Notably, an employee of any level may choose not to comply with a DAEO's determination. For a career federal employee, refusal to comply with the DAEO's determination will likely result in reassignment of a particular matter and may be grounds for a misconduct action under 5 U.S.C. Sections 7501-7515; for a presidential appointee, refusal to comply with a DAEO determination will be adjudicated by OGE and the President. Thus, it is appropriate to say that employees have an obligation to comply because the failure to do so has consequences that may be significant.

Board members do not have an affirmative obligation to prevent a fellow Board member from failing to comply with a DAEO disqualification and thus do not risk violations of their own if the Board member participates in a matter against DAEO advice.¹⁷

To ensure that these difficult recusal matters are addressed consistently and with transparency, the Board has adopted a written Board member disqualification protocol. The protocol is attached as ES Memo 19-1 (see Appendix 3). Without an established written protocol to direct future actions in the event a Board member disagrees with a DAEO recusal determination, the Agency would be forced to develop a procedure in the moment. Experience teaches that attempting to work through these complex issues in the context of a pending case – particularly a high-profile one – can create significant uncertainty and thereby undermine confidence in the Board’s processes. In addition, the Board has been advised by OGE that adopting a protocol that sets forth the required notifications to OGE and other external sources will satisfy the obligation of individual Board members to make such notifications.

In developing the protocol, the Board sought to provide a comprehensive, step-by-step procedure that was in full compliance with OGE requirements, including all required external

¹⁷ Due process considerations that could arise from the other Board members’ participation on the case would not fall within OGE’s purview. Research by the Ethics Office uncovered no guidance finding or suggesting that an adjudicator would commit an individual ethics violation by deliberating with an adjudicator who failed to recuse, notwithstanding that the decision itself may be tainted and a remedy required. In *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), the Supreme Court held that a judge should have recused himself, as a matter of due process, from considering a matter in which one of the parties made significant monetary contributions to his election at a time when it was likely that the party would have a matter before the judge. The Court found that the risk of bias under these circumstances was sufficiently substantial that it constituted a violation of constitutional due process. Even though the facts of the case were particularly egregious, the Court did not suggest an obligation on the part of any other judges involved in the matter based on the participation of the judge who should have recused himself. See also *Bradbury v. Idaho Judicial Council*, 233 P.3d 38 (Id. 2009) (court denies disqualification of three judges after chief judge eventually recused himself), *aff’d*, *Bradbury v. Eismann*, No. CV-09-352-S-BLW, 2009 WL 3443676 at *3 (D. Idaho Oct. 20, 2009); *Henry v. Jefferson County Com’n*, No. 3:06–CV–33, 2009 WL 2857819 at *5 (N.D.W. Va. Sept. 2, 2009) (court rejects argument that one panel member’s initial failure to recuse created potential for bias by all other panel members).

notifications. The Board believed it was important that the protocol fully describe the significant ramifications for a Board member seeking to challenge a DAEO and/or OGE determination and set forth the potential options at each step. The protocol provides ample opportunities for dialogue and the interactive process contemplated in OGE's regulations, and it incorporates multiple steps to persuade the affected member to comply with the DAEO's determination or for the DAEO to obtain a better understanding of the affected member's position. In addition, the protocol addresses several weaknesses identified from the circumstances surrounding *Hy-Brand* (see *Hy-Brand Discussion*, Section V, below), including ensuring written communications throughout the process to reduce the potential for misunderstandings, requiring the affected Board member to personally participate to ensure full exchange of information and to avoid miscommunication, and requiring notice to all Board members of the process as it unfolds.

The Board considered whether to include in the protocol a mechanism for one or more Board members to force another Board member's compliance with a DAEO determination or otherwise prevent the affected Board member's participation in a particular matter. Some suggested that the Board could adopt a stringent internal rule through which the Board would bind itself to the DAEO's determinations and police the recusal obligations of fellow Board members. The Board, for example, could delegate authority to the Chairman to enforce DAEO determinations by directing the Executive Secretary to screen another Board member off a case. The Board could adopt an internal procedure like that of the Federal Trade Commission (16 C.F.R. § 4.17), in which the Board, by majority vote (or potentially unanimous vote of the remaining members), could decide recusal enforcement if a member denied a motion to recuse. The advantage of such a "forced" enforcement mechanism arguably would be to allow the Board to protect the integrity of its decisions and decision-making process.

After full consideration, however, the Board ultimately concluded that such a rule likely would be legally unenforceable or, at the least, subject to a robust legal challenge. Even if the rule is ultimately found lawful, the benefits of such a mandatory recusal authority are strongly outweighed by the disadvantages. First, nothing provides that the Chairman, a Board majority, or a unanimous Board, with the authority to deny a fellow Board member's participation in a matter. To the contrary, each Board member has a right and obligation to participate in cases, and due process requires that party litigants before the Board have their cases decided without interference. The Board's case-handling process historically has recognized each Board member's right, absent recusal, to participate in every case, and procedures are in place to ensure that each member is afforded this opportunity.

Moreover, even if some legal authority permitted the Board to prevent a fellow Board member from participating in a matter, giving that authority to the Board would be problematic. At best, this process would be weakened by a naturally occurring information asymmetry. Board members with less information would be tasked with ruling on a recusal matter for which their affected colleague has superior, firsthand knowledge of why the recusal merits a challenge. At worst, allowing some or all of the Board to vote on a fellow Board member's participation in a case could be subject to political influences and potential manipulation for improper motives, or the perception that such considerations played a part in the determination.

The Board understands that, without a mechanism to prevent member participation, there is a risk that a case or other matter could be decided with a fatal taint due to the recused member's participation. A reviewing court, for example, could deny enforcement of a Board order because it concludes that the member's participation posed a conflict of interest or bias, and thus resulted in a

denial of due process.¹⁸ The Board believes, however, that – if the President does not step in to resolve the disqualification dispute – a petition for review under Section 10(f) of the Act in an appropriate court of appeals is the proper venue for a recusal dispute to ultimately be decided. To give that authority to the Board would be to deny parties the opportunity to have a court decide the issue.

