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November 9, 2017

The Honorable Trey Gowdy
Chairman
House Committee on Oversight and Government Reform
2418 Rayburn House Office Building
Washington, DC 20515

The Honorable Elijah E. Cummings
Ranking Member
House Committee on Oversight and Government Reform
2163 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Gowdy and Ranking Member Cummings:

Thank you for taking the time today to discuss my recommendations for legislative reform in connection with the reauthorization of the U.S. Office of Government Ethics (OGE). I have assembled the enclosed recommendations as a collection of discrete items, which you can consider individually rather than as a package.

In developing these thirteen recommendations, I have drawn on lessons from my service at OGE—both as a member of OGE's legal staff and as OGE's Director—over a period of fifteen years. Informed by real-world experience, these recommendations would strengthen the executive branch ethics program by enhancing OGE's independence, making OGE's oversight more effective, increasing transparency, and refining substantive government ethics requirements. They address topics that should appeal broadly to Members of Congress without regard to affiliation, leaving for another day other politically sensitive topics. As such, they present a real opportunity to achieve bipartisan reforms.

Thank you again for reviewing these recommendations. Please do not hesitate to contact me if you have any questions.

Sincerely,

Walter M. Shaub, Jr.
Senior Director, Ethics

Enclosure

A. Independence of OGE

1. Removal of OGE's Director – Insulate OGE's Director against retaliation by establishing new procedural or substantive requirements for removing the Director.

2. Communications with Congress – Authorize OGE to communicate with Congress.

B. Effectiveness of Oversight

1. Carryover Authority for OGE's Director – Allow OGE's Director to remain in office after expiration of the Director's term for up to one year or until replaced.

2. Scope of OGE's Authority – Clarify that OGE oversees the entire executive branch ethics program.

3. Collection of Ethics Information and Records – Strengthen OGE's collection of ethics-related information and records.

4. Investigations – Establish an Inspector General with regular jurisdiction over small agencies and limited special jurisdiction to conduct ethics investigations throughout the executive branch at OGE's request.

5. Income from Publicly Traded Assets – Eliminate the unnecessary and resource-draining requirement to disclose investment income from publicly traded assets.

C. Transparency

1. Online Postings on OGE's Website – Require OGE and agency ethics officials to record specified ethics actions and post the records on OGE's website.

2. Use of Government Aircraft – Require OGE or GSA to post publicly on its website the unclassified reports of senior official travel on government aircraft.

3. Discretionary Trusts – Require public disclosure of interests in discretionary trusts, and require that OGE report to Congress on the issues they present.

4. Candidate Transition and Ethics Plans – Require OGE to collect nonbinding Presidential transition and conflict of interest plans from candidates.

D. Substantive Ethics Requirements

1. Special Government Employees – End the use of special government employees for more than 130 days.

2. Discretionary Payments from Employers – Prohibit political appointees from working on particular matters affecting employers who make discretionary payments to them.

INDEPENDENCE OF OGE

REMOVAL OF OGE'S DIRECTOR

Insulate OGE's Director against retaliation by establishing new procedural or substantive requirements for removing the Director.

Recommendation: Establish requirements for removing the Director of the U.S. Office of Government Ethics comparable to those that apply when removing either a statutory Inspector General or the head of the U.S. Office of Special Counsel.

Discussion

The Inspector General Act provides statutory Inspectors General with the following procedural protection:

> (b) An Inspector General may be removed from office by the President. If an Inspector General is removed from office or is transferred to another position or location within an establishment, the President shall communicate in writing the reasons for any such removal or transfer to both Houses of Congress, not later than 30 days before the removal or transfer. Nothing in this subsection shall prohibit a personnel action otherwise authorized by law, other than transfer or removal.[1]

The organic statute for the U.S. Office of Special Counsel (OSC) goes even further, providing the Special Counsel with the following substantive protection: "The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office."[2] In contrast, the Ethics in Government Act is silent on the grounds and procedures for removing the Director of the U.S. Office of Government Ethics (OGE).[3]

This lack of protection exposes OGE's Director to a risk of political retaliation for carrying out the agency's mission. A Congressional committee report acknowledges the need to insulate OGE against political retaliation:

> A major issue discussed at the Oversight Subcommittee's hearing was the independence of the OGE. In many instances, the Office must rule on sensitive issues involving political appointees and other high-ranking officials. For the OGE to perform its role of preventing conflicts of interest and monitoring compliance with the ethics laws by agencies and officials, it is crucial that the Director act independently and free from political pressure. . . . The Congress created the OGE

[1] 5 U.S.C. app. § 3(b) (Inspector General Act).
[2] 5 U.S.C. § 1211(b).
[3] 5 U.S.C. app. § 401(b).

> as an institutional check to monitor the ethics program and to prevent conflicts of interest in the Executive Branch. This institutional check is effective only when the Office can act objectively and without fear of reprisal.[4]

Adding either the language used in the Inspector General Act or the language used in OSC's organic statute to the Ethics in Government Act would insulate the Director against political retaliation for holding senior executive branch officials accountable.

[4] S. REP. NO. 98-59 at 20 (1983), https://goo.gl/my1NNG.

COMMUNICATIONS WITH CONGRESS

Authorize OGE to communicate with Congress.

Recommendation: Give the U.S. Office of Government Ethics authority to initiate communications with Congress regarding its budget, legislative proposals, and oversight of the executive branch ethics program.

Discussion

The U.S. Merit Systems Protection Board (MSPB) is authorized to bypass the Office of Management and Budget (OMB) in communicating with Congress:

> Notwithstanding any other provision of law or any rule, regulation or policy directive, any member of the Board, or any employee of the Board designated by the Board, may transmit to the Congress on the request of any committee or subcommittee thereof, by report, testimony, or otherwise, information and views on functions, responsibilities, or other matters relating to the Board, without review, clearance, or approval by any other administrative authority.[5]

Congress has provided the U.S. Office of Special Counsel (OSC) with nearly identical authority, as well as the authority to communicate legislative proposals.[6]

Congress has similarly provided statutory Inspectors General with bypass authority. They are authorized to communicate directly with Congress "concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by [their agencies], to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action."[7] In addition, the Inspector General Act directs the executive branch to notify Congress of the views of statutory Inspectors General with respect to their budgetary needs:

> (1) For each fiscal year, an Inspector General shall transmit a budget estimate and request to the head of the establishment or designated Federal entity to which the Inspector General reports. . . .
> . . .
> (3) The President shall include in each budget of the United States Government submitted to Congress—

[5] 5 U.S.C. § 1205.
[6] 5 U.S.C. §§ 1217, 1218.
[7] 5 U.S.C. app. § 4(a)(5) (Inspector General Act).

