NOTE: Please see the attached addendum for the applicability of substantive legal interpretations in this advisory to Executive Order 13770. *See also* LA-17-02 and LA-17-03.

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DO-10-004

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Post-Employment Under the Ethics Pledge: FAQs

As you know, non-career appointees appointed on or after January 20, 2009, must sign an Ethics Pledge that contains a number of commitments. Exec. Order 13490, sec. 1. Several of these commitments pertain to the conduct of appointees while they are still in Government, but two of the commitments concern post-employment activities. Specifically, paragraphs 4 and 5 of the Pledge impose significant new post-employment restrictions on appointees. Paragraph 4 largely tracks the provisions of 18 U.S.C. § 207(c), with which most ethics officials are familiar. Paragraph 5, by contrast, introduces a number of concepts derived from the Lobbying Disclosure Act (LDA), with which ethics officials may be less familiar.

The Office of Government Ethics (OGE) has received questions about both paragraphs 4 and 5 of the Pledge. Therefore, OGE has compiled the following list of frequently asked questions and answers about these new post-employment restrictions. As always, OGE is ready to assist agency ethics officials with any other questions about the post-employment provisions or any other requirements of the Pledge.

A. Paragraph 4: Post-Employment Cooling-Off Period

Paragraph 4 of the Pledge provides:

> If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.

1. What is the relationship between paragraph 4 of the Pledge and 18 U.S.C. § 207(c)?

For the most part, paragraph 4 of the Pledge extends the cooling-off period from one to two years for appointees who are senior employees under 18 U.S.C. § 207(c). The Pledge does not extend criminal penalties to conduct beyond the one-year period in section 207(c)--which only Congress can do--but the Executive Order does specify other enforcement mechanisms, including civil proceedings and agency debarment, for violations of the two-year restriction of paragraph 4. *See* Exec. Order 13490, sec. 5. (Note, however, that the trigger for the two-year period under paragraph 4 might not always coincide with the one-year cooling-off period of section 207(c), as illustrated in the answer to Question 6 below.)

2. Which appointees are subject to the two-year restriction of paragraph 4?

Like the existing restriction in 18 U.S.C. § 207(c), paragraph 4 of the Pledge is intended to cover any appointees who are "senior employees," which reflects the judgment that it is appropriate to impose a two-year cooling-off period on higher level appointees who are likely to have the most influence within their agencies. The categories of senior employees are described in 18 U.S.C. § 207(c)(2) and 5 C.F.R. § 2641.104. The restriction of paragraph 4 applies if the appointee is restricted by section 207(c) at the time of his or her departure from Government.

> ***Example:*** *A non-career Senior Executive Service appointee, whose rate of basic pay meets the salary threshold for being a senior employee, leaves the Department of Energy to work for a private law firm. Sixteen months later, she is asked to represent a disappointed bidder in a bid protest suit against the Department in the Court of Federal Claims. Paragraph 4 of the Pledge would prohibit her from doing so. However, if she had only been a GS-14, Schedule C appointee, she could engage in this representation without violating paragraph 4 of the Pledge because she would never have been a senior employee under 18 U.S.C. § 207(c). Nevertheless, if she had participated personally and substantially as an employee in the contract award that led to the bid protest, she would be permanently prohibited from representing any other person in the matter, under 18 U.S.C. § 207(a)(1).*

3. How does paragraph 4 affect "very senior employees?"

Very senior employees, as described in 18 U.S.C. § 207(d)(1) and 5 C.F.R. § 2641.104, are not covered by 18 U.S.C. § 207(c), and therefore they are not subject to the two-year restriction in paragraph 4 of the Pledge. However, these very senior employees are already subject to a similar two-year cooling-off period under section 207(d) itself (as well as additional restrictions on contacting Executive Schedule officials even in agencies in which they did not serve).