Challenges to a DAEO recusal determination have been and should be rare. And the Board believes that the significant ramifications, cited above, that face a Board member who challenges a DAEO determination through OGE to the White House – up to and including removal by the President under Section 3(a) of the Act – should keep them rare. Only the most important, novel, and cutting-edge recusal issues are likely to be subject to challenge, and if a Board member feels strongly enough that his or her position is correct, the issue should be decided by the President or an Article III court.

IV. Action Items

As a result of the Review conducted by the Board and based on the findings from that Review, the Board has directed the implementation of the following new procedures to ensure its full compliance with all ethics and recusal obligations:

1. Solicitor’s Office to develop, for Board approval, a process by which all parties appearing before the Agency will be required to file an Organizational Disclosure Statement at the outset of a matter. This action is in process.

¹⁸ Courts generally hold that the participation of a conflicted member in a multi-member commission taints the entire decision, even if a quorum otherwise would support the agency action. See *Berkshire Employees Ass’n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941) (“Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.”); see also *Stivers v. Pierce*, 71 F.3d 732, 746-48 (9th Cir. 1995); *Cinderella Career & Finishing Sch., Inc. v. F.T.C.*, 425 F.2d 583, 592 (D.C. Cir. 1970). But see *Tesco American, Inc. v. Strong Indus., Inc.*, 221 S.W.3d 550, 555 & n.23 (Tex. 2006) (collecting cases and observing that “[s]everal courts have concluded that a decision need not be vacated if a disqualified judge’s vote was ‘mere surplusage’”).

2. ES Office to develop, for Board approval, a new protocol for public disclosure of Ethics Office Board member recusal lists. This action is in process.
3. ES Office to develop, for Board approval, a new protocol for Board member sign off of all revisions made to the member's own recusal list. This action is in process.
4. Acknowledgement of the DAEO's "red flags" checklist identifying atypical situations in which conflicts could arise; Ethics Office to incorporate the checklist into Board member and staff ethics training. This action is in process, and the checklist will be updated as appropriate.
5. Solicitor's Office to develop, for Board approval, procedures for handling recusal motions consistent with the Board's past practice of allowing individual Board members to determine their own recusal motions, with DAEO guidance. This action is in process.
6. Develop and implement Board member recusal protocol. This protocol has been developed and implemented by the Board (see Appendix 3).

V. *Hy-Brand* Discussion

Hy-Brand was a challenging time in the NLRB's history. The ethics issues surrounding *Hy-Brand* drew significant scrutiny and criticism of the Agency and individual Board members. The events undermined public confidence in the Agency and trust in the Board's ability to impartially carry out its important statutory mission. It also raised serious questions about the Board's ethical standards and whether the Agency was properly handling Board member recusals. One positive outcome of *Hy-Brand* is that it prompted this comprehensive Review, which has allowed the Board to fully consider all recusal compliance issues in a deliberative and systematic way. Although the Review's intent is not to relitigate *Hy-Brand*, the Agency's handling of the recusal issues in that case requires some discussion, particularly in light of the findings and recommendations herein. It is important for the public to understand what happened with the *Hy-Brand* case and why.¹⁹

¹⁹ The Board recognizes that a portion of the provided in this Section would typically be protected from disclosure by privileges such as the attorney-client privilege and the deliberative process privilege. The Board has always zealously guarded those privileges as indispensable to its administrative and decision-making

Hy-Brand arose in an atypical procedural posture, which created a unique Board member ethics and recusal challenge. In *Hy-Brand*, the recusal concerns surfaced after the Board’s decision had already been issued to the parties and released to the public.²⁰ Moreover, most recusal issues arise and are resolved before the case is assigned to Board members. *Hy-Brand* was unique because the recusal concerns did not involve the typical question of a Board member’s relationship to the parties or representatives in a specific matter to which he could be assigned. Rather, the recusal question focused on the *manner* in which the Board carried out its deliberative process in a case to which a member was already assigned.

Prior to the release of the *Hy-Brand* decision, Board Member Emanuel had been properly cleared to participate in the case. He was assigned the case through the standard process administered by the ES Office and pursuant to the centralized case assignment process in which any potential recusals are identified and screened. At the time, there were no recusal issues because *Hy-Brand* was not a “particular matter involving specific parties that [...] directly and substantially related” to a covered relationship. The DAEO has confirmed that Member Emanuel was properly assigned to the case.

After the *Hy-Brand* decision issued, the Agency’s Inspector General responded to ethics concerns raised in a hotline complaint. After investigation, the IG concluded Member Emanuel had violated his ethics obligations by participating in the case based on a novel recusal theory that had not previously been articulated by OGE or brought to the Board’s attention by the DAEO.

process, and it intends to continue to do so. In the unique circumstances of this Review – where many of the underlying facts and documents have already entered the public sphere through Inspector General Reports and Congressional investigations – and in the interest of transparency as we thoroughly evaluate the significant procedural questions that the *Hy-Brand* situation revealed as unanswered, the Chairman has approved disclosing this information to provide the Board’s stakeholders with the complete story.

²⁰ The issue in *Hy-Brand* involved the joint employer standard under the NLRA, which is an important and widely-debated issue in labor law.