> (A) a separate statement of the budget estimate prepared in accordance with paragraph (1);
> (B) the amount requested by the President for each Inspector General . . . ; and
> (E) any comments of the affected Inspector General with respect to the proposal if the Inspector General concludes that the budget submitted by the President would substantially inhibit the Inspector General from performing the duties of the office.[8]

In contrast, the Ethics in Government Act provides the U.S. Office of Government Ethics (OGE) with no authority to bypass OMB.[9] An example of the problems this circumstance creates relates to OGE's recent reauthorization hearing before the House Committee on Oversight and Government Reform (HOGR). The MSPB and OSC were able to submit their written testimony to HOGR in a timely fashion because they did not need OMB's approval. In OGE's case, however, OMB's review of, and insistence on changes to, OGE's written testimony delayed the submission of that testimony to HOGR. Another example has to do with OGE's funding. OMB has not permitted OGE to notify Congress of its full budgetary needs, which has left OGE underfunded and understaffed.

Amending the Ethics in Government Act to give OGE bypass authority would address these types of problems. This action is needed to place OGE on a footing comparable to its sister agencies, the MSPB and OSC, as well as its fellow members of the Council of the Inspectors General on Integrity and Efficiency (CIGIE).[10] Such an amendment would also provide Congress the information it needs to assess the effectiveness of the executive branch ethics program.

[8] 5 U.S.C. app. § 6(f) (Inspector General Act).
[9] *See* 5 U.S.C. app. §§ 401-403.
[10] OGE's Director is a statutory member of CIGIE. *See* 5 U.S.C. app. § 11(b)(1)(E) (Inspector General Act).

EFFECTIVENESS OF OVERSIGHT

CARRYOVER AUTHORITY FOR OGE'S DIRECTOR

Allow OGE's Director to remain in office after expiration of the Director's term for up to one year or until replaced.

Recommendation: Modify the Ethics in Government Act to treat the Director of the U.S. Office of Government Ethics the same as the head of the U.S. Office of Special Counsel by permitting an incumbent Director to carry over for up to one year after the end of a five-year term pending appointment of a Senate-confirmed replacement.

Discussion

The organic statute for the U.S. Office of Special Counsel (OSC) provides the following carryover authority for the Special Counsel:

> The Special Counsel shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The Special Counsel may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that the Special Counsel may not continue to serve for more than one year after the date on which the term of the Special Counsel would otherwise expire under this subsection.[11]

In contrast, the Ethics in Government Act provides no carryover for the Director of the U.S. Office of Government Ethics (OGE).[12] As a result, the OGE Director position has been vacant for longer than a total of five years during the last fourteen years.[13] Adding the language used in OSC's organic statute to the Ethics in Government Act would enhance the continuity of OGE's operations following the end of an OGE Director's five-year term.

[11] 5 U.S.C. § 1211(b).
[12] 5 U.S.C. app. § 401(b).
[13] The position was vacant from December 2003 to June 2006, from June 2011 to January 2013, and from July 2017 to the present.

SCOPE OF OGE'S AUTHORITY

Clarify that OGE oversees the entire executive branch ethics program.

Recommendation: Amend the Ethics in Government Act to clarify that the responsibilities of the U.S. Office of Government Ethics extend to the entire executive branch ethics program. Congress could accomplish this change by substituting "executive branch" for "executive agency" in each place where the phrase is used in sections 402 and 403 of the Ethics in Government Act.

Discussion

Section 402 of the Ethics in Government Act gives the U.S. Office of Government Ethics (OGE) authority over "employees of any executive agency, as defined in section 105 of title 5, United States Code" and uses the term "executive agency" in several places.[14] Similarly, section 403 of the Act gives OGE authority to collect information and records from each "executive agency."[15] As explained in a May 22, 2017, letter from OGE to the Director of the Office of Management and Budget, the Act places employees of the Executive Office of the President within OGE's purview.[16]

Confusion arose recently when an Administration official questioned whether the White House Office is an "executive agency" for the purposes of the Ethics in Government Act.[17] The theory that led to his confusion is that the White House Office is not an "executive agency" for certain limited purposes under 5 U.S.C. § 105. For example, the D.C. Circuit found that the President's official residence, which is distinct from but similar in certain respects to the White House Office, was not an "executive agency" for purposes of a certain employment discrimination law.[18]

But the White House Office has been found to be an "executive agency" for other purposes. For example, the White House Office is an "executive agency" for purposes of 18 U.S.C. § 603.[19] In addition, the White House routinely relies on a law that allows an

[14] *See* 5 U.S.C. app. § 402.
[15] *See* 5 U.S.C. app. § 403(a)(2).
[16] *See* Letter to M. Mulvaney, Director, Office of Mgmt. and Budget, from W. Shaub, Jr., Director, U.S. Office of Gov't Ethics (May 22, 2017), https://goo.gl/Zj77uU.
[17] *See* Letter to S. Passantino, Deputy Counsel to the President and Designated Agency Ethics Official, from W. Shaub, Jr., Director, U.S. Office of Gov't Ethics, n.1 (Mar. 9, 2017), https://goo.gl/kxqdiX; *see also* Letter to W. Shaub, Jr., Director, U.S. Office of Gov't Ethics, from S. Passantino, Deputy Counsel to the President and Designated Agency Ethics Official, n.1 (Mar. 1, 2017), from https://goo.gl/7YGFKK.
[18] *See Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995) (per curiam).
[19] Application of 18 U.S.C. § 603 to Contributions to the President's Re-Election Committee, 27 Op. O.L.C. 118, 119 (2003) (Office of Legal Counsel opinion finding that, under the statutory scheme of the Hatch Act Reform Amendments, the White House Office should be treated as an "executive agency" under title 5, notwithstanding the D.C. Circuit's holding in *Haddon*).

"executive agency" to let corporations and other entities outside the government cover the travel expenses of agency officials.[20]

The White House Office's status as an "executive agency" for purposes of the Ethics in Government Act is not in doubt. The Ethics in Government Act refers to OGE as the "supervising ethics office . . . for all executive branch officers and employees,"[21] and it requires OGE to review the financial disclosure reports of senior appointees in the White House Office.[22] Congress enacted the Ethics in Government Act before the D.C. Circuit held that the President's official residence is not an "executive agency" for purposes of one discrimination law.[23] Moreover, every prior Presidential administration since Congress enacted the Ethics in Government Act complied with exercises of OGE's authority under sections 402 and 403.[24]

To demonstrate this last point, after the current Administration questioned OGE's authority to collect copies of ethics waivers, OGE produced hundreds of pages of documents illustrating the history of White House compliance with OGE's authority under 5 U.S.C. app. § 403 to collect ethics information and records.[25] In the case of the dispute over OGE's collection of waivers, this Administration also ultimately complied with OGE's exercise of its authority under section 403.[26] The resolution of that dispute was a potentially encouraging sign that the relevant stakeholders may now have a better understanding of the scope of OGE's authority.[27] Nevertheless, clarifying the language of the statute would prevent confusion from arising again in this or any future administration.

