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

June 23, 2009

The Honorable Charles E. Grassley
United States Senate
Washington, DC 20510

Dear Senator Grassley:

Thank you for your letter of June 10, 2009, regarding Executive Order 13490, *Ethics Commitments by Executive Branch Personnel,* and open and transparent Government. The Office of Government Ethics (OGE) shares the President's and your commitment to openness and transparency. In the short term, OGE has taken several steps to make the executive branch ethics program and OGE's role in the nomination process more transparent to the public. From January 20, 2009 to the present, OGE has filled over 1,700 requests for nominated official's Public Financial Disclosure reports (SF 278) and over 150 requests for Ethics Agreements. These numbers are unprecedented. The effect of OGE streamlining its process is that most requesters receive SF 278s in less than 24 hours from the time of the request. In the coming months OGE expects to begin identifying necessary changes to the ethics laws to facilitate even greater transparency including the posting of certain ethics records on-line.

For the longer term, the President committed during his campaign to create a more open and accountable Government by making information available as soon as practicably possible. Part of this commitment is an electronic ethics clearinghouse notionally referred to as ethics.gov. OGE expects to play a prominent role in helping shape the content of ethics.gov, and the Administration has provided funding in OGE's FY 2010 budget to initiate the development and/or maintain this site.

As you note correctly in your letter, Executive Order 13490 requires, among other things, that political appointees make certain commitments as a condition of employment. These commitments are memorialized in signed ethics Pledges. The Executive Order imposes unprecedented restrictions on incoming political employees by limiting the participation of lobbyists in Government and curtailing the revolving door between industries and their Government regulators. To ensure there is a degree of flexibility when the Pledge's commitments conflict with the public interest, the Executive Order provides for very limited waivers in appropriate circumstances.

Paragraph 3 of the Ethics Pledge pertains to former lobbyists entering Government and the issues on which they may work following appointment. Consistent

with the President's intent, there have been very few waivers of any paragraph 3 provisions. To OGE's knowledge, all paragraph 3 waivers have been fully reported by the White House. The existing paragraph 3 waivers are for William Lynn, Deputy Secretary of Defense; Jocelyn Frye, Director of Policy and Projects in the Office of the First Lady; and Cecilia Munoz, Director of Intergovernmental Affairs in the Executive Office of the President.

Paragraph 2 of the Pledge is a "cooling-off" requirement that applies to all appointees, not just those who have been registered lobbyists. Essentially, for two years after being appointed, paragraph 2 prevents an appointee from working on certain matters that would affect the appointee's former employers and clients. In many respects, this commitment builds on and extends long-standing provisions in the Standards of Ethical Conduct (Standards of Conduct), found at 5 C.F.R. § 2635.502, applicable to all executive branch employees who are deemed to have a "covered relationship" with their former employers and others for a one-year period.

By design, implementation of these provisions of the Standards of Conduct has been delegated to the Designated Agency Ethics Official (DAEO) in each agency. Most DAEOs are senior career officials with in-depth knowledge of the workings of their agencies and are in the best position to evaluate whether recusal is necessary. Similarly, a DAEO may authorize a person required to recuse under section 2635.502 to participate in certain matters if the DAEO determines that the agency's need for the employee's services is outweighed by the magnitude of the potential appearance concern. Authorizations under section 2635.502 are necessary for many appointees (and newly appointed career officials) early in their tenures to perform their jobs and are granted only if the authorizing DAEO is satisfied that regulatory criteria are met.

In your letter, you refer to the President's choice to lead the National Aeronautics and Space Administration (NASA), Major General Charles Bolden, USMC Ret. Your letter refers to press accounts indicating General Bolden will require a waiver of Pledge paragraph 3 "because of his work as a lobbyist for a NASA contractor." General Bolden will not require a waiver of Pledge paragraph 3. Paragraph 3 applies to persons registered as lobbyists within the past two years, and General Bolden has not been a registered lobbyist during that period. Therefore, he is not covered by paragraph 3 of the Pledge. He has worked as a consultant to Science Applications International Corporation (SAIC) and until March 2008 served as a director of Aerojet, Inc., a subsidiary of GenCorp. His situation illustrates the close connection between section 2635.502 and paragraph 2 of the Pledge. General Bolden's private sector position with SAIC creates a "covered relationship" for him. This covered relationship will limit his ability to participate in certain matters involving this company unless the NASA DAEO authorizes him to participate. In addition, his employment relationships with SAIC and GenCorp. fall within the scope of paragraph 2 of the Pledge. Consequently, General Bolden will likely seek a limited waiver of paragraph 2 allowing him to participate in policy and programmatic matters that could affect these NASA contractors, but which will not authorize him to participate in contract matters or one-on-one meetings or

communications with either entity under any circumstances. Until he is appointed, no waiver will be issued.

