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Office of Government Ethics
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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Don W. Fox, General Counsel

SUBJECT: REQUIREMENTS UNDER SECTION 17 OF THE STOCK ACT REGARDING
NEGOTIATIONS FOR AND AGREEMENTS OF POST-GOVERNMENT,
NON-FEDERAL EMPLOYMENT

On April 4, 2012, President Obama signed into law the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act).¹ Section 17 of the STOCK Act, which became effective upon enactment, provides that a covered employee may not directly negotiate or have any agreement of future employment or compensation unless the employee, within three business days after commencement of such negotiation or agreement, files with his or her supervising ethics office a notification statement. An employee who files a notification statement regarding the negotiation or agreement also must file a notification regarding recusal whenever there is a conflict of interest or appearance of a conflict of interest with respect to the non-federal entity identified in the notification.² In addition, this section affirms the recusal obligations addressed in the Standards of Ethical Conduct for Employees of the Executive Branch at 5 C.F.R. part 2635, subpart F. The requirements under section 17 of the STOCK Act apply to negotiations that commenced on or after April 4, 2012, and to agreements of future employment reached on or after April 4, 2012.

This Legal Advisory provides guidance for implementing section 17 of the STOCK Act. Included as an attachment to this advisory is a suggested format that agency ethics officials may choose to have an employee use to ensure full compliance with the notification and recusal requirements of section 17.

¹ The version of the STOCK Act signed by President Obama (S. 2038, enrolled bill) is available on OGE's website at [https://www.oge.gov/Web/oge.nsf/Resources/President+Signs+the+Stop+Trading+on+Congressional+Knowledge+Act+of+2012+\(STOCK+Act\)+\(S.+2038\)](https://www.oge.gov/Web/oge.nsf/Resources/President+Signs+the+Stop+Trading+on+Congressional+Knowledge+Act+of+2012+(STOCK+Act)+(S.+2038)).

² These restrictions are in addition to the basic provisions governing seeking employment set forth in subpart F of the Standards of Ethical Conduct.

Covered Employees and the Supervising Ethics Office

An individual who is required to file a public financial disclosure report (OGE Form 278) under section 101 of the Ethics in Government Act of 1978 (EIGA) is subject to the notification and recusal requirements of the STOCK Act. Accordingly, a special Government employee who otherwise would be required to file a public financial disclosure report under section 101 of EIGA is subject to the requirements of section 17 of the STOCK Act. However, not all special Government employees file public financial disclosure reports pursuant to section 101 of EIGA. For example, section 101(h) of EIGA excludes from the public financial disclosure reporting requirement an employee who is not reasonably expected to perform the duties of his or her office or position for more than 60 days in a calendar year, and other special Government employees are excluded for other reasons. These employees are not subject to the requirements of section 17 of the STOCK Act.

Upon commencement of a negotiation for or agreement of future employment or compensation, a covered employee must submit notice of the negotiation or agreement and notice of the employee's recusal to the "supervising ethics office."³ These requirements and the recusal requirement do not extend to a public filer who is a nominee for a position or candidate for the office of the President or the office of the Vice President.⁴

Commencement of Negotiation for or Agreement of Future Employment or Compensation

The requirements of section 17 are triggered when an employee directly negotiates or enters into an agreement with a non-federal entity or entities for future employment or compensation. At that point, the employee has a duty to file the notification statements within three business days. Although section 17(a) restricts an employee from "directly" negotiating, the section contemplates the restrictions to apply to a negotiation within the broader meaning of 5 C.F.R. part 2635, subpart F, and the term "direct" does not have a limiting effect on the existing recusal requirements. A "negotiation" begins when an employee enters into a discussion or communication with another person, or such person's agent or intermediary, that is mutually conducted with a view toward reaching an agreement regarding possible employment or compensation with that person. This term is not limited to discussions of specific terms and conditions of employment in a specific position. However, 5 C.F.R. part 2635, subpart F distinguishes between a negotiation and certain other actions an employee may take upon

³ Section 2(6) of the STOCK Act defines "supervising ethics office" by reference to section 109(18) of EIGA, which verifies that OGE is the supervising ethics office for all executive branch officers and employees. Pursuant to 5 C.F.R. §§ 2638.101(c) and 102, OGE has determined that employees should submit the notices that section 17 of the STOCK Act requires to the Designated Agency Ethics Official (DAEO) of the employing agency.

⁴ Although the language in section 17(a) of the STOCK Act refers generally to public filers in connection with these requirements, the section makes clear that any covered individual must file the notification statements with that individual's "supervising ethics office." As noted above, the definition of "supervising ethics office" in EIGA at section 109(18) applies only to executive branch "officers" and "employees," and nominees and candidates who have not yet been appointed or elected are not "officers" or "employees" of the executive branch. See 5 U.S.C. §§ 2104 & 2105. Moreover, section 17(b) of the STOCK Act requires recusal whenever there is a conflict of interest or appearance of a conflict of interest, and the conflicts of interest authorities applicable to the executive branch are not applicable to a nominee or candidate who has not been appointed or elected. Therefore, section 17 is not applicable to nominees or candidates for the office of the President or the office of the Vice President, but will become applicable to nominees upon their appointment.

