



PARTNERSHIP FOR PUBLIC SERVICE  
CENTER *for* PRESIDENTIAL TRANSITION

# Presidential Appointments Vetting Guide

PRECEDENTS, AUTHORITIES AND CASE STUDIES

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Partnership for Public Service  
July 2020



## INTRODUCTION

Individuals being considered for politically appointed positions are thoroughly vetted during presidential transitions by a president-elect's legal team and during the term of the president by the Office of Presidential Personnel and other components of the executive branch. The vetters look for potential red flags—financial, ethical or personal issues that might disqualify potential appointees from serving in an administration or require some action to eliminate potential conflicts of interest or other significant impediments to appointment.

Historically, vetting teams (and advisers to appointees) have been handicapped by a lack of institutional knowledge of how various administrations have approached the kinds of problems that emerge during the appointment process, and in many cases, in an absence of formal legal precedents.

The law firms of Steptoe & Johnson and Holland & Knight compiled this collection of precedents, authorities and case studies to serve as a reference point for the president's appointments team as it develops its own rules and guidelines, and as it deals with complex and unexpected issues that inevitably will arise. This guide also can be used by advisers for potential appointees to better understand the types of issues that should be considered.

This guide represents an important contribution to the work of the Partnership for Public Service's Center for Presidential Transition, which provides guidance to presidential candidates and incumbents on how to set up and execute a first or second term transition to encourage a smooth continuity of government.

Sincerely,

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## *Executive Summary*

### **Presidential Appointments Vetting Guide**

#### **PRECEDENTS, AUTHORITIES AND CASE STUDIES**

This guide provides guidance and recommendations regarding the federal government ethics structure for a presidential nominee subject to Senate confirmation (as well as certain senior level presidential appointees who do not require Senate confirmation). This guide addresses general financial disclosure requirements, analyzes conflicts of interest involving financial holdings, remedies to address such conflicts, and other ethical issues which a potential nominee may encounter.

#### **Section I - General financial disclosure requirements and considerations.**

- Nominees subject to Senate confirmation and appointees to other senior level positions are required to submit the “OGE Form 278e” in connection with their appointment. This public disclosure form requires a filer to provide significant information regarding the filer’s “financial interests” and the extent and nature of the filer’s links to various organizations, as well as similar information for the filer’s spouse and dependent children. Rules governing the disclosure of this information are intended in part to help identify potential conflicts of interest.
- Many nominees and appointees may hold complex financial assets and their treatment is discussed in this guide. Some of the more significant disclosure issues involve “pooled investment vehicles,” including equity interests in private equity funds, hedge funds, venture capital funds and other investment vehicles with multiple holders. One principal issue with respect to such investment vehicles is whether the nominee needs to disclose only the nominee’s interest in the fund, or whether the nominee must include information concerning the underlying “portfolio holdings” of the pooled investment vehicles. The Office of Government Ethics (“OGE”) guidance in this area has evolved over time. The current focus is on whether such pooled investment vehicles qualify as “excepted investment funds” or “EIFs” for purposes of these disclosure requirements, as federal ethics typically does not require investment vehicles that qualify as EIFs to disclose their underlying portfolio holdings.
- OGE has issued guidance regarding the disclosure and potential conflicts of interest associated with “discretionary trusts,” which it has defined rather narrowly to exclude many trusts that are often considered to be discretionary trusts in other contexts. The guidance provides that qualifying discretionary trusts do not need to be disclosed, and the underlying holdings of discretionary trusts therefore do not need to be disclosed because the beneficiaries of the trust do not have a “vested interest” in the trust or its assets. The current rule is that a filer needs to identify the discretionary trust as a source of income only if the trust has made a distribution during the reporting period. OGE has considered changes to this guidance.
- Partnership income and distributions (generally cash) represent another area of complexity in terms of disclosure. Income from fees, operations or business operations generally must be reported in exact dollar amounts, while income from other forms of passive investment typically is disclosed through the use of

broad ranges (e.g., a filer might disclose that income from passive investment A during reporting period was between \$50,001-\$100,000). Such income should be disclosed as “other income” on the form.

- Income of retirement plans are another area in which there have been recent changes in practice. Beginning in the Trump administration, OGE determined that retirement income must be disclosed only to the extent of actual distributions from qualified plans rather than disclosure of the income earned in the 401(k) plan or other retirement account.