4. Which officials may not be contacted under paragraph 4 of the Pledge?

Unlike paragraph 5 of the Pledge (discussed below), which augments the requirements of 18 U.S.C. § 207(c), paragraph 4 in this respect tracks 18 U.S.C. § 207(c), which bars representational contacts with any official of any agency in which a senior employee served in any capacity during the one-year period prior to terminating from a senior position. The scope of 18 U.S.C. § 207(c) is explained at length in OGE's post-employment regulations. *See* 5 C.F.R. § 2641.204.

5. If post-employment activities are permitted by an exception to 18 U.S.C. § 207(c), are they likewise permitted under paragraph 4 of the Pledge?

Yes. Paragraph 4 of the Pledge incorporates the exceptions and other provisions applicable to 18 U.S.C. § 207(c), as well as the relevant OGE post-employment regulations in 5 C.F.R. part 2641. *See* Exec. Order 13490, sec. 2(m).

> ***Example:*** *An appointee leaves his senior position at the Department of Justice to become an employee of the State of New York. He wants to represent New York in a meeting with DOJ officials in a meeting about drug enforcement policy. This activity is permissible under 18 U.S.C. § 207, because it falls within the exception at 18 U.S.C. § 207(j)(2)(A) for carrying out official duties as an employee of a state or local government. Therefore, the activity also is permissible under paragraph 4 of the Pledge. However, if the former appointee does not actually become an employee of the State, but simply provides consulting or legal services as a contractor, he may not rely on this exception. See 5 C.F.R. § 2641.301(c)(2) and Example 3.*

6. How does paragraph 4 of the Pledge apply to non-career appointees who later are appointed or reinstated to career positions?

The two-year period specified in paragraph 4 runs from the end of the appointee's non-career appointment, not from the end of any separate career appointment the individual may have. In other words, the two-year clock begins to run as soon as a non-career appointee moves to a position that is not subject to the Pledge. (By contrast, the one-year cooling-off period of 18 U.S.C. § 207(c) commences when an individual ceases to be a senior employee, whether career or non-career. 5 C.F.R. § 2641.204(c).) Of course, in most cases, non-career appointees will leave Government when their non-career service is concluded.

> ***Example:*** *A career member of the SES is given a non-career Presidential appointment, at which time she signs the Ethics Pledge. After the conclusion of her Presidential appointment, she is reinstated as a career SES appointee, pursuant to 5 C.F.R. § 317.703. After serving five more*

> *years in a career SES position, she retires from Government. Although she is a senior employee subject to 18 U.S.C. § 207(c) when she retires, she is not restricted by paragraph 4 of the Pledge because more than two years already have elapsed since the end of her non-career appointment.*

B. Paragraph 5: Post-Employment Lobbying Ban

Paragraph 5 of the Pledge provides:

> In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

1. What is the relationship of the lobbying ban in paragraph 5 to the post-employment restrictions in paragraph 4 of the Pledge or 18 U.S.C. § 207?

The restrictions of paragraph 5 are in addition to the restrictions of paragraph 4, 18 U.S.C. § 207, or any other provision of law (e.g., the Procurement Integrity Act, 41 U.S.C. § 423(d)).

2. Does the lobbying ban in paragraph 5 apply to appointees who are not "senior employees?"

Yes. The lobbying ban applies to all appointees who sign the Pledge, unlike the restriction in paragraph 4. Note, however, that certain Schedule C and other appointees are not required to sign the Pledge, i.e., those with no policymaking duties (such as chauffeurs and secretaries) who have been exempted for that reason from public financial disclosure requirements. *See* DO-09-010, http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2009/do09010.pdf.

> ***Example:*** *A non-career SES appointee is paid below the basic pay threshold to be considered a senior employee, under 18 U.S.C. § 207(c)(2)(A)(ii). Although he is not subject to the two-year restriction in paragraph 4 of the Pledge, he is subject to the lobbying ban in paragraph 5.*

3. Does the lobbying ban extend beyond the agency where the former appointee served?

Yes. Paragraph 5, unlike paragraph 4 or 18 U.S.C. § 207(c), restricts a former appointee from lobbying certain officials throughout the entire Executive Branch, not just officials of the agency where the former appointee actually served. (What it means to "lobby," including the concepts of "lobbying contact" and "acting as a registered lobbyist," is discussed in questions 6 through 10 below.)