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[20] *See* 31 U.S.C. § 1353(c)(l) (restricting authority to accept such reimbursements only to an "executive agency" as defined under 5 U.S.C. § 105); *see also* White House Office, Semiannual Report of Payments Accepted from a Non-Federal Source (Sept. 30, 2016), https://goo.gl/BTUpBw.

[21] *See* 5 U.S.C. app. § 109(18)(D).

[22] *See* 5 U.S.C. app. §§ 103(c), 402(b)(4).

[23] *See Haddon*, 43 F.3d 1488; Ethics in Government Act of 1978, Pub.L. No. 95-521, 92 Stat. 1824 (1978); Ethics Reform Act of 1989, Pub. L. 101-194, 202, 103 Stat. 1716, at 1724 (1989).

[24] *See* Letter to M. Mulvaney, Director, Office of Mgmt. and Budget, from W. Shaub, Jr., Director, U.S. Office of Gov't Ethics (May 22, 2017), https://goo.gl/Zj77uU; *see also Office of Government Ethics Jurisdiction Over the Smithsonian Institution*, 32 Op. O.L.C. 56, 63-64 (2008) (OLC opinion finding historical practice relevant to its analysis of the scope of OGE's authority).

[25] *See* Letter to M. Mulvaney, Director, Office of Mgmt. and Budget, from W. Shaub, Jr., Director, U.S. Office of Gov't Ethics (May 22, 2017), https://goo.gl/Zj77uU.

[26] *See* Peter Overby, *White House Discloses Ethics Waivers for Presidential Aides*, NAT'L PUBLIC RADIO (Jun. 1, 2017), http://www.npr.org/2017/06/01/530994415/white-house-discloses-ethics-waivers-for-presidential-aides.

[27] At the urging of Senator Chuck Grassley and Senator Diane Feinstein, the Administration has now gone even further, agreeing to release copies of waivers on an ongoing basis. *See* Mem. from Dale A. Christopher, Jr., Deputy Director for Compliance, U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, *Posting of Waivers Issued under Executive Order 13770*, PA-17-05 (Sep. 21, 2017).

COLLECTION OF ETHICS INFORMATION AND RECORDS

Strengthen OGE's collection of ethics-related information and records.

Recommendation: Amend 5 U.S.C. app. § 403(a)(2) to strengthen the ability of the U.S. Office of Government Ethics (OGE) to collect ethics information and records:

- Add language requiring noncompliant executive branch officials to provide written explanations to the President, Congress, and OGE; and

- Establish an administrative mechanism to adjudicate any executive branch employee's failure to produce information or records requested by OGE, with an Administrative Law Judge examining whether the requested information or records are: (a) adequately described in writing, (b) reasonably related to the executive branch ethics program, and (c) unclassified.

Discussion

A House committee report aptly articulates the need for the U.S. Office of Government Ethics (OGE) to access ethics information and records:

> The Committee believes that it is not possible for OGE to ensure the effective and efficient operation of the executive branch ethics program as a whole without having up-to-date information on how agency programs are structured and without having important management data. This data would indicate, for example, the number of individuals who have and haven't filed [financial disclosure reports]; the number and type of corrective actions required of agency employees (divestitures, waivers, disqualifications); and the number of employees alleged or found to have violated employees' standards of conduct or conflict of interest laws, rules, and regulations.[28]

A Senate committee report reflects a similar appreciation of this need:

> [F]or purposes of performing his responsibilities, [OGE's Director] will require access to relevant files and records of agency ethics counselors and other agency materials, information, and documentation necessary to monitor compliance with this statute and related conflict of interest laws and regulations.[29]

[28] H.R. REP. NO. 100-1017, at 19-20 (1988).
[29] S. REP. NO. 95-170, at 150 (1977).

To fulfill this need, OGE's organic statute provides the following authority to collect information and records related to the ethics program:

> (a) Upon the request of the Director, each executive agency is directed to-
>
> . . .
>
> (2) except when prohibited by law, furnish to the Director all information and records in its possession which the Director may determine to be necessary for the performance of his duties.[30]

This language is unambiguous, but OGE has experienced occasional resistance to its collection efforts. OGE has the authority it needs but lacks means to ensure compliance on the part of high-level officials. Therefore, Congress should create a mechanism to ensure compliance with OGE's requests for information and records related to the ethics program.

Congress could provide that, if an executive branch employee refuses to provide OGE with requested information or records, the employee must submit a written explanation of that refusal to Congress, the President, and OGE. This requirement could include a blanket exception for all classified information.

In addition, Congress could amend the Ethics in Government Act to establish an adjudicatory process through which an Administrative Law Judge (ALJ) would determine whether the information or records requested by OGE are: (a) adequately described in writing, (b) reasonably related to the ethics program, and (c) unclassified. Upon a finding that the information and records sought in OGE's request meet this standard, the ALJ would issue an order compelling compliance with OGE's request.

[30] 5 U.S.C. app. § 403(a)(2).

INVESTIGATIONS

Establish an Inspector General with regular jurisdiction over small agencies and limited special jurisdiction to conduct ethics investigations throughout the executive branch.

Recommendation: Establish a Special Inspector General for Small Executive Agencies (SIGSEA) with regular jurisdiction over the many small agencies in the executive branch that lack Inspectors General and special jurisdiction to conduct ethics investigations upon the request of the Director of the U.S. Office of Government Ethics (OGE).

- *Ordinary Jurisdiction:* Establish SIGSEA as a separate agency in the executive branch, and provide it with the same authority that Inspectors General ordinarily have with respect to their assigned agencies.

- *Special Ethics Jurisdiction*: Provide SIGSEA with limited authority to investigate certain ethics-related matters. SIGSEA would be authorized to exercise this special jurisdiction *only* upon receipt of a referral from OGE.

    - This special jurisdiction would extend to the entire executive branch but would be limited to suspected violations by senior political appointees appointed to positions listed in 5 U.S.C. §§ 5312-5316 or 3 U.S.C. §§ 105(a)(2)(A)-(B), 106(a)(2)(A)-(B). It would also be limited to suspected violations of the following authorities: (1) 18 U.S.C. §§ 203-209; (2) 5 U.S.C. app. § 502; (3) 5 U.S.C. app. § 101-109; (4) the Stop Trading on Congressional Knowledge Act of 2012, as amended; (5) any Executive Order substantially concerning government ethics; (6) OGE's executive branch-wide regulations; and (7) any written ethics agreement or pledge signed by a Presidential appointee.