Specifically, the IG report concluded that, because of the deliberative process the Board used in reaching its decision, the *Hy-Brand* case and a previously-issued case that dealt with the same issue, *Browning-Ferris*, a case from which Member Emanuel was recused, had effectively become one for the purposes of Paragraph 6 of the Trump Ethics Pledge. The concern was based largely on the fact that the *Hy-Brand* opinion incorporated significant portions of the dissent from *Browning-Ferris*. Thus, although Member Emanuel’s former law firm had not represented any of the parties in *Hy-Brand*, and he would not otherwise be subject to recusal from that case, the IG concluded otherwise. Specifically, he found that, because Member Emanuel’s former law firm had represented parties in *Browning Ferris*, which had been deemed – after the fact – to be the same “particular matter involving specific parties,” Member Emanuel should not have participated in the case.²¹

Although the Board is not legally bound by a recusal determination of the IG, the IG report put the Board on notice of a potential ethics violation in *Hy-Brand*. Based on the IG’s findings and consistent with the IG’s recommended “corrective action,” the Board immediately sought guidance

²¹ In the IG’s February 9, 2018 report to the Board entitled, “Notification of a Serious and Flagrant Problem and/or Deficiency in the Board’s Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter,” the finding was stated as follows:

The wholesale incorporation of the dissent in *Browning-Ferris* into the *Hy-Brand* majority decision consolidated the two cases into the same “particular matter involving specific parties.” The dissent in *Browning-Ferris* resulted from the Board’s deliberative process following the adjudication of the facts and determination of law at the Regional level and the submission of briefs by the parties, including Member Emanuel’s former law firm, and *amicus* providing legal arguments for the Board’s consideration. Because of the level of the incorporation of the *Browning-Ferris* dissent into what became the Board’s decision in *Hy-Brand*, it now is impossible to separate the two deliberative processes. Rather, the Board’s deliberation in *Hy-Brand*, for all intents and purposes, was a continuation of the Board’s deliberative process in *Browning-Ferris*.

The IG’s February 9, 2018 report was transmitted to the NLRB’s Congressional oversight committees on February 15, 2018. After completing an investigation, the IG issued a “Report of Investigation – OIG-1-541” on March 20, 2018, which reaffirmed the conclusion that *Hy-Brand* and *Browning Ferris* were the same particular matter involving specific parties and reported on “additional issues that warranted investigative efforts.” With respect to those additional issues, the IG cleared Member Emanuel of allegations that he knowingly made false statements to Congress and to the IG and found no violations of provisions of the *Standards of Conduct*.

from its DAEO. Additionally, as required, the Board notified the Agency's oversight committees in Congress of the IG's findings. This generated significant interest in Congress, as well as significant press attention. Thus, while the DAEO was analyzing the IG's ethics conclusions and reviewing the underlying facts, there was significant pressure to resolve the ethics controversy quickly. Ultimately, in February 2018, the DAEO adopted the IG's conclusion, and did so retroactively, explaining that under the totality of the circumstances, Member Emanuel's participation in the manner in which *Hy-Brand* was adjudicated violated the Ethics Pledge and Member Emanuel must be recused from further participation in *Hy-Brand*.²²

When the DAEO made the recusal determination, the Board was advised by the DAEO that Member Emanuel must be recused from further adjudicating the Charging Parties' Motion for Reconsideration in *Hy-Brand* and participating in the Board's decision whether to vacate the existing case. The other Board members understood that they would violate their own Trump Ethics Pledges if they allowed Member Emanuel to participate further in the case or spoke with Member Emanuel about the case or the underlying recusal determination. It was understood that such actions would be intentional violations of the Ethics Pledge, whereas Member Emanuel's actions had been unintentional. The Board was advised that it was necessary to vacate the *Hy-Brand* decision in which Member Emanuel participated. Separately, Member Emanuel was advised that he was disqualified by the DAEO from any further consideration of the *Hy-Brand* case. In addition, the DAEO would not permit Member Emanuel to include a footnote or other statement in the decision

²² In a March 27, 2018 memorandum to Member Emanuel's attorney, the DAEO advised that she had "not concluded that Member Emanuel acted in bad faith in the adjudication of *Hy-Brand*." But she determined: "I believe Member Emanuel's participation in the adjudication of *Hy-Brand*, including the wholesale incorporation of the dissenting opinion in *Browning-Ferris*, which resulted from the Board's deliberation in a still pending case in which [Member Emanuel's former law firm] represented a party and took the same position on the issue of the joint employer standard that Member Emanuel ultimately endorsed, violated the Ethics Pledge."

stating his position, explaining that doing so would be inconsistent with his recusal from further participation in the case.

At the time, the Board sought to clarify and confirm the DAEO's recusal determination and actions. The DAEO advised that she had reviewed her determination and directions to the Board with OGE, which stated that they were supported and within the DAEO's discretion. The Board requested a written opinion confirming OGE approval but was advised that OGE would not provide a written opinion on an ongoing matter nor would they agree to discuss questions with then-Chairman Kaplan about the DAEO's actions and confirm OGE's concurrence. However, the DAEO repeatedly confirmed that OGE was supportive of the DAEO's recusal determination and the disqualification of Member Emanuel from any further consideration of *Hy-Brand*. Additionally, OGE supported the decision that Member Emanuel should be recused from further participation and should not discuss the case or the recusal matter with other Board members. The DAEO's advice left the Board members with no other options. Based on this advice that the DAEO and OGE characterized as binding, the Board immediately complied with the DAEO's directives. In the DAEO's view, the approach taken in *Hy-Brand* was consistent with the DAEO's authority to interpret novel questions involving the Ethics Pledge, in consultation with OGE.

Contrary to the Board's understanding at the time, more than a year after the it's ethics Review began, the DAEO and OGE have now confirmed that, although OGE considers DAEO recusal determinations to be binding, they are not self-enforcing. That is, OGE views compliance with a DAEO determination as required and noncompliance may give rise to an ethics violation, but that violation does not empower the DAEO to direct NLRB staff to screen Board members off a case or otherwise prevent the Board member from participating in the matter from which s/he has been recused. Rather, the violation is subject to review and external enforcement. In connection with this Review, OGE has advised that its responses to questions during *Hy-Brand* about the

DAEO's scope of authority, and its characterization of that authority as the ability to make "binding determinations," did not address what would occur in case of continued disagreement with the DAEO's position. According to OGE, this is because its government ethics program is premised on an expectation of compliance. Thus, OGE considers the DAEO's authority to be binding because there are consequences for failure to comply, which include external enforcement processes.

Upon learning of this characterization of DAEO authority, the Review then considered how the recusal of Member Emanuel had been handled in *Hy-Brand*. The distinction between a binding DAEO disqualification recusal determination and one that is challengeable through external enforcement was not fully explored during the *Hy-Brand* matter. In fact, the Board was advised that disagreement with the DAEO's determination was not an option for Member Emanuel and that other Board members would violate their ethics pledge if they allowed him to participate. And, as noted earlier, there were – and continue to be – no regulations or other written guidance addressing the ability to disagree with or seek review of a DAEO determination.

