



U.S. Department of Justice

Justice Management Division

Washington, D.C. 20530

MEMORANDUM FOR MATTHEW AXELROD
PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL

FROM: Lee J. Lofthus *Lee J. Lofthus 6/20/2016*
Assistant Attorney General for Administration and Designated
Agency Ethics Official

SUBJECT: Waiver under E.O. 13490 and Determination under 5 C.F.R. §
2635.502

The purpose of this memorandum is to waive the restriction in Executive Order 13490 of January 21, 2009, Ethics Commitments by Employees in the Executive Branch, and further to make a determination under the standards of conduct on impartiality, 5 C.F.R. § 2635.502, that you may participate in multi-district litigation (MDL) in which your former law firm represents private plaintiffs and in which the Department is also participating.

On January 4, 2016, the Department of Justice filed a civil complaint in federal court in Detroit, Michigan, on behalf of the Environmental Protection Agency (EPA), against Volkswagen AG, Audi AG, Volkswagen Group of America Inc., Volkswagen Group of America Chattanooga Operations, LLC, Porsche AG and Porsche Cars North America INC. (collectively referred to as *Volkswagen Litigation*). The complaint, on behalf of the Environmental Protection Agency, alleges that nearly 600,000 diesel engine vehicles had illegal defeat devices installed that impair their emission control systems and cause emissions to exceed EPA's standards, resulting in harmful air pollution. The Department is seeking civil penalties and injunctive relief.

In addition to the Department's civil action, the Federal Trade Commission (FTC) is pursuing enforcement action on behalf of consumers, seeking injunctive relief. Also, there are a large number of claims (over 1000) by private parties against Volkswagen which seek restitution and compensatory relief for consumers and others.

The federal lawsuits against Volkswagen, by DOJ, the FTC, and private parties, have been consolidated in multidistrict litigation (MDL) in the Northern District of California. Among the private actions that are part of the MDL are claims by persons represented by Cohen Milstein, a law firm in which you were a partner prior to joining the Department in February 2015. The Court has appointed a steering committee which includes 21 law firms; Cohen Milstein is not on the steering committee. The MDL raises important issues of enforcement of environmental statutes, as well as consumer fraud. You participated from the outset in mid-2015 in supervising the Department's investigations of Volkswagen's conduct. As the Deputy Attorney General's

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(DAG) principal advisor, it is among your responsibilities to oversee a case of this breadth and scope, which includes participation by multiple components of the Department. You recused from the litigation when Cohen Milstein entered an appearance on behalf of private plaintiffs in the MDL.

Prior to your appointment as Principal Associate Deputy Attorney General (PADAG) in February, 2015, you were a partner with Cohen Milstein. Consequently, you are generally recused from participation in particular matters in which Cohen Milstein is or represents a party, under E.O. 13490. Further, we consider your participation under the impartiality standard of conduct, 5 C.F.R. § 2635.502, for the purpose of making a determination to authorize your participation in a particular matter with specific parties in which your former employer represents a party.

The Court has established imminent deadlines to consider proposed settlement agreements of certain claims in the MDL. It is important to the Department that you resume a supervisory role for these claims and for overall Department action in pursuing claims arising from Volkswagen's conduct. The issues presented in all these matters overlap and require a consistent response at the highest levels of the Department.

Executive Order 13490, Ethics Commitments by Employees in the Executive Branch

The Executive Order provides that a political appointee will not, for a period of two years from the date of appointment, participate in any particular matter involving specific parties that is directly and substantially related to the appointee's former employer or former clients, including regulations and contracts. Sec. 1, ¶ 2. The Executive Order further provides that "particular matter involving specific parties" shall have the same meaning as set forth in the ethics regulations at 5 C.F.R. § 2641.201(h), except that it shall also include "any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties." E.O. 13490, Sec. 2(h)

E.O. 13490 references the following definition provided in the standards of conduct (although the E.O. specifically includes regulations and contracts):

5 C.F.R. § 2641.201(h): Particular matter involving a specific party or parties –
(1) Basic concept. The prohibition applies only to communications or appearances made in connection with a "particular matter involving a specific party or parties." Although the statute defines "particular matter" broadly to include "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding," 18 U.S.C. § 207(i)(3), only those particular matters that

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involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product application, enforcement action, administrative adjudication, or court case.

The E.O. provides for waiver of the recusal provisions by the Director of the Office of Management and Budget (OMB) or his designee, in consultation with the Counsel to the President or his designee. E.O. 13490, Sec. 3(a). The Director, OMB, has designated the Designated Agency Ethics Official (DAEO) of each executive branch agency to exercise the Sec. 3 waiver authority, in writing, and in consultation with the Counsel to the President.

Specific Waiver Request

The *Volkswagen Litigation* is a significant matter which will have a substantial impact on a large number of consumers and others, on environmental enforcement, and has implications for corporate malfeasance. You have played an important role from the outset in supervising the Department's investigations and developing the Department's positions. Your experience and leadership on these issues would contribute to the Department's continued pursuit of its claims in these matters.

The standard for waiving the restriction in the E.O. is that it be in the public interest. E.O. 13490, Sec. 3. For the reasons discussed above, I believe that it directly serves the public interest that the Department have the benefit of your participation in this case, given the institutional interest of the Department; the important legal, policy, and strategic considerations; and your knowledge of the relevant issues presented. I certify that it is in the public interest that you be able to participate in the Department's involvement in the *Volkswagen Litigation*.