    - Upon receipt of a referral from OGE, SIGSEA would be required either (1) to conduct the investigation without reimbursement by OGE, or (2) to provide OGE with a written explanation for its decision to decline to conduct the investigation.

- *Conflict of Interest Exception:* To avoid organizational conflicts of interest, do not give SIGSEA jurisdiction over OGE, the U.S. Office of Special Counsel, or the U.S. Merit Systems Protection Board. Instead, add these three small agencies to the jurisdiction of the Inspector General for the U.S. Office of Personnel Management.

Discussion

There have occasionally been calls for Congress to grant the U.S. Office of Government Ethics (OGE) investigative authority. It is true that OGE lacks any real authority to investigate potential violations of ethics laws, and there may well be a need for an additional entity in the executive branch to have investigative authority over ethics-related matters. However, OGE is not the right entity to be given investigative authority.

Giving OGE investigative authority would jeopardize the executive branch ethics program's critical function as a prevention mechanism. Unlike Inspectors General, OGE and agency ethics officials receive countless requests for advice and counsel from the executive branch's 2.7 million employees, especially from its more than 400,000 financial disclosure filers. OGE alone receives over 2,000 requests for advice and counsel each year, and OGE's staff comprises only about 1% of the total population of officials in the executive branch who support the ethics program.[31] OGE recently asked all executive branch agencies to rate their investment of time in the various ethics program functions, and the function identified by the greatest number of agencies as requiring the most significant investment in 2016 was the advice and counseling function.[32]

These numbers support the conclusion that the existing ethics program is, through and through, a prevention mechanism. The program serves to protect the executive branch against potential violations of laws, regulations, and policies related to government ethics. This focus on prevention is fitting; after all, the ultimate goal of any ethics program should be to *prevent* violations before they occur, rather than merely remediate the harm that violations cause.

For this reason, Congress should resist the temptation to transform OGE into one more Office of Inspector General among many. To the extent that increased enforcement capacity may be needed, Congress could establish an entity that might be called the Special Inspector General for Small Executive Agencies (SIGSEA), which would be headed by a Special Inspector General. With respect to small agencies that lack Inspectors General, SIGSEA would have the same responsibilities and authorities as any Inspector General of an agency or establishment in the executive branch. SIGSEA would also have limited special jurisdiction to conduct certain ethics investigations throughout the executive branch. SIGSEA would have its own budget and would not be reimbursed by the agencies within its jurisdiction or OGE.

This limited special jurisdiction to conduct ethics investigations would need to be carefully circumscribed. SIGSEA would conduct an investigation of an ethics matter only to the extent delineated by OGE's Director, except when the matter arises at one of the small agencies within SIGEA's ordinary jurisdiction. These OGE-referred ethics investigations would be limited to allegations of violations by senior political appointees appointed to positions listed in 5 U.S.C. §§ 5312-5316 or 3 U.S.C. §§ 105(a)(2)(A)-(B), 106(a)(2)(A)-(B). In addition, the scope of SIGSEA's special ethics jurisdiction would be limited to suspected violations of the conflict of interest provisions of 18 U.S.C. §§ 203-209; the disclosure requirements established in 5 U.S.C. app. §§ 101-109; any written ethics agreement or pledge signed by a Presidential appointee; the Stop Trading on Congressional Knowledge Act of 2012, as amended; the outside employment provisions of 5 U.S.C. app. § 502; and any Executive Order substantially concerning government ethics. Due to the potential for

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[31] *See Agency Profile*, U.S. Office of Gov't Ethics, 8, 26 (2017) (indicating OGE receives about 2,000 requests for assistance per year and that there are about 75 OGE employees), https://goo.gl/42VP4T; CY16 Annual Agency Ethics Program Questionnaire Results, U.S. Office of Gov't Ethics, 2 (2017) (indicating that approximately 6,895 individuals provided support for the executive branch ethics program as part of their official duties in calendar year 2016 according to data supplied to OGE by agency ethics officials in response to OGE's annual survey of ethics program data), https://goo.gl/TGrRke.

[32] CY16 Annual Agency Ethics Program Questionnaire Results, U.S. Office of Gov't Ethics, 9 (2017), https://goo.gl/TGrRke.

organizational conflicts of interest, SIGSEA would not have jurisdiction over OGE, the U.S. Office of Special Counsel, or the U.S. Merit Systems Protection Board. Instead, the Inspector General for the U.S. Office of Personnel Management would have investigative jurisdiction over these three small agencies.

This recommended structure would have several advantages. First, it would create a firewall between OGE and the investigative function. Although OGE would refer alleged violations to SIGSEA, the separation of the advice-giving and investigative responsibilities would preserve the willingness of executive branch employees to solicit needed advice from OGE staff members and the agency ethics officials.[33] The separation of the responsibilities of OGE and SIGSEA would also ensure that any investigation is carried out by trained professional investigators, rather than by unqualified OGE personnel drawn from OGE's staff of ethics officials to perform investigative work as a mere collateral duty.

Second, there are concerning gaps in the coverage of Inspectors General within the executive branch, with dozens of small agencies operating outside the jurisdiction of any Inspector General.[34] Assigning these small agencies to the various statutory Offices of Inspectors General of large executive branch agencies would strain the resources of those offices. Small agencies also present different issues than large agencies. Establishing SIGSEA as an office that specializes in the oversight of small agencies would help to build needed expertise in addressing the distinct challenges they present.

Third, establishing SIGSEA would be economical. OGE would have difficulty maintaining adequate capacity for conducting ethics investigations because it has a wide range of highly specialized responsibilities unrelated to investigative work. In contrast, SIGSEA would find it easier to maintain such capacity because its investigators could focus on other types of investigations arising at small agencies within its ordinary jurisdiction when not conducting ethics investigations.

Fourth, the establishment of SIGSEA would include a system of checks and balances to prevent politically motivated investigations. SIGSEA could not conduct an investigation into an ethics matter without a referral from OGE, unless the matter arose at one of the small agencies within SIGSEA's ordinary jurisdiction. Likewise, OGE could refer an investigation but could not directly compel SIGSEA to undertake it. Thus, as a check on the authority to conduct special ethics investigations, both OGE's Director and the Special Inspector General would have to agree that the circumstances of a matter warrant an ethics investigation. In order to ensure that SIGSEA does not ignore OGE's requests, however, Congress should also require SIGSEA to provide OGE with a written explanation of any decision to decline to investigate a matter referred by OGE.

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[33] Unlike a full grant of authority for OGE to conduct investigations, a grant of authority to refer matters to SIGSEA would not likely deter employees from seeking advice. This new grant of authority to refer matters to SIGSEA would be in keeping with OGE's existing authority to refer matters to Inspectors General, which has not deterred employees from seeking advice. *See* 5 U.S.C. app. § 403(a).