To the question of why Member Emanuel was not allowed to disagree with his disqualification in *Hy-Brand*, the DAEO has explained to the Board that she believed that Member Emanuel, through his personal attorney, requested a binding recusal determination and then agreed to comply with that determination. Member Emanuel, however, continues to vigorously disagree that he or his attorney requested a binding determination or that he voluntarily agreed to be bound by it. Further, Member Emanuel contends that he strongly disagreed with the substance of the recusal determination but was unable to seek review of it. He also strongly opposed being removed from the case but believed that he was unable to challenge the removal.²³

²³ Member Emanuel's disagreement with the DAEO's determination in *Hy-Brand* was a substantive one and one informed through consultations with a personal attorney. Although compliance with DAEO determinations is encouraged and is the cultural norm for the NLRB's ethics program, the novel recusal theory advanced by the IG and later adopted by the DAEO is precisely the type of recusal determination for which a challenge and further review should be permitted. First, it was developed by an IG, not an ethics

With respect to the other Board members, the DAEO believes that she was requested by the Board to make a binding decision about whether to remove Member Emanuel from participation in the case and that the Board then agreed to abide by the determination. The DAEO contends that the Board was required to honor what she believed was Member Emanuel's agreement to voluntarily comply with her recusal determination. There is no record of the Board requesting that the DAEO make a binding decision as to the recusal of Member Emanuel. As noted above, the Board understood the DAEO's disqualification of Member Emanuel to be self-enforcing and to obligate each individual Board member to prevent Member Emanuel from any further participation in the case, including being prohibited from all communications with him regarding the case or the recusal

official. Although the IG's theory was later adopted by the DAEO, who relied on a totality of the circumstances analysis and supplemented the government ethics analysis with a comprehensive due process analysis, the DAEO's decision to do so was made in a pressured environment filled with competing political interests. Second, the theory had no grounding in any ethics statute, regulation, or the ethics pledge taken by members of the Board. The theory had never been advanced before in any other setting, judicial, administrative, or academic. Third, the theory arguably is contrary to the plain language of the ethics regulations. In particular, all ethics requirements speak in terms of "specific parties" and "particular matters," and carefully define how these terms should be applied in recusal determinations. Nevertheless, the theory applied in *Hy-Brand* relied on a theoretical merger of two separate NLRB cases that had always been considered separate matters involving separate parties. Requiring strict adherence to these definitions avoids, perhaps by OGE's well-thought-out design, the undesired creation of recusal obligations that no one could predict in advance and that come into existence at some undefined point in time while a case is under consideration. Fourth, the recusal theory arguably relied on facts that should not be relevant in a recusal determination, namely whether the Board found persuasive and incorporated arguments from a prior dissenting opinion in developing its rationale for a case decision. Attacking the Board's embrace of prior legal arguments – as opposed to facts involving specific parties and particular matters – is inconsistent with the reality of the Board's historic decision-making process and significantly restricts the Board's ability in the future to draft decisions with supporting arguments, which are required to stand up to judicial review. Moreover, to conclude, as the *Hy-Brand* recusal theory did, that the Board essentially decided the merits of another case is unprecedented. The Board in *Hy-Brand* overruled the legal standard established in a prior case. It is common for appellate courts and the Board to state that they are "overruling" another case when, in fact, it is the precedent in the other case that is being overruled. It was a particularly egregious assertion in *Hy-Brand*, as the Board could not have ruled on the merits of the prior *Browning-Ferris* case because the Board no longer had jurisdiction over the case once it was appealed to the D.C. Circuit. Finally, in past situations, Board members have been permitted to make their own recusal decisions, raising questions as to why this was not permitted in the *Hy-Brand* case. For all these reasons, it was not irrational, but rather quite understandable, for Member Emanuel to question his recusal determination in *Hy-Brand* and to desire further review by OGE.

issues. The Board understood the failure to undertake these measures would result in individual Board members violating their own ethics obligations.²⁴ There was no Board vote on these matters.

Based on the Review, the Board has now clarified that, under OGE regulations, the DAEO's disqualification determination was binding on Member Emanuel. However, the Board has now confirmed that Member Emanuel could have disagreed with the DAEO's determination and not been removed from participation in the case. The Board has now established a written protocol under which a decision by Member Emanuel to continue participation would have required notices to OGE pursuant to OGE's regulations and other external enforcement procedures. Ultimately, the recusal determination then would be reviewed by the President, and, if judicial review was sought, by a court of appeals as part of the *Hy-Brand* enforcement proceeding. Further, as clarified by this Review, while existing ethics regulations may require other Board members to give external notice of a potential recusal violation, the DAEO does not have authority to self-enforce a recusal determination against a Board member or require that fellow Board members take affirmative action to prevent noncompliance with a DAEO disqualification determination.

²⁴ The language used by the Board's *Hy-Brand* decisions reflects the Board's understanding at the time that the DAEO's determination was self-enforcing. In the Board's decision vacating the original *Hy-Brand* decision, the opinion stated: "The Board's Designated Agency Ethics Official has determined that Member Emanuel is, and should have been, disqualified from participating in this proceeding," *Hy-Brand*, 366 NLRB No. 26, slip op. at 1 (*Hy-Brand II*), and noted in a footnote that 5 C.F.R. Section 2635.502(c) gives the Agency's DAEO authority to "make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter." In the Board's ruling on the subsequent motion for reconsideration, referencing again 5 C.F.R. Section 2635.502(c), the Board majority opinion says: "Based on this authority, the DAEO issued a determination of disqualification. Accordingly, Member Emanuel was and is disqualified from participating in *Hy-Brand*..." *Hy-Brand*, 366 NLRB No. 93, slip op. at 1 (*Hy-Brand III*). Although at no point did Chairman Ring or Member Kaplan endorse the DAEO's substantive recusal determination or the apparent self-enforcement, their concurrence explained: "When the DAEO, pursuant to the authority she invoked under federal law, took the unprecedented step of disqualifying Member Emanuel from participating in *Hy-Brand II* (and subsequent proceedings in the case), the Board had no alternative but to comply with her directive. To do otherwise—if that was even possible—would have meant protracted legal challenges and, more troubling, lasting injury to the Board's reputation." *Hy-Brand III*, 366 NLRB No. 93, slip op. at 2 (Chairman Ring and Member Kaplan, concurring).

