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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Shelley K. Finlayson 
Chief of Staff and Program Counsel

SUBJECT: Legislative Activity of the 114th Congress Affecting the Executive Branch
Ethics Program

This Legal Advisory reports on relevant legislative activity from the 114th Congress and covers: 1) legislation enacted that is of interest to the executive branch ethics community; 2) agency-specific legislation enacted that is of interest to the ethics community; and 3) ethics-related legislation that did not pass but is notable and/or likely to be reintroduced.¹

OGE has also prepared and published the “Compilation of Federal Ethics Laws,” which includes laws within the jurisdiction of the ethics program, and related statutes such as the Hatch Act. Although there were no major changes to ethics laws during the 114th Congress, the Compilation includes updated footnotes related to the civil monetary penalties. The Compilation may be found on OGE’s website at: goo.gl/U8k3Fb.

Legislation Enacted of Interest to the Ethics Community

Although the 114th Congress did not directly amend the primary ethics statutes, it did pass several pieces of legislation that directly affect the work of ethics officials or concern other areas of government integrity and transparency.

- The Edward "Ted" Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2016 raises the profile of the ethics program by recognizing the importance of ethics as a key aspect of the Presidential nominations and appointment process. Among other things, the act creates an Agency Transition Directors Council to develop strategies for addressing interagency challenges; ensuring interagency coordination; and facilitating coordination between the government, transition teams, and the President-Elect. It also establishes the White House Transition Coordinating Council to provide guidance to

¹ For updates on legislative activity in the 115th Congress, see OGE’s Max.gov page at: <https://community.max.gov/display/OGE/Legislation>.



agencies. The statutory composition of these councils formally recognizes the role of OGE and the ethics program in a successful transition.²

- The Consolidated Appropriations Act of 2016 demonstrates Congress's continued focus on conference spending. The act requires that the head of any agency funded by the act submit to the Inspector General, or senior ethics official for agencies without an IG, information regarding the costs and contracting procedures related to each conference where the cost of the conference exceeded \$100,000. It also requires reporting of the date, location, and number of employees attending any conference where the cost exceeds \$20,000.³
- The Inspector General Empowerment Act of 2016 provides for increased access to documents by Inspectors General. It ensures that Inspectors General have timely access to "all records, reports, audits, reviews, documents, papers, recommendations or other materials" which relate to the responsibilities of Inspectors General under the act.⁴
- The Enhance Whistleblower Protection for Contractor and Grantee Employees Act increases whistleblower protections for contractor and grantee employees. The legislation makes permanent a pilot program to provide federal whistleblower protections to contactors and grantees in both the defense and civilian workforces.⁵
- The FOIA Improvement Act of 2016 makes numerous changes to the Freedom of Information Act and also requires agencies to update their FOIA regulations. Among the changes to the FOIA, the act requires agencies to establish a minimum of 90 days for requesters to file administrative appeals and to provide dispute resolution services throughout the FOIA process.⁶ The act codifies the Department of Justice's "foreseeable harm" standard for invoking the deliberative process exemption under FOIA Exemption 5 and puts a 25 year sunset on agencies' ability to invoke the "deliberative process" privilege under Exemption 5.

Agency Specific Legislation Enacted of Interest to the Ethics Community

The 114th Congress also passed legislation that, while directed at specific agencies, focused on ethics and conflicts of interest. This type of legislation may serve as a template for legislation involving other agencies or the overall ethics program during the current Congress.

- The American Innovation and Competitiveness Act of 2016 requires that the Director of the National Science Foundation update the Foundation's policies and procedures relating

² The Edward "Ted" Kaufman and Michael Leavitt Presidential Transitions Improvements Act, Pub. L. No. 114-136, 130 Stat. 301 (2016).

³ The Consolidated Appropriations Act, Pub. L. No. 114-113, 129 Stat. 2242 (2016).

⁴ The Inspector General Empowerment Act, Pub. L. No. 114-317, 130 Stat. 1595 (2016).

⁵ The Enhance Whistleblower Protection for Contractor and Grantee Employees Act, Pub. L. No. 114-261, 130 Stat. 1362 (2016).