[34] *See Oversight of Small Agencies*, 1 Hearing Before the Subcomm. on Fin. and Contracting Oversight of the S. Comm. On Homeland Sec. and Governmental Affairs, 113th Cong., (Apr. 10, 2014), https://www.gpo.gov/fdsys/pkg/CHRG-113shrg89526/pdf/CHRG-113shrg89526.pdf.

INCOME FROM PUBLICLY TRADED ASSETS

Eliminate the unnecessary and resource-draining requirement to disclose investment income from publicly traded assets.

Recommendation: Eliminate the requirement to disclose income from publicly traded assets that are registered with the U.S. Securities and Exchange Commission, except for proceeds from above-market value transactions.

Discussion

With respect to most of the roughly 28,000 public financial disclosure reports that the executive branch collects each year, the filers do not possess great wealth. These financial disclosure reports do not disclose extensive financial holdings. Nevertheless, employees often find the process of completing them burdensome and time consuming. More importantly, the process of reviewing these financial disclosure reports consumes a significant portion of the resources of agency ethics offices.

This expenditure of effort is justifiable to the extent that financial disclosure reports reveal conflicts of interest. For most filers, however, the one required disclosure item that consumes the most time is not relevant to the conflict of interest analysis. This item is investment income from publicly traded assets, such as securities, mutual funds, and exchange-traded funds that are registered with the U.S. Securities and Exchange Commission (SEC). The burden flows from the difficulty filers experience in determining the amount of income generated during the reporting period. With regard to new entrant financial disclosure reports and termination financial disclosure reports, the reporting period can vary in length and often does not line up neatly with year-end brokerage statements. Employees are often forced to track down quarterly statements and add up the earnings for each individual asset.

While agency ethics officials need to know the value of publicly traded assets in order to evaluate the potential for conflicts of interest to arise, they do not need to know the amount of income these highly regulated assets produce. Dividends paid to all investors in a publicly traded company's stock, for instance, generally pose no conflicts of interest distinct from the value of the filer's investment in that stock. Likewise, the amount of capital gains generated by selling publicly traded assets at market value is not information agency ethics officials need to perform conflict of interest analyses.

For these reasons, Congress should eliminate the requirement to disclose income from publicly traded assets registered with the SEC. Congress could carve out an exception that requires the disclosure of the proceeds from any above-market value transactions, in order to capture information about unusual payments. This minor adjustment to statutory disclosure requirements would free the U.S. Office of Government Ethics and agency ethics offices to focus their resources on substantive conflict of interest concerns.

TRANSPARENCY

ONLINE POSTINGS ON OGE'S WEBSITE

Require OGE and agency ethics officials to record specified ethics actions and post the records on OGE's website.

Recommendation: Require the U.S. Office of Government Ethics (OGE) and agency ethics officials to record the following ethics actions and post the records on OGE's website for public viewing:

- Public financial disclosure reports of nominees and appointees to Executive Schedule Level I & II positions identified in 5 U.S.C. §§ 5312-5313;
- Other public financial disclosure reports that OGE reviews;
- Ethics agreements of PAS nominees and appointees;[35]
- Certifications of PAS appointees' compliance with ethics agreements;
- Ethics agreements of individuals appointed pursuant to 3 U.S.C. §§ 105(a)(2)(A)-(B), 106(a)(2)(A)-(B);
- Certifications of compliance with ethics agreements by individuals appointed pursuant to 3 U.S.C. §§ 105(a)(2)(A)-(B), 106(a)(2)(A)-(B);
- Waivers issued pursuant to 18 U.S.C. §§ 208(b)(1), (3);
- Authorizations issued pursuant to 5 C.F.R. § 2635.502(d);
- Waivers issued pursuant to 5 C.F.R. § 2635.503(c);
- Waivers issued pursuant to either Executive Order 13490 or Executive Order 13770;
- Certificates of Divestiture;
- Records of agencies' approval of the acceptance of gifts from outside sources;[36]
- Records of PAS appointees' initial ethics briefings;[37]
- Records of PAS appointees' ethics training;
- Waivers of any other ethics requirements and extensions of any ethics-related deadlines; and
- Reports of OGE's review of agency ethics programs.

Discussion

The only ethics-related documents listed above that the law requires the U.S. Office of Government Ethics (OGE) to post on its website are the public financial disclosure reports of executive branch officials serving in positions that are paid at Executive Schedule Levels I and II.[38] As a matter of practice, OGE voluntarily posts other ethics-related documents and information on its website. In the case of some documents not published on OGE's website, OGE at least identifies the documents online and enables the public to

[35] These are nominees and appointees to presidentially appointed, Senate-confirmed positions.
[36] This requirement would apply only to gifts for which employees must obtain agency approval.
[37] These briefings are required by 5 C.F.R. § 2638.305.
[38] *See* An Act to modify the requirements under the STOCK Act regarding online access to certain financial disclosure statements and related forms, Pub. L. 113–7, § 1 (2013).

submit requests for the documents directly through its website.[39] However, OGE could discontinue these practices at any time. In addition, some key ethics actions either are not recorded in writing or are not published on OGE's website.[40] Congress should require OGE and agencies to record in writing the actions listed in the table below, and Congress should require OGE to post the records on OGE's website.[41]

Document	Online Posting Requirement and Status
Public financial disclosure reports of nominees and appointees to Exec. Schedule Level I & II positions	required
Other public financial disclosure reports that OGE reviews	not required and not posted[42]
Ethics agreements of PAS nominees and appointees	not required but posted voluntarily
Certifications of compliance with ethics agreements by PAS appointees	not required but posted voluntarily
Ethics agreements of individuals appointed pursuant to 3 U.S.C. §§ 105(a)(2)(A)-(B), 106(a)(2)(A)-(B)	not required and not posted
Certifications of compliance with ethics agreements by individuals appointed pursuant to 3 U.S.C. §§ 105(a)(2)(A)-(B), 106(a)(2)(A)-(B)	not required, not posted, and probably not recorded in writing
18 U.S.C. §§ 208(b)(1), (3) waivers	not required and not posted
5 C.F.R. § 2635.502(d) authorizations	not required, not posted, and not always recorded in writing
5 C.F.R. § 2635.503(c) waivers	not required and not posted
Executive Order 13490 and Executive Order 13770 waivers	not required but posted voluntarily
Certificates of Divestiture	not required and not posted[43]
Records of agencies' approval of the acceptance of gifts from outside sources	not required, not posted, and not always recorded in writing
Records of PAS appointees' initial ethics briefings	not required and not posted
Records of PAS appointees' ethics training	not required and not posted
Waivers of any other ethics requirements and extensions of any ethics-related deadlines	not required, not posted, and not always recorded in writing
OGE's program review reports	not required but posted voluntarily