The lessons learned about *Hy-Brand* in this Review will prevent a repeat. Undoubtedly, noncompliance by a Board member with a DAEO disqualification decision should continue to be very rare and is certainly not encouraged. Nevertheless, *Hy-Brand* revealed that there are extraordinary situations where a Board member may have a principled disagreement with a recusal determination. Because Board members have the discretion to assert such a disagreement, it is important that the Board have in place the necessary understanding of the law as well as a clear procedure to address such situations. The adoption of a clear protocol for handling these matters in the future will provide clarity and confidence in the Board's processes.

VI. Conclusion

This Review provided the Board with the opportunity to comprehensively review and evaluate all policies and procedures governing ethics and recusal requirements for Board members. The work detailed in this Report demonstrates the Board's commitment to full compliance with all government ethics requirements. The Board found that its overall ethics program and recusal process meets government ethics requirements and meets or exceeds the ethics processes of other benchmarked federal agencies. Where gaps or areas for improvement were identified, the Review developed recommended changes in this Report, which were reviewed and approved by the Board with the aim of enhancing the Agency's ethics program. In the end, all of the Board's stakeholders should have full confidence in the integrity of the Board and its comprehensive recusal processes.

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STATEMENT OF MINORITY MEMBER LAUREN MCFERRAN

On June 8, 2018, a Board press release announced that Chairman Ring “proposed for Board consideration a review, to be conducted expeditiously, that would examine every aspect of the Board’s current recusal practices.....” Ultimately, a Board majority voted to delegate to Chairman Ring the authority to carry out the review as part of a broader delegation of administrative authority to the Chairman, from which I abstained.

The current Chairman’s Report was produced pursuant to the delegation of authority. It reflects the work of Agency staff under the supervision and direction of the Chairman. Along with the other Board members, I have been regularly apprised of the progress of that work. I acknowledge and appreciate the time and the effort reflected in the Report and the work done by staff in this initiative. Its subject matter is vitally important.

The Chairman’s Report, as such, has not been approved by the Board. The Board was asked to vote on six specific “Action Items” that emerged from the report. I support and voted to approve three of these recommendations.²⁵ Rather than address the specific language or details of the Chairman’s Report or the Action Items I did not vote to approve, I would like to explain my additional, separate views on the general issues addressed in the Chairman’s Report:

²⁵ Specifically, I agree that the Board should:

- Direct the Solicitor’s Office to develop, for Board approval, a process by which all parties appearing in a case before the Board be required to file an Organizational Disclosure Statement similar to the disclosure required in federal and state courts (modeled on Federal Rule of Civil Procedure 7.1 and Federal Rule of Appellate Procedure 26.1).
- Direct the Office of the Executive Secretary to develop, for Board approval, a new protocol for public disclosure of the Ethics Office Board member recusal lists.
- Acknowledge the DAEO’s “red flags” checklist identifying atypical situations in which conflicts could arise; direct the Ethics Office to incorporate the checklist into Board member and staff ethics training.

1. The Chairman’s Report, as the document explains, is a consequence of the Board’s decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017), which raised important issues concerning the ethical standards applicable to members of the National Labor Relations Board, the administration and enforcement of those standards, and the fairness and integrity of the Board’s decision-making process. I dissented from the *Hy-Brand* decision, in which a Board majority overruled precedent establishing the joint-employer standard under the National Labor Relations Act. On February 26, 2018, following an investigation by the Board’s Inspector General, and a determination by the Board’s career Designated Agency Ethics Official (DAEO) that Member Emanuel was and should have been disqualified from participating in *Hy-Brand*, the Board vacated its earlier decision and order.²⁶ I joined in that decision. On June 6, 2018, the Board unanimously denied a motion to reconsider its decision to vacate the original *Hy-Brand* decision.²⁷ In denying reconsideration, the Board cited federal executive-branch ethics regulations and observed that “[b]ased on this authority, the DAEO issued a determination of disqualification” and that “[a]ccordingly, Member Emanuel was and is disqualified from participating in *Hy-Brand*.”²⁸ I adhere to my views expressed in that decision, and in my separate concurrence with Member Pearce.²⁹

2. Preserving the independence and integrity of the Designated Agency Ethics Official and the Inspector General are crucial, if the Board and its members are to comply fully with applicable statutes, regulations, and executive orders and to conform to due process requirements for the Board’s decision-making. The Board and its members should adopt no policy or practice that undermines the independence or integrity of the Designated Agency Ethics Official or the Inspector General.

²⁶ *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 26 (2018).

²⁷ *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 93 (2018).

²⁸ *Id.*, slip op. at 1.

²⁹ *Id.*, slip op. at 3.

3. No Board member is entitled under the National Labor Relations Act to participate in a decision where that participation would violate a law, regulation, or executive order binding on the member. Nothing in the Act prevents the Board as a body from ensuring the integrity of its decisions and actions by determining which members may properly participate in a decision or action, consistent with federal law, regulations, or executive orders.

4. The Board has a strong institutional interest in preserving the integrity of its decision-making process, both as a matter of public confidence and as a matter of guaranteeing due process to the parties in a Board proceeding, which includes the right to unbiased and otherwise-qualified decision-makers. The Board's decisions and rules are subject to review in the federal courts, and the failure of Board members to comply with ethical standards can lead to the reversal of Board decisions or the invalidation of rules.

5. In light of the Board's institutional interests, individual Board members and the Board as a body should defer to disqualification determinations made by the DAEO. The Board should accordingly adopt a rule providing that the Board as a body will prohibit a member who has been disqualified by the DAEO from participating in a matter. I do not interpret the Office of Government Ethics regulations to provide for review of the DAEO's disqualification determinations, as opposed to providing due process for Executive Branch employees and officials who face disciplinary consequences for violation of ethical standards.