> ***Example:*** *A former appointee at the Department of Transportation may not, as a registered lobbyist, make a lobbying contact with the Secretary of Health and Human Services. This would be prohibited even though she never served at HHS in any capacity and the subject matter of the lobbying is unrelated to her former Government position.*

4. Which officials may not be contacted by former appointees under paragraph 5?

The ban extends to lobbying contacts with specified Executive Branch personnel. The officials who may not be contacted are: any "covered executive branch official," defined in the LDA as the President, the Vice President, any official in the Executive Office of the President, any Executive Schedule official (EL I-V), any uniformed officer at pay grade 0-7 or above, and any Schedule C employee, 2 U.S.C. § 1602(3); and any non-career SES member, even though the latter are not covered under the LDA definition. For purposes of simplicity, the discussion below will refer to all Executive Branch officials who may not be contacted as "covered officials." Paragraph 5 of the Pledge does not prohibit former appointees from contacting other Executive Branch personnel besides these covered officials. Nor does it prohibit former appointees from contacting "covered legislative branch officials," within the meaning of the LDA, 2 U.S.C. § 1602(4).

> ***Example:*** *A former appointee of the Environmental Protection Agency has become a registered lobbyist. She may not, on behalf of one of her lobbying clients, contact a non-career SES official at the Department of Agriculture. However, she may contact a career SES official at the Department, and she also may contact Legislative Branch officials.*

5. How long does the lobbying ban last?

The ban lasts for the "remainder of the Administration." This means the duration of all terms of the President who was in office at the time the appointee received an appointment covered by the Executive Order. Executive Order 13490, sec. 2(o)(definition of "Administration"). In some cases, holdover officials appointed during a prior Administration have signed the Pledge as a condition of continued employment. Such holdover officials are bound by their commitment under paragraph 5 for the same duration as appointees who actually were appointed during the current Administration.

6. What does it mean to "lobby?"

For purposes of the Pledge, to lobby is "to act . . . as a registered lobbyist." Exec. Order 13490, sec. 2(f). A registered lobbyist, in turn, is a person listed in required filings as a lobbyist for a particular client by a registrant under the LDA, 2 U.S.C. § 1603(a), because of the person's actual or anticipated lobbying activities and contacts. Executive Order 13490, sec. 2(e); *see* 2 U.S.C. §§ 1602(10)(definition of lobbyist). **In a nutshell: if a former appointee is a registered**

lobbyist for a particular client, he or she is prohibited by paragraph 5 of the Pledge from making any lobbying contact with a covered official on behalf of that client. The LDA definition of lobbying contact is broad, including oral or written communications made on behalf of a client with regard to Federal legislation (such as legislative proposals), executive branch programs and policies (such as rulemaking or contracts), and the nomination/confirmation of persons for PAS positions. 2 U.S.C. § 1602(8)(A). However, the definition also enumerates certain exceptions, which should be consulted to determine if a former appointee would be engaging in prohibited lobbying under the Pledge. 2 U.S.C. § 1602(8)(B).

> ***Example:*** *An appointee recently left the Treasury Department to join XYZ Associates, a consulting firm. The firm is helping one of its clients to obtain Federal funding to develop an innovative telecommunications security product. XYZ Associates is registered for this client under the LDA, and it listed the former appointee as one of three lobbyists in its latest quarterly report of lobbying activity filed under the LDA. Under paragraph 5 of the Pledge, the former appointee may not meet with the Secretary of Homeland Security to seek support for funding of the client's research.*

> ***Example:*** *An appointee leaves Government to become Chancellor of a large university. In her new job, she has occasion to make contacts with various covered officials about a range of issues of concern to her university, such as education policy, taxation, and Federal grants. The university itself is registered under the LDA, because it employs an in-house lobbyist in its governmental affairs office and it meets the monetary threshold for registration under 2 U.S.C. § 1603(a)(3)(A)(ii). However, the university has never listed its Chancellor as a lobbyist and is not required to do so under the LDA, because the Chancellor's lobbying contacts and other lobbying activities constitute a small fraction (far less than 20%) of the total time she devotes to university services during any 3-month period. See 2 U.S.C. § 1602(10)(definition of lobbyist). Therefore, the former appointee does not act as a registered lobbyist when she contacts the covered officials, and she does not violate paragraph 5 of the Pledge.*