[39] These documents include public financial disclosure reports of Presidential nominees and appointees to Senate-confirmed positions below Executive Schedule Level II, candidates for President and Vice President, and Designated Agency Ethics Officials.
[40] For example, OGE's website does not publish training records of PAS appointees. In addition, agencies are not always required to issue authorizations under 5 C.F.R. § 2635.502(d) in writing.
[41] Note that this list of recommended online posting intentionally excludes some information and records. It excludes some ethics-related documents pertaining to lower level officials for whom the balancing of the public's interest with privacy concerns might weigh against posting online. It also excludes records of advice that ethics officials provide individual employees for two reasons: (1) the information addressed in the advice is often of a personal nature, and (2) the ethics program's effectiveness as a prevention mechanism depends entirely on employees' willingness to disclose information to ethics officials and seek advice from them, which would be diminished by the knowledge that any advice-seeking communication would be published on OGE's website.
[42] OGE does not post the reports themselves online but does post a list of the reports it has finished reviewing.
[43] OGE does not post these documents online but does post a list of the Certificates of Divestiture it has issued.

USE OF GOVERNMENT AIRCRAFT

Require OGE or GSA to post on its website the unclassified reports of senior official travel on government aircraft.

Recommendation: Require either the U.S. Office of Government Ethics or the U.S. General Services Administration to publish on its website the unclassified reports that executive branch agencies currently file with the U.S. General Services Administration regarding the use of government aircraft by senior officials. Increase the frequency with which agencies must file these reports, and add a requirement that each report must contain a complete explanation as to both the decision to use a government aircraft and the selection of the type of aircraft used.

Discussion

Recent news reports have highlighted the potential for senior officials to misuse government aircraft, which implicates the executive branch-wide regulations of the U.S. Office of Government Ethics (OGE) concerning misuse of position.[44] Extensive investigative efforts on the part of a news organization recently led to the resignation of one cabinet official.[45] However, it should not have been so difficult to uncover this information.

The General Services Administration (GSA) collects unclassified reports of senior official travel on government aircraft.[46] But GSA collects the information only twice per year[47] and, more importantly, has refused to serve as a central clearinghouse for these reports. The Campaign Legal Center (CLC) recently filed a Freedom of Information Act request with GSA for copies of its senior official travel reports, but GSA refused to release the reports in its custody. Incredibly, this repository of executive branch-wide information instructed CLC to file a separate request with each of the more than 130 agencies.

GSA's denial of this request is indefensible. GSA should have released these records because, based on the following facts, they are clearly GSA records: (1) GSA maintains a centralized database of these reports, which are transmitted[48] to GSA through an online portal on GSA's website;[49] (2) GSA's own regulations establish the requirement to file these reports;[50] (3) GSA prescribes the specific content of the reports;[51] (4) GSA is the issuer of

[44] *See* 5 C.F.R. § 2635.704.
[45] Dan Diamond and Rachana Pradhan, *How We Found Tom Price's Private Jets*, POLITICO MAGAZINE (Oct. 4, 2017), http://www.politico.com/magazine/story/2017/10/04/how-we-found-tom-prices-private-jets-215680.
[46] *See* 41 C.F.R. § 301-70.907.
[47] *Id*.
[48] Although transmitted through the website, these records are not posted on the website for public viewing.
[49] *See* GSA Travel Reporting Tool, https://www.travel.reporting.gov/TRAVEL/TRAVELLogin.
[50] 41 C.F.R. § 301-70.906.
[51] 41 C.F.R. § 301-70.907.

the applicable system of records notice for these reports;[52] and (5) GSA uses data contained in the reports to compile an annual report of its own.[53]

Requiring GSA to post these reports on its website contemporaneously would deter misuse of government aircraft. Because GSA already collects these reports, this new requirement would not be burdensome. It also would not reveal sensitive information because these reports do not contain any classified information,[54] information regarding travel by the President or the Vice President,[55] or information regarding "space available" travel, pursuant to 10 U.S.C. § 2648.[56]

Two minor adjustments to existing reporting requirements are also needed. First, agencies should be required to file these reports more often than twice per year. Second, agencies should be required to include in each report an explanation as to both the decision to use a government aircraft and the selection of the type of aircraft used.

[52] *See* GSA/PPFM-3 (Apr. 25, 2008), https://www.gpo.gov/fdsys/pkg/FR-2008-04-25/html/E8-8930.htm.
[53] Fiscal Year 2015 Senior Federal Travel Annual Report, U.S. GEN. SERVS. ADMIN. (2016), https://www.gsa.gov/cdnstatic/FY_2015_Senior_Federal_Travel_Summary_6-10-16.pdf.
[54] *See* Note to 41 C.F.R. § 301-70.907.
[55] 41 C.F.R. § 301-70.910.
[56] *See* 41 C.F.R. § 301-70.906.

DISCRETIONARY TRUSTS

Require public disclosure of interests in discretionary trusts, and require that OGE report to Congress on the issues they present.

Recommendation: Require public financial disclosure filers[57] to disclose the existence of a vested or unvested interest in a discretionary trust by disclosing the names of the trust and the trustee(s). In addition, require the U.S. Office of Government Ethics to study this issue, track the disclosure of such interests for a period of two years, and then submit a report to Congress with recommendations regarding the disclosure and substantive conflict of interest issues they present.

Discussion

The U.S. Office of Government Ethics (OGE) has defined a discretionary trust as any trust that gives the trustee unfettered discretion to make or not to make distributions to eligible income beneficiaries.[58] Under this arrangement, an eligible income beneficiary might receive frequent large distributions from the trust or might receive nothing at all. OGE's guidance currently indicates that a public filer is not required to disclose an interest in a discretionary trust.[59]

OGE recently explained in a Federal Register notice soliciting public comment that there may be reason to question the key assumption that underlies its guidance on discretionary trusts.[60] In response, OGE received seven public comments that mostly seemed to confirm OGE's concerns and further called into question the validity of its guidance on discretionary trusts in all cases.[61]

The problem that the executive branch ethics program faces is that ethics officials currently have no way of knowing whether an employee is an eligible income beneficiary of a discretionary trust. Whether or not the holdings of a discretionary trust are covered by the criminal conflict of interest statute—*a question the Office of Legal Counsel has not publicly answered*—an employee who is an eligible income beneficiary of a discretionary trust might have a motive to make official decisions that would increase the value of the