6. The Board should adopt a rule establishing a procedure for addressing motions to recuse a Board member, made by a party to a Board proceeding. That rule should be modeled after the rule adopted by the Federal Trade Commission, 16 C.F.R. Section 4.17. The Board should initially refer such motions to the Board member who is the subject of the motion. If that member declines to recuse, the Board as a body should rule on the motion. The Board should disqualify a member if the member's participation would be contrary to a disqualification determination made by the

DAEO or if participation would be a clear violation of applicable ethical standards, including the Standards of Ethical Conduct for Employees of the Executive Branch and the ethical standards or rules that a federal court might apply on review of the Board's decision. Where a recusal motion is made, the Board's ultimate decision in a case should reflect and explain the ruling on that motion, in sufficient detail to permit judicial review.

7. In all matters related to ethics, recusal, and disqualification, the Board and its members should strive for maximum transparency to the public, to the federal courts, and to the Office of Government Ethics.

**APPENDICES TO THE
NATIONAL LABOR RELATIONS BOARD'S
ETHICS RECUSAL REPORT**

APPENDIX 1



United States Government

NATIONAL LABOR RELATIONS BOARD

Office of the Executive Secretary

Washington, DC 20570

E.S. MEMO 18-1

TO: Lori Ketcham, Associate General Counsel, Ethics and
NLRB Designated Agency Ethics Official (DAEO)

FROM: Roxanne L. Rothschild, Deputy Executive Secretary

SUBJECT: Executive Secretary's Office handling of Board Member recusals

DATE: January 30, 2018

This memorandum outlines the steps taken by the Office of the Executive Secretary ("ES Office") to handle matters in which a Board member is recused from participating in particular cases pending before the Board. The ES Office takes the following actions to identify, designate, and track cases that require Board Member recusals.

IDENTIFY

The ES Office uses several methods to identify cases in which Board Member recusal is required.

1. Ethics Office Recusal List – When a Board Member joins the Agency, the Ethics Office prepares a memorandum for the Board Member addressing his or her recusal obligations and lists organizations for which recusal would be required by the Board Member if that organization were a party to a case, or representing a party to a case pending before the Board.
2. OCIO report – When a Board Member is subject to recusal based on the involvement of his or her former law firm in cases pending before the Board, the ES Office asks OCIO to run a report in NxGen to identify all cases pending before the Agency in which the law firm is (or was) a case participant, and where there is an "open" Board Action (i.e., there is a matter in the case currently pending before the Board).
3. NxGen Participant List – As new cases come in to the Board for assignment, the ES Office checks the Participant List in each case in NxGen to identify whether the Board Member's former law firm is (or was) a participant in the case or

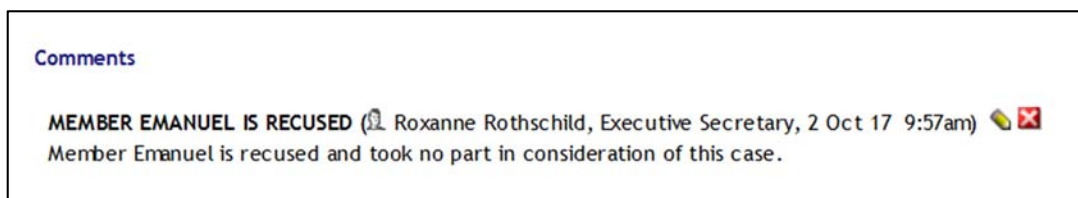
representing a participant in the case before the case is assigned to a Board staff for handling and a Board Member panel for decision.

4. Board-side Transparency & Involvement – The ES Office posts the Ethics Office memorandum and the OCIO report on the Board Team Site in Sharepoint so that all Board-side personnel can access the list if they need any information about or have any questions about recusals. This transparency encourages greater involvement by all Board-side staff in recusal issues and provides the opportunity for “more eyes” on the issue for double-checking accuracy of recusals.

DESIGNATE

Cases in which a Board Member needs to be recused are designated as such in the Judicial Case Management System (JCMS).

1. Current Case Review – When a Board Member joins the Agency, the ES Office uses the Ethics Office memorandum recusal list for the Board Member and the OCIO report to review all currently pending cases before the Board to identify any cases in which recusal by the Board Member is required. When the need for recusal in a case is identified, a “Comment” is entered in the Case File area of JCMS indicating that the Board Member is recused and will take no part in consideration of the case (see below).



2. Incoming Case Review – The ES Office reviews the Ethics Office memorandum recusal list and the Participant List in NxGen when incoming cases are being assigned to a Board staff and Board Member panel to ensure that a Board Member is not assigned to participate in a case in which he or she needs to be recused. When the need for a recusal is identified, a designation regarding the recusal is made in the Case File area of JCMS (see “Comment” designation above), and the recused Board Member is not assigned to the case.

TRACK

1. Recusal Report – In cases for which a Board Member’s recusal is identified, a code is designated in the “Control DB” for each recusal case in JCMS so that the case shows up on a Board-side Recusal List report in NxGen Analytics. This allows for the easy tracking of all cases currently pending before the Board in which a Board Member is recused.

2. JCMS Designation – The Comment added to the Case File in JCMS regarding a Board Member’s recusal serves as a reference for when a panel change is requested for pending cases. If a Board Member is recused, ES Office personnel know that any panel change cannot add that Board Member to the panel. In addition, when the panel voting is completed in JCMS, the ES Office knows that the recused Board Member should not be asked to “note off” on the Board decision (non-participating Board Members are asked to “note off” on certain types of Board decisions before the decision can be issued).

The above process describes the method by which Board Member recusals are identified, designated and tracked by the ES Office in the normal course of events. If the ES Office is notified in some other way than is described above about a Board Member’s recusal from a case, the same steps are taken to designate and track the recusal case.