7. How does a former appointee know if she would be making a lobbying contact "as a registered lobbyist"?

The most obvious way that a former appointee would know if she is acting as a registered lobbyist is if she is already listed as a lobbyist in a registration statement (LD-1 form) or quarterly report (LD-2 form), based on actual or expected lobbying for a particular client. These forms are filed by the lobbyist's employer with the Secretary of the Senate and the Clerk of the House. Additionally, even if the former appointee is not already listed as a lobbyist in an LDA filing, she will be acting as a registered lobbyist if she is engaging in lobbying that is expected to be reported in a subsequent LDA filing that will list her as a lobbyist. This interpretation recognizes that permitting former appointees a "grace period" during which they may freely

lobby covered officials, when they reasonably anticipate reporting those activities in a subsequent LDA filing, would be inconsistent with the purposes of the Pledge.

> ***Example:*** *A former appointee has been retained by a client expressly for the purpose of making several lobbying contacts, and the former appointee's employer has determined that the LDA registration requirement has been triggered, under 2 U.S.C. § 1603(a). However, the employer has until 45 days after the former appointee is retained to file the initial registration statement that would list the individual as a lobbyist. 2 U.S.C. § 1603(a)(1). If the former appointee makes any lobbying contact with a covered official during that 45 day period, she will be deemed to have acted as a registered lobbyist during that time period, for purposes of the Pledge. This is because the registration statement that is eventually filed will list this individual "as an employee of the registrant who has acted . . . as a lobbyist on behalf the client." 2 U.S.C. § 1603(b)(6)(emphasis added).*

8. Does this mean that ethics officials have to opine about what circumstances will trigger registration under the LDA?

Ethics officials will need some familiarity with the LDA registration system in order to counsel appointees about their post-employment activities under paragraph 5 of the Pledge. However, neither OGE nor DAEOs can give definitive advice about LDA registration requirements. Appointees and former appointees should be advised to consult with their prospective employers and/or private counsel about whether their anticipated activities will trigger registration and reporting requirements under the LDA. Former appointees and their employers also may contact the Secretary of the Senate and the Clerk of the House of Representatives for guidance concerning registration and reporting requirements.

9. Are there any circumstances under which a former appointee may become a registered lobbyist?

There are relatively narrow circumstances in which a former appointee may become a registered lobbyist. Paragraph 5 of the Pledge is intended to minimize the potential for unfair advantage or undue influence resulting from an appointee's service in the Executive Branch. Consequently, for the remainder of the Administration, a former appointee cannot become a registered lobbyist if this will involve making any lobbying contact with a covered official in the Executive Branch. However, the Pledge does not restrict former appointees from registering and making contacts with Legislative Branch officials, as this would not implicate the same concerns about exploiting the access and influence obtained as a result of prior Executive Branch service.

> ***Example:*** *A former Commerce Department appointee is retained by a utility company to lobby on a legislative proposal to create tax incentives for installing new emissions control technology. After being retained, the former appointee is*

listed as a lobbyist in an LDA registration statement for this activity. As long as he makes no lobbying contacts with covered officials in the Executive Branch on behalf of this client and confines all his lobbying contacts to Legislative Branch officials, he will not violate paragraph 5 of the Pledge.

Example: *In the scenario above, the client asks the former appointee to attend a meeting with the Assistant Secretary for Tax Policy at the Treasury Department to discuss how the legislative proposal would be consistent with the Administration's agenda. He may not do so, because this would be a prohibited lobbying contact with a covered official in the Executive Branch.*

10. If a former appointee is registered as a lobbyist on behalf of one client, is he prohibited from making contacts on behalf of another client for which he is not required to register?