[57] Public filers are identified in 5 U.S.C. app. § 101(f).
[58] *See* OFFICE OF GOV'T ETHICS, Inf. Adv. Op. LA-13-04 (2013); OFFICE OF GOV'T ETHICS, Inf. Adv. Op. DO-08-024 (2008).
[59] OFFICE OF GOV'T ETHICS, Inf. Adv. Op. LA-13-04 (2013).
[60] *Request for Public Input on the Application of the Criminal Conflict of Interest Prohibition to Certain Beneficial Interests in Discretionary Trusts*, OFFICE OF GOV'T ETHICS, 82 Fed. Reg. 122-02 (Jan. 3, 2017), https://www.gpo.gov/fdsys/pkg/FR-2017-01-03/pdf/2016-31583.pdf.
[61] *See* Comment of American College of Trust and Estate Counsel; Comment of Stewart E. Sterk, Mack Professor of Law, and Melanie B. Leslie, Belkin Professor of Law and Dean of the Benjamin N. Cardozo School of Law, Yeshiva University; Comment of Caplin & Drysdale; Comment of Daniel Redman; Comment of Layne T. Rushforth; Comment of Prof. Thomas P. Gallanis Associate Dean for Research, Allan D. Vestal Chair in Law and Professor of History, University of lowa; Comment of Project on Government Oversight; available at https://oge.gov/web/OGE.nsf/All%20Documents/CE1D4E1D687EEAE8852581370062C236?opendocument.

trust's assets.[62] Worse, the lack of transparency creates at least some potential for abuse if an employee were to transfer assets to a discretionary trust subject to an unwritten agreement to return the assets after the employee's government service ends.[63]

Rather than waiting for OGE and the Office of Legal Counsel to come to an agreement on a supportable theory that as yet remains elusive, Congress should address this issue directly in the Ethics in Government Act. At this time, the recommendation is not necessarily that Congress require the full disclosure of all holdings of a discretionary trust. For now, the recommendation is to require a public filer to disclose the existence of an interest in a discretionary trust, including an interest as an eligible income beneficiary, by reporting only the names of the trust and any trustee(s). In addition, the recommendation is to require OGE to study this issue, track the disclosure of such interests for two years, and then submit a report with recommendations to Congress.

[62] While this might also be true to some limited extent with regard to the assets of living parents, the beneficiary of the trust may in some jurisdictions have a stronger expectation of receiving, and potentially a greater claim to, the assets of the trust than to the assets of his or her parents.

[63] Aside from being a sham transaction, such an arrangement would conflict with the exclusivity of the remedy that Congress created for shielding assets from conflict of interest and disclosure laws: the qualified blind and diversified trust program. *See* 5 U.S.C. app. § 102(f).

CANDIDATE TRANSITION AND ETHICS PLANS

Require OGE to collect nonbinding Presidential transition and ethics plans from candidates.

Recommendation: Require the U.S. Office of Government Ethics (OGE) to collect and post on its website written plans for how candidates would prepare for a Presidential transition and resolve their conflicts of interest.[64] This requirement would have the following features:

- Candidates would submit nonbinding plans one year before the inauguration but could amend those plans at any time before or after the election;
- The statute would specify a list of topics that the plans must address, but a candidate could address any topic by providing a negative response (e.g., a candidate's plan could indicate that the candidate will not take a specific action); and
- OGE would determine whether these plans address all of the specified topics, but OGE could not reject any plan on substantive grounds.

Discussion

One goal of this recommendation is to require candidates to focus relatively early in the election cycle on how they will approach the Presidential transition. A Presidential transition is a critical time when the nation is vulnerable, with the potential for manmade, natural, or economic disasters to strike while the government's top leadership positions are vacant. Requiring candidates to file transition plans would ensure that Presidential candidates have prepared for the daunting logistical challenge of standing up a new Presidential administration in the short period between the election and the inauguration. These early submissions would afford the public insight into the leadership capabilities of the candidates.

Another goal of this recommendation is to afford the public an effective opportunity to assess the candidates' plans for resolving conflicts of interest. The proposed timing for the submissions is important, for it would prevent partisan political loyalties from overshadowing public debate over conflicts of interest. The disclosure of ethics plans well in advance of a party's national convention would facilitate the public's consideration of the plans submitted by candidates of the same party. The resulting within-party comparison would likely generate meaningful public debate over conflict of interest issues. In contrast, a cross-party comparison would leave voters with the stark choice of either abandoning their conflict of interest concerns or abandoning their party.

[64] Congress could elect to *include* or *exclude* a sitting President from this requirement.

For their part, Presidential candidates will not be disadvantaged by this requirement. To the contrary, candidates will be helped by the requirement to focus on the Presidential transition and conflicts of interest earlier than in the past. The proposed statutory requirement would permit them to amend their written plans at any time, which would afford them latitude to adjust to evolving circumstances (e.g., difficulty identifying a purchaser for an asset, a negative reaction by the public in response to a candidate's initial submission, the acquisition of a new asset).

This recommendation would not impose an impermissible qualification to be President. The U.S. Office of Government Ethics (OGE) would have no authority to reject the candidacy of an individual on substantive grounds if OGE doubted the efficacy of a plan to resolve conflicts of interest. OGE's review of the plans would be procedural only. OGE's role would be to ensure that the submitted plans address each required topic, just as OGE now reviews candidates' public financial disclosure reports for completeness.

SUBSTANTIVE ETHICS REQUIREMENTS

SPECIAL GOVERNMENT EMPLOYEES

End the use of special government employees for more than 130 days.

Recommendation: End the use of special government employees for more than 130 days by providing that an individual designated as a special government employee automatically becomes a regular employee on the 131st day of work in any 365-day period.

Discussion

Congress limited the applicability of some ethics laws to government employees who serve only for short periods of time and are designated upon their hiring as special government employees.[65] An agency can designate as a "special government employee" any employee hired for a period "not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days."[66] The executive branch, including the U.S. Office of Government Ethics (OGE), has interpreted this definition to include any employee who is prospectively expected *at the time of hiring* to work no more than 130 days during the 365-day period, even if the individual later actually works more than 130 days.[67]

This interpretation creates the potential for abuse in that—despite OGE's advice to the contrary—an agency might seek to designate an individual as a special government employee year after year, willfully ignoring a pattern of that individual having repeatedly served for more than 130 days each year. Congress could eliminate this potential by stating explicitly in the statute, at 18 U.S.C. § 202(a), that a special government employee will become a regular employee automatically on the 131st day of service in any 365-day period.

[65] *See* 18 U.S.C. §§ 202(a), 203(c), 205(c), 209(c).
[66] *See* 18 U.S.C. § 202(a). (Note: Certain other types of employees are specifically designated by statute as special government employees, but they are not relevant to this discussion.)
[67] *See* 3 Op. Off. Legal Counsel at 454 (agency should make good faith designation in advance of appointment and if an agency does so, the employee will continue to be regarded as a SGE for the duration of the 1-year period even if the employee serves for more than 130 days); *see also* Mem. on Preventing Conflicts of Interest on the Part of Special Gov't Employees, 28 Fed. Reg. 4539 (May 2, 1963).