APPENDIX 2



United States Government

NATIONAL LABOR RELATIONS BOARD

Office of the Executive Secretary

Washington, DC 20570

E.S. MEMO 18-2

TO: Lori Ketcham, Associate General Counsel, Ethics and
NLRB Designated Agency Ethics Official (DAEO)

FROM: Gary Shinnars, Executive Secretary

SUBJECT: Specific procedures for identifying and designating Board Member
recusals

DATE: April 6, 2018

This memorandum supplements E.S. Memo 18-1 with further details regarding the steps taken by the Office of the Executive Secretary ("ES Office") and the Solicitor's Office to handle matters in which a Board member is potentially recused from participating in particular cases pending before the Board.

The steps followed are:

1. IDENTIFYING RECUSALS

As new cases come in to the Board for assignment, we check the recusal lists posted in Sharepoint on the Board Team Site in the Recusals folder under "Helpful Resources." These lists were provided to the ES Office from the Ethics Office, are maintained by the ES Office, or are reports generated by OCIO.

In reviewing the lists, we check to see if the company is included on the list (if there is a d/b/a name, we check both names).

We also check the "Participants" Tab in NxGen to identify whether the Board Member's former law firm is (or was) a party in the case or a legal representative for a participant in the case. The law firm may also be a former case participant, which is indicated by an "end" date for the former law firm's participation in the case.

In checking the recusal lists, we look for the relevant name in the list (which is usually in alphabetical order) and we also use the Find function [Ctrl + F] to type in the name of the company to ensure that we have not missed anything.

We also check the “Related Cases” tab in NxGen to see if there are any open related cases where the former law firm is a case participant or is the legal representative for a case participant.

2. DESIGNATING RECUSALS

If we find a recusal conflict based on the above review, we recuse the Board member by:

Code the case with a “CM” designation in the “Control DB” for each recusal case in JCMS. This coding causes the case to appear on a Board-side Recusal List report in NxGen Analytics, and allows for easy tracking of all cases currently pending before the Board in which a Board Member is recused.

We add a “Case Comment” in NxGen analytics stating that the Board Member is recused. This comment then appears in the Board-side Recusal List report in NxGen Analytics.

We add a “Comment” stating that the Board member is recused in the Case File area of JCMS. This comment will be seen by anyone accessing the case in JCMS.

The case is not assigned to the recused Board member (either as originating staff or as a panel participant). Nor does the Board member note off on decisions that are to be issued in cases from which he or she is recused.

3. EXCEPTIONS

One exception to this general practice pertains to those limited cases that appear only on the “**Emanuel Recusals – Littler Cases Before the Courts July 2017**” list. The Ethics Office has advised the ES Office that the aforementioned list does not require automatic recusal, but rather provides “guidance.” Accordingly, for cases, companies or organizations appearing on that list, for which there are no other recusal indications either via case participants or other recusal lists, we have agreed with Member Emanuel’s front office to notify them of a potential conflict. They will investigate the potential conflict, consulting with the Ethics Office if necessary, and then advise the ES Office if recusal is necessary. If recusal is necessary, we will designate and track the case in JCMS and NxGen as per the steps identified above.

Another exception to this general practice includes those limited cases where there is no initial recusal issue, but the drafting of the Board’s decision, includes argument and/or references that give rise to a possible recusal issue. For those situations, the Board Member’s front office will identify the possible recusal issue(s) and seek the advice of the Ethics Office regarding whether recusal of the Board Member is required based on the way in which the Board’s decision is drafted.

4. SOLICITOR'S OFFICE

For cases that are received by the Solicitor's Office through the internal transfer process (and therefore are not assigned to the Solicitor's Office by the ES Office), the Solicitor's Office follows the steps listed below:

- 1) Check the recusal lists for the named employer(s) and any d/b/a names, etc. (Look for the name in its alphabetical arrangement and also use the Find function [Ctrl + F] to type in the name and make sure the name is not missed by manual review).
- 2) Check the "Participants" tab in NxGen to see if any of the former law firm's attorneys are listed as legal representatives for case participants.
- 3) Notify the ES Office if a former law firm attorney is listed under Participants but is not on the recusal lists.
- 5) Notify the ES Office if a reference is found to a former law firm attorney in documents attached to the parties' briefs. Check with the ES Office to see if recusal is implicated.
- 6) Notify the ES Office when a question arises involving the possibility of recusal, in an abundance of caution, even though the entities involved in the case have a tangential connection to names on the attached lists (For example, if the case involves a company that appears to be a subsidiary of a listed entity).
- 7) Double-check that a Comment has been entered in the Case File in JCMS, and add the Comment if it is not already there.

APPENDIX 3



UNITED STATES GOVERNMENT
National Labor Relations Board

MEMORANDUM

E.S. MEMO 19-1

To: Board Front Offices

From: Roxanne L. Rothschild, Executive Secretary

Date: November 18, 2019

Subject: NLRB Board Member Recusal Process

At the Board's direction, I am issuing this Memorandum setting forth the process that is to be followed when the Agency's Designated Agency Ethics Official ("DAEO") makes a recusal determination regarding a Board member's participation in a case or other proceeding or matter pending before the Board.

Either upon request or *sua sponte*, the NLRB's DAEO makes a recusal determination regarding a Board member's participation in a case or other proceeding (matter) under 18 U.S.C. § 208, 5 C.F.R. §§ 2635.502(c), 502(e),¹ or the Ethics Pledge. This determination will be made in writing. Where the Board member accepts the DAEO's determination as his or her decision, the Office of the Executive Secretary ("ES Office") will note the recusal in JCMS and will screen the Board member off the matter.

While Board members almost always concur with the DAEO's recusal determination, in the rare circumstance where a Board member reaches his or her own decision to disagree with the DAEO's determination and intends instead to participate in a matter, the following procedures will apply:

1. STEP ONE: Board Member-DAEO Determination Review

- Matter temporarily placed on hold by the ES Office.
- Within 10 days of the DAEO's written recusal determination, there shall be a mandatory meeting between the Board member and the DAEO to review and discuss the DAEO's determination and the Board member's reasons for disagreement.