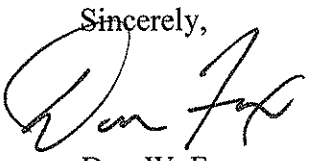
Because paragraph 2 of the Pledge is based largely on section 2635.502 of the Standards of Conduct and impacts all appointees, not just those who have been registered lobbyists, it is to be expected that limited waivers of paragraph 2 will not be as rare as waivers of paragraph 3. However, in addition to the benefit of the DAEOs' expertise, the Ethics Pledge includes the extra safeguard of required consultation with the White House Counsel's Office. OGE's implementing guidance regarding the issuance of Pledge waivers also instructs DAEOs to consult with OGE. (OGE's guidance, dated February 23, 2009, is enclosed for your reference.) Director Cusick does not believe that such waivers, which involve a consultative role for both this Office and the White House Counsel, undermine in any way the spirit of the Pledge or the President's commitment to ethics. On the contrary, strong rules require reasonable exceptions.

The Executive Order requires OGE to make an annual report to the President regarding the Pledge, and OGE will do so in early 2010. In the interim, OGE will be requesting information from executive branch agencies on their initial implementation of the Pledge. With regard to access to Pledge waivers, the Executive Order requires that any waivers be maintained as part of the employee's official personnel file, which is maintained by the agency where the official works. Because waivers are maintained in personnel records, OGE does not control their release. Individual waivers are available from the issuing agency.

You also asked about recusals generally. Any employee in the executive branch might, from time to time, find it necessary to recuse himself or herself from participating in a particular matter to avoid a conflict of interest or the appearance of a conflict. Generally, there is no requirement that recusals be reduced to writing. Rather, an employee can simply refrain from participation. With regard to executive branch officials appointed with the advice and consent of the Senate, it has been OGE's practice to include any recusals known at the time of appointment in a written ethics agreement, which is made publicly-available once the official-designate has been nominated by the President.

I hope you find this information responsive and informative. Please do not hesitate to contact me at 202-482-9292 if you have additional questions or concerns.

Sincerely,



Don W. Fox
General Counsel

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

February 23, 2009
DO-09-008

MEMORANDUM

TO: Agency Heads and Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Authorizations Pursuant to Section 3 of Executive Order 13490, "Ethics Commitments by Executive Branch Personnel"

The purpose of this DAEOgram is to provide guidance to agency heads and Designated Agency Ethics Officials (DAEOs) on the application of section 3 of Executive Order 13490. As you know, section 1 of the Executive Order requires all covered appointees to abide by several commitments in an Ethics Pledge, unless they are granted a waiver under section 3. The Director of the Office of Management and Budget (OMB) has now designated the DAEO of each executive agency to exercise section 3 waiver authority in consultation with the Counsel to the President. This designation and the limitations on waiver authority are addressed below.

DAEOs are Now Designated to Exercise Waiver Authority in Consultation with White House Counsel

Section 3(a) of the Executive Order provides:

> The Director of the Office of Management and Budget, or his or her designee, in consultation with the Counsel to the President or his or her designee, may grant to any current or former appointee a written waiver of any restrictions contained in the pledge signed by such appointee if, and to the extent that, the Director of the Office of Management and Budget, or his or her designee, certifies in writing (i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver.

The Director of OMB has, after consultation with Counsel to the President, determined that the most appropriate designee of his authority is the Designated Agency Ethics Official (DAEO) of each executive agency. This designation reflects the high degree of trust and confidence with which the experience and professional judgment of the DAEOs are viewed. The deep agency knowledge of the DAEOs was also an important factor in the Director's decision.

Limitations on Exercise of Waiver Authority

It is the President's intention that waivers will be granted sparingly and that their scope will be as limited as possible. All waivers must be in writing. As specified in the Executive Order, a waiver may be granted only after consultation with the Counsel to the President and only upon the DAEO's certification either that the literal application of the restriction is inconsistent with the purposes of the restriction or that it is in the public interest to grant the waiver. Executive Order 13490, sec. 3(b). For the latter purpose, the public interest includes, but is not limited to, exigent circumstances relating to national security or the economy. Additionally, provisions in paragraph 3 of the Pledge, which pertains to appointees who have been registered lobbyists within two years of appointment, may be waived where the appointee's lobbying activities in connection with an agency, or on a particular matter, or in a specific issue area have been *de minimis*.

Finally, we wish to emphasize that the legal requirement under the Executive Order of advance consultation with the Counsel to the President remains and is to be strictly enforced. Norman Eisen, the Special Counsel to the President, is the point of contact in the Office of the Counsel to the President and can be reached at (202) 456-1214 or neisen@who.eop.gov. To ensure that the consultation requirement is met, no waiver should ever be granted until the Special Counsel has provided a written acknowledgement affirmatively stating that the required consultation has occurred and is complete. Your OGE desk officers should also be consulted in advance with respect to all waiver issues.

Conclusion

OGE will continue to publish additional guidance on the Pledge required by Executive Order 13490 as needed. Questions about the application of the Pledge should be referred to the OGE desk officer responsible for your agency.