DISCRETIONARY PAYMENTS FROM EMPLOYERS

Prohibit political appointees from working on particular matters affecting employers who make discretionary payments to them.

Recommendation: Establish the following noncriminal prohibition that applies if a covered noncareer employee receives a discretionary payment from an employer:

- For a period of three years after receiving a discretionary payment from an employer, a covered noncareer employee would be prohibited from participating personally and substantially in any particular matter in which, to the employee's knowledge, the employer has a financial interest.

- "Discretionary payment" would be defined to mean any "*thing of value*" worth more than $10,000 given to the employee, either by the employer or at the direction of the employer, under either of the following circumstances:

    - The payment was made or promised while the employee was being consider for, or was serving in, a covered noncareer position; or

    - The Director of the U.S. Office of Government Ethics (OGE) concludes that a reasonable person with knowledge of the relevant facts would question whether the employer would have made the payment if the employee had not been considering government service.

  The prohibition would not apply if the employee meets the burden of demonstrating to the satisfaction of the Director that the employee would have received the payment or thing of value even if the employee had not entered government service.

- "Employer" would be defined to mean any organization, other than the federal government, in which the employee has served as officer, director, trustee, general partner, or employee. It would include both current and former employers.

- "Covered noncareer employee" would have the meaning set forth at 5 C.F.R. § 2636.303(a).

- Violations would be addressed either by imposing civil penalties under 5 U.S.C. app. § 504 or by requiring termination of the employee's government service.

Discussion

There is a gap in the ethics laws that allows senior political appointees to accept discretionary payments from private sector employers, including employers they may be

responsible for regulating. The conflict of interest laws bar supplementation of federal salary by outside sources.[68] However, the law applies only if there is a *direct link* between the payment and an appointee's services to the government and, even then, only if the payment is made *after* the appointee has assumed the duties of the government position.[69] Regulations of the U.S. Office of Government Ethics (OGE) address a narrowly defined type of "extraordinary payment" made prior to entering government but do not cover all discretionary payments from employers.[70]

The Wall Street Journal commented on the particularly egregious case of a payment that former Treasury Secretary Jack Lew's employer, Citigroup, made around the time he joined the State Department in 2009:

> The terms of Mr. Lew's original employment contract with Citi included a bonus guarantee if he left the bank for a "high level position with the United States government or regulatory body."
>
> Most companies include incentives for top employees not to leave, but in this case the contract was written to reward Mr. Lew for treating the bank like a revolving door. Citi says it likes to accommodate employees who do public service or work at nonprofits. But the Lew contract was specific about a senior job in the federal government. There would be no special payout if he left to run the Red Cross or the New York state budget office.[71]

Congress should close this gap by establishing a new statutory requirement that applies whenever a senior political appointee has received a payment from an employer under circumstances suggesting that the employer may have made the payment, at least in part, because the appointee was entering government service. The statute would apply only to a "covered noncareer employee" as that term is currently defined in OGE's regulations at

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[68] *See* 18 U.S.C. § 209.

[69] *See Crandon v. U.S.*, 494 U.S. 152 (1990); *Applicability of 18 U.S.C. § 209 to Acceptance by F.B.I. Employees of Benefits Under the "Make A Dream Come True" Program*, 21 U.S. Op. Off. Legal Counsel 204, 206 (1997); *Application of Conflict of Interest Rules to Appointees Who Have Not Begun Service*, 26 Op. O.L.C. 32 (May 8, 2002).

[70] Unfortunately, practitioners have disagreed over the meaning of "extraordinary payment." Some have tried to define the term permissively, arguing that a discretionary payment does not amount to an "extraordinary payment" if written materials of the employer—*even those the employer only recently created*—authorize the employer to make the payment. *See* 5 C.F.R. § 2635.503 (referencing "written" materials in the definition of "extraordinary payment"). The proponents of this view unreasonably reject the commonsense notion that, implicit in the regulation, is a requirement that written materials should be deemed to constitute an "established program" only if they afford no greater benefits to those going into government service than to those who leave the employer for other reasons. *See id.* (requiring a showing that the payment is part of an "established program"). Therefore, reliance on OGE's "extraordinary payment" regulation would fail to solve the problem of discretionary employer payments.

[71] Editorial Bd., *Jack Lew's Golden Parachute: His Citigroup contract paid him a bonus for returning to government*, THE WALL STREET JOURNAL (Feb. 26, 2013), https://goo.gl/AZt3jc; *see also* Matthew Boesler, *Citi Offered Jack Lew a Big Bonus to Secure a 'High-Level' Government Position*, BUSINESS INSIDER (Feb. 25, 2013), http://www.businessinsider.com/citis-government-job-bonus-for-jack-lew-2013-2.

5 C.F.R. § 2636.303(a). It would require the covered noncareer employee to recuse for three years from particular matters affecting the known financial interests of the employer.

In order to serve as an effective deterrent, the recusal obligation would need to be as broad in scope as the requirement established in the primary criminal conflict of interest statute, 18 U.S.C. § 208. The recusal obligation should not be limited to "particular matters involving specific parties" but should also cover "particular matters of general applicability."[72] This breadth of scope can be achieved by referring to any "particular matter" in which, to the appointee's knowledge, the employer has a financial interest.

The recusal obligation would apply if: (a) the payment was made or promised while the employee was being consider for, or was serving in, a covered noncareer position; or (b) OGE's Director concludes that a reasonable person with knowledge of the relevant facts would question whether the employer would have made the payment if the employee had not been considering government service. However, the prohibition would not apply if the employee meets the burden of demonstrating to the satisfaction of OGE's Director that the employee would have received the payment or thing of value even if the employee were not entering government service.

The prohibition should apply not only to cash payments but to any "*thing of value*." For example, it would apply if the employer accelerated a vesting requirement, released the employee from a debt, or gave the employee a carried interest. To avoid covering minor "settling up" payments to departing employees, however, the recusal obligation should apply only if the aggregate value of all payments or things of value exceeds $10,000.

This new prohibition should not be established as a criminal statute. The goal of this prohibition is to err on the side of requiring recusal unless the employee meets the burden of showing that the payment was innocently made. This cautious prophylactic approach, which puts the burden on the employee, is not suitable for a criminal statute. Instead, Congress could provide for a noncriminal penalty in the event of a violation. One option would be to subject the employee to civil penalties under 5 U.S.C. app. § 504; an alternative would be to provide for the termination of the employee's government service.

[72] *See "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter,"* Office of Gov't Ethics, Inf. Adv. Op., DO-06-029, 7 n. 9 (2006).