## **Section II – Potential financial conflicts of interests**

Information disclosed on the OGE 278e is analyzed by OGE, the ethics counsel in the Office of White House Counsel, and the designated agency ethics officials at the agency or department where the nominee or appointee intends to serve. The purpose is to determine whether a potential conflict exists and, if so, and what steps need to be taken, such as divestiture, to address the potential conflict.

- OGE regulations provide for a regulatory exemption with respect to disclosure and conflicts for holdings of diversified mutual funds. Certain investment vehicles, such as Exchange Traded Funds, have been determined in many cases to satisfy this regulatory exemption. Other financial products, such as equity-linked notes, do not meet the regulatory exemption; however, OGE developed an automatic waiver for these financial products so that filers could treat them as the functional equivalent of a diversified mutual fund.
- If the nominee or appointee is unable to determine the underlying portfolio holdings of an investment fund that meets the requirements of an EIF, so that the filer is effectively “blind” as to the vehicles’ actual holdings, OGE has determined that fund and its holdings do not give rise to potential conflicts of interest. Such so-called Blind EIFs may include certain hedge funds that do not disclose their holdings to investors.
- In order to qualify for the conflicts of interest exemptions with respect to a Blind EIF, the filer must provide OGE with a statement from the management of the fund (a so-called manager letter) attesting to the fact the fund does not provide information concerning underlying portfolio investments to investors, and certain related representations. Over time, OGE has standardized the language of manager letters required to qualify for a Blind EIF status.
- The treatment of investment funds that, for one reason or another, do not meet the requirements for an EIF, has also evolved over time. For example, for many years, a filer was required to divest any pooled investment vehicle that did not meet the requirements of an EIF and that was either unable or unwilling to disclose all of its underlying holdings. In 2014, OGE modified its approach and ruled that the question of divestiture should turn primarily on whether a Senate confirmed political nominee is unable to disclose a fund’s holdings due to a lack of knowledge regarding those holdings.
- Many nominees and appointees often think that establishing a “blind trust” may be a way to address potential conflicts that arise during the vetting process. That, however, is not the case – federal ethics law **does not** allow a nominee to resolve a potential conflict by simply placing the asset in question in a blind trust.

Federal ethics laws do allow for the creation of qualified blind trusts and qualified diversified trusts, but such trust vehicles must be certified by OGE and the employee must turn over the management of the trust assets to an independent, institutional trustee who is approved by OGE. In the case of a qualified blind trust, the independent trust may not disclose to the nominee any new assets purchased by the trust during its existence. No qualified blind trusts were established under the Obama or Trump administrations.

- Qualified diversified trusts are rarely used but could be a potential avenue to avoid conflicts. The trust assets must be widely diversified, meaning that the value of the assets concentrated in a particular economic or geographic sector is no more than 20 percent of the total and that no single entity other than the U.S. government makes up more than five percent of total value.

### **Section III - Spousal financial conflict of interest rules.**

Generally, many of the disclosure and conflict of interest rules consider the filer and his/her spouse to be a single economic unit, which can impact or inhibit the independent career and other interests of the non-filer spouse.

- With respect to disclosure, OGE applies a very narrow innocent spouse rule to determine whether the filer needs to report the spouse's assets. For divorced or permanently separated filers, the filer generally need not report such interests.
- While disclosure and conflicts rules concerning financial holdings by spouses and dependent children are well-established, the rules concerning conflicts potentially raised by careers of spouses are not clear. Restrictions on the employment activities of the filer's spouse are often negotiated as part of the filer's ethics agreement and can vary widely depending on the filer's position and the spouse's career. For example, ethics agreements may contain certain commitments that the filer's spouse will not communicate directly with the nominee's agency during the time of the nominee's appointment.

### **Section IV - Remedies for conflicts.**

If a filer's holding(s) disclose a conflict of interest, remedies to address this conflict can include recusal, waivers or divestiture depending on the specific situation.