⁶ The FOIA Improvement Act, Pub. L. No. 114-185, 130 Stat. 538 (2016).

to the conflicts of interest of individuals on temporary assignment at the Foundation, including individuals on assignment under the Intergovernmental Personnel Act of 1970.⁷

- The Fixing America's Surface Transportation (FAST) Act of 2016 creates an ethics office within the Export-Import Bank led by a career civil servant appointed by the head of the bank [the Chief Ethics Officer]. The Chief Ethics Officer is also to serve as the Designated Agency Ethics Official and carry out such duties as referring violations to the Inspector General, rendering advisory opinions, and providing general ethics guidance.⁸
- The National Defense Authorization Act for Fiscal Year 2017 authorizes a public-private talent exchange wherein a private sector employee can be appointed to work within the Defense Department (DOD), or elsewhere in the civil service upon approval of the Secretary of Defense, while continuing to receive pay and benefits from their private employer.⁹ The law further provides that private sector employees appointed under this authority are considered DOD employees for purposes of the Ethics in Government Act and the criminal conflict of interest laws. These individuals are also prohibited from having access to any trade secrets or to any other nonpublic information of commercial value to the private sector organization from which they are assigned.

Notable Ethics-Related Provisions Considered But Not Passed by the 114th Congress

The 114th Congress considered several notable ethics-related provisions that were not enacted. Many of the bills have been considered across multiple sessions, signaling Congress's continued interest in ethics and related topics. OGE will continue to monitor these areas for future activity.

- The Transparency in Government Act of 2015 would have amended the reporting amount categories in section 102 of the Ethics in Government Act (EIGA). The bill also would have amended sections 101 and 103 of EIGA with respect to the public availability of reports and reporting requirements for Congress and the Judiciary. Lastly, the bill would have amended the definition of "lobbyist" under the Lobbyist Disclosure Act of 1995.¹⁰
- The Federal Advisory Committee Act Amendments of 2015 would have amended the Federal Advisory Committee Act to require that recusal agreements and waivers issued pursuant to 18 U.S.C. § 208(b)(3) for advisory committee members be made available to the public on the official website of the executive branch agency to which the advisory committee reports. The bill also would have required that agencies designate advisory committee members as special Government employees or representatives, explain to advisory committee members the difference between those designations, and summarize applicable ethics requirements.¹¹

⁷ The American Innovation and Competitiveness Act, Pub. L. No. 114-329, 130 Stat. 2969 (2016).

⁸ The Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2016).

⁹ The National Defense Authorization Act, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

¹⁰ The Transparency in Government Act, H.R. 1381, 114th Congress (2015).

¹¹ The Federal Advisory Committee Act Amendments, H.R. 2347, 114th Congress (2015).

- The Government Spending Accountability Act of 2015 would have set limits on agency conference spending and related travel expenses. The bill also would have required agencies to post online quarterly reports, including a certification that no conflicts of interest resulted from conference expenses paid for by a private entity.¹²
- The Stop Wasteful Federal Bonuses Act of 2015 would have prohibited an agency head from awarding an employee a bonus within five years after the agency Inspector General, another senior ethics official, or the Comptroller General made an adverse finding relating to the employee. The bill also would have required such an employee to repay any bonuses received during the year that the adverse finding was made. The bill defines an “adverse finding” as a finding that the employee violated a policy for which the employee may be removed or suspended, or violated a law for which the employee may be imprisoned for more than a year.¹³
- The Lobbying and Campaign Finance Reform Act of 2015 would have amended the Lobbying Disclosure Act (2 U.S.C. § 1602(10)) to change the definition of “lobbyist” to include any individual who is employed or retained by a client or received financial or other compensation for services that include more than one lobbying contact over a 2-year period.¹⁴

Conclusion

OGE brings the actions of the 114th Congress to your attention as part of our initiative to keep the ethics community apprised of relevant ethics-related legislative activity. OGE will provide you with relevant updates throughout the 115th Congress and will also continue to monitor and keep agency ethics officials informed of agency-specific legislative proposals that may affect their agency’s ethics program. If you would like to discuss this Legal Advisory or other legislative matters, please contact me at (202) 482-9314, or LEAP Branch Chief Diana Veilleux at (202) 482-9203.

¹² Government Spending Accountability Act, H.R. 2032, 114th Congress (2015).

¹³ The Stop Wasteful Federal Bonuses Act, S. 742, 114th Congress (2015).

¹⁴ The Lobbying and Campaign Finance Reform Act, S. 1480, 114th Congress (2015).