5 C.F.R. § 2635.502

The Standards of Conduct, 5 C.F.R. § 2635.501 *et seq.*, prohibit participation in matters that raise a question of an actual loss of impartiality or the appearance of loss of impartiality. Specifically, whenever an employee knows that a person with whom the employee has a "covered relationship" (which includes a former employer or former client) is a party, or represents a party in a specific matter, and where the circumstances would cause a reasonable person to question the employee's impartiality under the appearance standard, the employee should not participate in the matter unless authorized to do so. 5 C.F.R. § 2635.502(a). An employee may participate in a specific party matter where it is determined that the interest of the government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations. 5 C.F.R. § 2635.502(d).

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An official has a covered relationship with a former employer or partnership for one year after employment terminates. You left Cohen Milstein in February 2015, more than a year ago. You no longer have a covered relationship with Cohen Milstein as defined by the regulation. The regulation also provides that, in other circumstances that would raise a question regarding an official's impartiality, participation may be considered using the process in the regulation. In circumstances such as these, where a senior official who is subject to recusal under the provisions of the Ethics Pledge seeks to participate in a particular matter with specific parties, the Department has also made a determination whether to authorize participation using the criteria provided in the impartiality regulation.

The process for determining whether an employee should participate in a particular matter involving the appearance of a loss in impartiality is laid out at 5 C.F.R. § 2635.502(d). Under that process, I, as the agency designee, with the recommendation of an ethics official, must make a determination that the interest of the government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations. In making this determination, I may consider such factors as: (1) the nature of the relationship involved; (2) the effect the resolution of the matter will have on the financial interest of the person involved in the matter; (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter; (4) the sensitivity of the matter; (5) the difficulty of reassigning the matter; and (6) adjustments, if any, that are viable to reduce or eliminate the likelihood that a reasonable person will question the employee's impartiality.

Using the above criteria, I conclude that you are authorized to participate as the PADAG in the *Volkswagen Litigation*. (1) You did not participate in this matter, which did not exist, while you were a partner with Cohen Milstein, and thus you have no client confidences regarding this case. (2) Cohen Milstein represents private plaintiffs and seeks restitution and compensatory damages on their behalf. Attorneys fees may also be part of the recovery. The Department does not directly affect these interests, but the action the Department takes to settle its part of the MDL may have an effect on the Court's acceptance of the settlements by the private parties, including Cohen Milstein's clients, in the MDL. However, you have no continuing financial interest in the law firm, so you have no financial interest in the outcome of the private plaintiff litigation in the MDL. Further, (3, 4 & 5) this litigation raises important issues related to the enforcement of environmental statutes, and consumer fraud, and it is important that the Department's action be effective and properly coordinated with actions taken by other enforcement authorities as well as in consideration of action by private plaintiffs. The matter is time sensitive in that the Department needs to respond to the Court on proposed settlement agreements in the MDL. It is in the best interest of the government that you be authorized to participate in these decisions. As PADAG, and as someone who guided the Department's action from the beginning of the investigations, you bring in-depth knowledge, and a valuable perspective and judgment to the Department's

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participation in this important case which would be difficult to replace.(6) I note that Cohen Milstein is not part of the MDL steering committee. Therefore, it is extremely unlikely that DOJ's liaison counsel to the steering committee would have any direct contact with Cohen Milstein. You personally would have no direct contact with your former firm. Accordingly, I conclude that the Department's interest in your participation in the *Volkswagen Litigation* outweighs the possible concern that a reasonable person may question the integrity of the Department's programs and operations.

WAIVER: I hereby certify that it is in the public interest for you as Principal Associate Deputy Attorney General to participate in the *Volkswagen Litigation*. As discussed above, and pursuant to E.O. 13490 Sec. 3(a), I waive the restriction in Section 1 of E.O. 13490, on participation in a specific party matter that is directly and substantially related to your former law firm, Cohen Milstein. We have consulted with the Office of the Counsel to the President concerning this waiver. Further, I hereby determine, under 5 C.F.R. § 2635.502, that the interest of the Department in your participation in this litigation outweighs any possible concern that a reasonable person may question the integrity of the Department's programs and operations.

DEPARTMENT OF JUSTICE

Washington

June 20, 2016

CERTIFICATION OF PUBLIC INTEREST WAIVER FOR MATTHEW AXELROD

FROM: Lee J. Lofthus
Designated Agency Ethics Official, Department of Justice

SUBJECT: Waiver from Restrictions Related to Former Law Firm for *Volkswagen Litigation*.

Pursuant to the authority delegated under Section 3 of Executive Order 13490 and for the reasons stated in the attached memorandum and after consultation with the Counsel to the President, I hereby certify that a limited waiver of the restrictions of paragraph 2 of the Ethics Pledge is in the public interest for appointee Matthew Axelrod in the position of Principal Associate Deputy Attorney General of the Department of Justice. Mr. Axelrod shall not be restricted from participating in the *Volkswagen Litigation*, subject to the limitations set forth in the attached memorandum and without waiving the limitation on Mr. Axelrod's participation in regulations and contracts as provided in paragraph 2 of the Ethics Pledge. This waiver does not otherwise affect Mr. Axelrod's obligation to comply with other provisions of the Ethics Pledge or with all other pre-existing government ethics rules.

Signed _____


Lee J. Lofthus
Designated Agency Ethics Official
Department of Justice

Date _____

6/20/2016