- Generally, the government employee's ethics agreement and screening memo will outline the scope of recusals and designate the gatekeeper who will screen the employee's communications to ensure compliance.
- Agencies, after consulting with OGE, may grant waivers. Waivers must be issued in writing and must be issued prior to the employee's participation in a particular matter covered by the waiver. Further, the waiver must disclose the disqualifying financial interest and conclude that the disqualifying financial interest is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from such employee.
- Waivers are also available for Special Government Employees (SGE) serving on advisory committees established under the Federal Advisory Committee Act. Waivers must be issued prior to the individual acting in the matter and the agency official first must review the SGE's financial disclosure form before determining that a waiver is appropriate.

- Another remedy to address a conflict is divestiture of the financial interest that gives rise to a potential financial conflict of interest. Divestitures have become the default remedy for many potential conflicts.
- The Internal Revenue Code allows the director of OGE to issue a certificate of divestiture, or CD, which provides a nominee with a tax benefit if he or she is forced to divest certain interests as part of the vetting process. More specifically, a nominee or appointee may defer any capital gains tax owed on such a compelled sale, as long as the proceeds of such sale are promptly reinvested in a limited category of permitted property. The tax deferral lasts until the replacement property is sold. A CD may not be issued for any property that already has been sold – thus, if a nominee or appointee wishes to take advantage of this tax deferral, he or she must wait until receipt of the CD before moving forward.

### **Section V - Executive compensation arrangements.**

Executive compensation arrangements are individualized contractual arrangements between employers and executives and take a range of forms. Little standardization of treatment has developed.

- These arrangements can cover bonus payments, deferred compensation arrangements and other special categories of executive equity compensation interests such as stock options. The treatment of these arrangements is one of the most complicated areas for government ethics compliance and is subject to a considerable degree of uncertainty.
- The arrangements are often customized for the executive and generally have to be analyzed on a case by case basis for purposes of government ethics disclosure and conflicts compliance. Direct discussions with human resources offices and other components of the employer are often necessary to address disclosure and conflict issues, and to maintain consistency with corporate filings. These arrangements may be subject to confidentiality agreements, further exacerbating compliance in the vetting process.
- Executive compensation and other employment-related payments can also raise emoluments clause issues. For example, profit distributions or fees from sovereign wealth funds may represent payments from foreign governments for these purposes. In particular, these payments can raise issues with part-time appointees who retain interests in law partnerships and reserve military officers who receive fee income from such governmental or quasi-governmental entities.

### **Section VI - Use of the Standard Form 86 Supplement as a vetting tool**

The Supplement to the Standard Form 86 is technically associated with the National Security Questionnaire and helps provide vetting officials with information about topics that have led to scandals or other concerns. The questions in the 86 supplement should be read in the context of past scandals.

- As a screening mechanism, the 86 supplement provides somewhat fragmented information, and the requested information can be overlap with other forms (including the 278e and the Senate Questionnaire), therefore requiring extra care

to make sure such information is consistently reported across forms. Answers must be carefully conditioned and qualified to assure accuracy.

- For example, the current version of the 86 supplement requests detailed information about positions and former positions with organizations and companies, overlapping with the disclosure required in the 278e. The current version also asks questions about possible sexual harassment claims and about past financial dealings with foreign governments and other foreign entities.
- The form also asks a catch all of whether there is anything that could cause embarrassment to the president or cause the filer to be the subject of blackmail or coercion. Ideally, such issues would be raised during the vetting process with White House counsel early in the process.

### **Section VII - Outside employment and activities.**

An executive order issued by the Bush I administration, which is still in effect, prohibits political appointees from receiving any “outside earned income” while serving in the government.

- This prohibition on outside earned income is generally interpreted in a manner consistent with the tax code. However, a share of business or operating income that is derived from a limited partnership, where no services are provided to the partnership, should not be treated as earned income for the nominee or appointee and therefore should not subject to this outside earned income prohibition.
- Government employees must obtain permission if they are to serve in a nonprofit in an official capacity. The employee remains subject to government ethics rules.
- The STOCK Act prohibits certain government employees from purchasing securities that are subject to an independent public offering if done in a manner that is not available to members of the public. An employee who has acquired stock from a former private employer will not be considered to have purchased the stock if, during such time in government service, the stock shares are automatically converted to common stock when that company goes public. Neither agency ethics officials nor OGE will opine on these STOCK Act issues, since they treat these issues as a matter of securities law.
- President Obama issued an executive order extending restrictions on appointees in his administration from unauthorized communications with officials of the executive agency in which they served for two years following the end of their employment. President Trump subsequently revoked the order and issued a substantially modified new order requiring that officials comply with the restrictions found in [18 U.S.C. 207\(c\)](#), which under statute, extend for only one year. Those restrictions make it punishable for any former executive branch officials to “knowingly make, with the intent to influence, any communication to or appearance before any officer or employee of the department of agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States) in connection with any matter on which such person seeks official action.”