“seeking” employment that do not reach the level of a negotiation or agreement. These lesser actions do not trigger the requirements of section 17.

Section 17 does not cover all manner of negotiations and agreements for employment. Only negotiations and agreements for “future employment” trigger the notification requirements. Future employment means employment commencing after termination of federal government employment.⁵ This section is not applicable to employment or other compensated activities concurrent with federal government employment, though employees are cautioned that all existing authorities applicable to such employment or compensated activities remain in force. Section 17 also is not applicable to future federal government employment because the language of the section refers to “private” employment only.

Notification and Recusal Requirements

Under section 17(a) of the STOCK Act, a covered employee must file a statement notifying his or her agency ethics official of any negotiation for or agreement of future employment or compensation within three business days after commencement of the negotiation or agreement. The notification statement must include the employee’s signature, the name of the non-federal entity or entities involved in any such negotiation or agreement, and the date the negotiation or agreement commenced. The notification statement may identify one or more non-federal entities with which the employee is negotiating for or has an agreement of future employment or compensation, provided that all entities are separately identified.

Section 17(b) of the STOCK Act provides that an individual filing a notification statement under subsection 17(a) must file a notification of recusal whenever there is a conflict of interest or appearance of conflict of interest with respect to any non-federal entity identified in the notification. Section 17(b) also affirms the individual’s obligation to recuse in such circumstances. Recusal consistent with 5 C.F.R. part 2635, subpart F, satisfies this requirement. Thus, an employee may satisfy the requirements of this provision by not participating personally and substantially in a particular matter that has a direct and predictable effect on the financial interests of the non-federal entity with which the employee is negotiating for or has an agreement of future employment or compensation. 5 C.F.R. § 2635.604(a); see also 5 C.F.R. § 2640.103(d) (“Disqualification is accomplished by not participating in the particular matter.”)

A suggested format is attached that may serve as both a notification of post-employment negotiation or agreement and notification of recusal. However, an employee does not recuse simply by notifying his or her agency ethics official of a negotiation or agreement and of the employee’s recusal. Conversely, an employee does not comply with the notification requirement by recusal alone. Agency ethics officials must ensure that an employee complies with both

⁵ The legislative history supports this conclusion. The Congressional Record makes clear that the STOCK Act extended to the executive branch the current legislative post-employment negotiation disclosure requirements: “The bill requires executive branch officials to disclose their negotiations for private sector jobs, just like legislative branch officials do under current law.” 158 Cong. Rec. H649 (daily ed. Feb. 9, 2012) (statement of Rep. Lamar Smith). For the legislative branch, the Congressional Record clarifies that the current negotiation disclosure requirements, which are established in the Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735, apply to “post-Congressional employment.” 153 Cong. Rec. H9208 (daily ed. July 31, 2007) (statement of Rep. Bob Etheridge).

notification requirements of section 17 of the STOCK Act and that an employee recuses consistent with 5 C.F.R. part 2635, subpart F.

Waivers and Authorizations

In appropriate instances, an employee may seek a written waiver or an authorization as appropriate under 5 C.F.R. § 2635.605. A written waiver or an authorization will resolve, respectively, a conflict of interest or an appearance of conflict of interest with respect to the non-federal entity with which the employee is negotiating for or has an agreement of future employment or compensation. If a waiver or an authorization is issued, the recusal requirement affirmed in section 17(b) of the STOCK Act is inapplicable because the employee no longer has either a conflict of interest or an appearance of a conflict of interest necessitating recusal.

Ethics officials should consult with their agency's OGE Desk Officer Team if they have any questions concerning the issues addressed in this Legal Advisory. OGE will provide additional guidance on other provisions of the STOCK Act in the near future.

Attachment 1 – Suggested Format for Notification of Post-Employment Negotiation or Agreement and Recusal Statement

NOTIFICATION OF POST-EMPLOYMENT NEGOTIATION OR AGREEMENT AND RECUSAL STATEMENT

Section 17 of the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act) requires certain employees to file a statement notifying their agency ethics official of any negotiation for or agreement of future employment or compensation with a non-federal entity within three business days after commencement of the negotiation or agreement. Employees who file this notification statement also must file with their agency ethics official a recusal statement whenever there is a conflict of interest or appearance of a conflict of interest with the entity. In any such case, the employee must recuse, unless the employee has first obtained a written waiver or authorization as discussed in 5 C.F.R. § 2635.605, or qualifies for a regulatory exemption pursuant to 18 U.S.C. § 208(b)(2).

NOTIFICATION OF POST-EMPLOYMENT NEGOTIATION OR AGREEMENT

Name of Employee	
Agency/Office	
Date Negotiation or Agreement Commenced	
Name(s) of Non-Federal Entity or Entities Disclose each non-federal entity with which you are negotiating for or have an agreement of future employment or compensation.	

RECUSAL STATEMENT

For as long as I am negotiating for or have an agreement of employment or compensation with any entity listed above, I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of that entity, unless I first obtain a written waiver or authorization consistent with 5 C.F.R. § 2635.605, or qualify for a regulatory exemption pursuant to 18 U.S.C. § 208(b)(2).

Employee Signature	Date Submitted
Agency Ethics Official Signature	Date Received