¹ 5 C.F.R. § 2635.502(e) provides: "*Disqualification*. Unless the employee is authorized to participate in the matter under paragraph (d) of this section, an employee shall not participate in a particular matter involving specific parties when he or the agency designee has concluded, in accordance with paragraph (a) or (c) of this section, that the financial interest of a member of the employee's household, or the role of a person with whom he has a covered relationship, is likely to raise a question in the mind of a reasonable person about his impartiality. Disqualification is accomplished by not participating in the matter."

- Board member must personally participate in this meeting.
- Based on the Board member-DAEO meeting and possible follow-on discussions, and in no event longer than 30 days, the Board member shall either:
 1. Agree to voluntarily self-recuse from the matter, after which the ES Office will note the recusal in JCMS and screen the Board member off the matter; or
 2. Decline participation (in the substantive issues of the matter) but append a separate statement or personal footnote to the opinion setting forth the reasons s/he disagrees with the recusal determination, thereby preserving the issue for judicial review, which allows the matter to proceed; or
 3. Continue to disagree with the DAEO recusal determination; proceed to Step Two.

2. **STEP TWO: Internal “Interactive Process”**

- Matter continues on temporary hold by ES Office.
- Other Board members notified of Board member-DAEO disagreement for situational awareness.
- DAEO and Chairman (as agency head under Office of Government Ethics (“OGE”) regulations²) engage in an “Interactive Process” with the Board member to try to reach a consensus resolution.
 - Board member must personally participate in this process.
 - This Interactive Process may include DAEO/Board member discussions with OGE and/or with the White House.
 - At all times, the Board member and DAEO will engage in good faith efforts to move the process forward expeditiously.
 - Based on the additional information exchanged in the Interactive Process and/or clarity gained in the course of that process:
 1. Either the Board member or the DAEO may change his or her decision;
 - i. DAEO can reverse the recusal determination, which will be provided in written documentation to the Board member; or
 - ii. Board member can voluntarily self-recuse from the matter (which will be done in writing) after which the ES Office will note the recusal in JCMS and screen the Board member off the matter); or
 2. Board member can decline participation (in the substantive issues of the matter) but append a separate statement or footnote to the

² If the Chairman is the Board member who disagrees with the recusal determination, then the Interactive Process must occur directly between the DAEO and the Chairman, with no involvement from other Board members.

opinion setting forth the reasons s/he disagrees with the DAEO's recusal determination, thereby preserving the issue for judicial review, which allows the matter to proceed without that Board member's substantive participation; or

3. Where the Board member continues to disagree with the DAEO determination, s/he will document in writing that s/he has engaged in the Interactive Process with the DAEO and the Chairman, but that s/he intends to participate in the case or matter; proceed to Step Three.

3. STEP THREE: Meeting Between Chairman and Board Member³

- Matter continues on temporary hold by the ES Office.
- Chairman (as agency head under OGE regulations) meets with the Board member to discuss the DAEO recusal determination and the implications of further non-compliance.
 - Chairman and Board member must personally participate in this process.
 - Based on the meeting between the Chairman and Board member, additional information exchanged in the Interactive Process and/or clarity gained in the course of that process, the Board member can:
 1. Voluntarily self-recuse from the matter (which will be done in writing) after which the ES Office will note the recusal in JCMS and screen the Board member off the matter); or
 2. Decline participation in the substantive issues of the matter but append a separate statement or footnote to the opinion setting forth the reasons s/he disagrees with the DAEO's recusal determination, thereby preserving the issue for judicial review, which allows the matter to proceed without that Board member's substantive participation.
 - Where the Board member continues to disagree with the DAEO determination, s/he will document in writing that s/he has engaged in the Interactive Process with the DAEO and the Chairman, but s/he intends to participate in the case or matter; proceed to Step Four.

4. STEP FOUR: Mandatory External Notifications of Non-Compliance by Board Member with DAEO Recusal Determination

- Other Board members notified of status for situational awareness.
- The DAEO refers the recusal determination to the Director of the Office of Government Ethics
 - If non-criminal, OGE reviews and enforces under [5 C.F.R. § 2638.501 and 504](#).
 - Under these procedures, the Interactive Process may continue with OGE's assistance.

³ If the Chairman is the Board member who disagrees with the recusal determination, move directly to Step 4.

- OGE will review the determination and may initiate proceedings to direct the Board member to comply with the recusal determination under OGE rules and the Ethics in Government Act.
 - If criminal (18 U.S.C. § 208), OGE rules require the Director of OGE to refer the matter to the Board's Inspector General (IG) or the Department of Justice, per 5 C.F.R. § 2638.502.
- The Chairman and/or DAEO also may refer the Board member's refusal to comply with the recusal determination to the IG, and, if a criminal conflict of interest under 18 U.S.C. § 208 or a violation of the Trump Ethics Pledge (see Sec. 5), to the Department of Justice.⁴
- The Chairman (as Agency Head) notifies the President, who has supervisory authority over Board members under Section 3(a) of the Act and may remove a Board member for "malfeasance in office" of the Board member's refusal to comply with the DAEO's (and potentially OGE's) recusal determination.
- The Chairman also may provide this same notification to the Board's Congressional oversight committees.

5. **STEP FIVE: Matter Adjudication with Board Member Participation and Recusal Dispute Noted**

- After no more than 60 days from the date of the initial written DAEO recusal determination, unless the Board member agrees to extend the time (e.g., for completion of OGE proceedings), the Board will proceed with adjudication of the matter. A cite to the DAEO's documentation of the recusal determination will be included in the matter or case decision; the Board member whose recusal status is at issue may opt to include an explanation in that decision as to his or her disagreement with the DAEO's recusal determination. These statements will preserve the recusal issue for judicial review. (5 C.F.R. § 2638.107 (d) (agency head) and 5 C.F.R. § 2638.104(c)(9) (DAEO).)

⁴ While this flow chart reserves referral to the IG until after OGE has conducted its formal review, the IG Act and OGE regulations, 5 C.F.R. § 2638.106, permit the IG to intervene *sua sponte* or upon request at any time. There may be situations where it is appropriate for the IG to intervene sooner.