No. The registration and quarterly reporting requirements of the LDA are client-specific, as is the definition of "lobbyist." *See* 2 U.S.C. §§ 1603(a)(2)(single registration for each client); 1604(a)(separate quarterly report for each client); 1602(10)(lobbyist is individual employed or retained by client for certain amount of lobbying contacts and activities on behalf of that client). Therefore, a former appointee does not "lobby" a covered official, in violation of paragraph 5 of the Pledge, unless he does so on behalf of a specific client for which he is a registered lobbyist.

Example: *A former appointee works for a law firm that does some lobbying. His firm has registered him as a lobbyist for Blue Corporation, a client which he represents in lobbying contacts with Legislative Branch officials. He also has another client, Green Corporation, for which he has provided only non-lobbying services. Green Corporation now asks him to make a lobbying contact with the Department of Transportation. His firm decides it will not be necessary to register him for Green Corporation. (The firm might determine, for example, that he does not meet the definition of lobbyist for Green Corporation, under 2 U.S.C. § 1602(10), or that the firm itself does not meet the monetary threshold to register for Green Corporation, under 2 U.S.C. § 1603(a)(3)(A)(i).) He would be prohibited, however, from making even a single lobbying contact with DOT on behalf of Blue Corporation, because he is a registered lobbyist for Blue Corporation, even though his other lobbying contacts for that client have been exclusively with the Legislative Branch.*

11. Is there any exception to the requirements of paragraph 5 for former appointees who signed the Pledge but served only a brief time in the Administration?

Neither paragraph 5 nor any other part of the Executive Order makes any exception for appointees who signed the Pledge but served only a short time.

Addendum (March 20, 2017)
DO-10-004: Post-Employment Under the Ethics Pledge: FAQs

The following substantive legal interpretations in this advisory are **applicable** to Executive Order 13770:

- Part A: Post-employment cooling-off period. *See* E.O. 13770, sec. 1, par. 2.
  - Q2. Which appointees are subject to the restriction
  - Q3. How the restriction affects very senior employees
  - Q4. Which officials may not be contacted under this restriction
  - Q5. Applicability of exceptions under 18 U.S.C. § 207(c) to the restriction

- Part B: Post-employment lobbying ban. *See* E.O. 13770, sec. 1, par. 3.
  - Q1. Relationship of the lobbying ban to other restrictions
  - Q2. Whether the lobbying ban applies to appointees who are not senior employees
  - Q5. Duration of the lobbying ban
  - Q11. Whether exceptions to the restriction exist

The following substantive legal interpretations in this advisory are **applicable in part** to Executive Order 13770, to the extent that they address the core questions listed below. However, because the post-employment ban in Executive Order 13490 restricts "lobbying," while the corresponding ban in Executive Order 13770 restricts "lobbying activities," the substantive legal interpretations of "lobbying" are **not relevant** to Executive Order 13770.

- Part B: Post-employment lobbying ban. *See* E.O. 13770, sec. 1, par. 3.
  - Q3. Whether the ban extends beyond the agency where the former appointee served
  - Q4: Which officials may not be contacted by former appointees

The following substantive legal interpretations in this advisory are **not relevant** to the corresponding post-employment restrictions in Executive Order 13770:

- Part A: Post-employment cooling-off period. *See* E.O. 13770, sec. 1, par. 2.
  - Q1. The relationship between the restriction and 18 U.S.C. § 207(c)
  - Q6. How the restriction applies to non-career appointees who later are appointed or reinstated to career positions

- Part B: Post-employment lobbying ban. *See* E.O. 13770, sec. 1, par. 3.
  - Q6. What it means to "lobby"
  - Q7. How a former appointee would know if he or she is making a lobbying contact "as a registered lobbyist"
  - Q8. Whether ethics officials must opine about circumstances that would trigger registration under the LDA
  - Q9. Whether there are any circumstances under which a former appointees may become a registered lobbyist
  - Q10. Whether a former appointee who is a registered lobbyist on behalf of one client is prohibited from making contacts on behalf of another client for which he or she is not required to register