## **Section VIII - Tax issues affecting potential nominees during the vetting process.**

Some nominees may employ household or other help on which payroll taxes are due. Failure to withhold or pay those taxes have derailed past nominees. Currently, these “nanny tax” issues have become less critical and are not necessarily viewed as a negating item for nominations when the nominee has cured the liability or otherwise committed to paying any back-tax liability. Tax accountant letters are useful. Nominees undergoing confirmation by the Senate Finance Committee face higher scrutiny. Tax penalties are also reviewed, including any penalties assessed for underpayment of estimated taxes. There is also an interest in foreign bank account reporting and international transparency.

## **Section IX – Nominee drug and alcohol issues.**

Drug use is subject to a complex analysis throughout the vetting process.

- The seriousness of the drug-use issue varies based in part upon the elapsed time since the last use, types of drugs used, frequency of use and other factors. The SF-86 National Security Questionnaire requests the filer to report in detail past illegal drug use.
- For purposes of vetting, illegality of drug use is determined by federal, not state or local law. Legalization of marijuana by several states has not reduced the concerns regarding prior drug use in vetting nominees, especially in the current administration.
- Different committees view the seriousness of past drug use differently. The Senate Finance Committee chair will not move forward nominees who have used illegal substances post-college. The Judiciary Committee has an automatic rule blocking nominees who have used illegal drugs since being admitted to the Bar.
- The SF-86 also requests the filer to divulge any past alcohol abuse or arrests for DWI/DUI, even if the offenses were expunged from the filer’s police records. Generally, questions regarding alcohol abuse are about behavior or actions that were taken over the past seven or 10 years.

## **Section X – Past mental and medical healthcare treatment.**

The SF-86 contains questions regarding a nominee’s past mental healthcare treatment. In the past, mental healthcare treatment was often a disqualifying condition for a security clearance. However, the questionnaire over time added various exemptions, which essentially disregarded certain categories of psychiatric and other mental health treatment as such treatments were deemed not to be indicative of security risks. Exemptions have also been provided for individuals who sought treatment as a survivor of sexual assault, and as returning servicemen suffering from PTSD.

## **Section XI – Immigration status of a nominee’s household employees**

The current administration has placed an emphasis on immigration status of nominees’ domestic and other household employees. In addition to questions regarding whether the nominee has filed and maintained I-9 forms and related documentation, the White House personal data statement requests lists of all domestic employees and independent contractors, and vetting counsel may inquire as to their immigration status.

## **I. FINANCIAL DISCLOSURE**

Potential financial conflicts of interest are addressed by both disclosure and conflict of interest restrictions. Financial conflicts can give rise to criminal sanctions, generally governed by 18 USC § 208. Disclosure of financial interests on the Form 278e for public filers (and OGE Form 450 for nonpublic filers) is governed by statute, OGE regulations, OGE guidance and informal practice. OGE publishes a Public Financial Disclosure Guide. The most recent version of the guide was issued in January 2019. Disclosure rules are intended to help identify potential conflicts of interest, but are not limited to that goal. Increasingly complex financial products held in the portfolios of filers create a need for different approaches to both disclosure and conflict of interest analysis. A selection of some of the more significant disclosure issues is provided below.

### **1.1 Pooled Investment Vehicles**

Ownership of passive interests in private equity funds, hedge funds, venture capital funds and other collectively owned investment vehicles, all of which fall into the regulatory category of pooled investment vehicles, raise significant disclosure issues for filers. These issues have increased in importance in recent years because of the widespread use of investments in funds as part of the typical portfolio of prospective appointees. Guidance from OGE and other ethics officials has attempted to keep up with this change in the investment environment.

#### **Precedent**

If a pooled investment vehicle does not qualify as an excepted investment fund, (see below), the filer must disclose the underlying holdings of portfolio companies. A pooled investment fund may qualify as an excepted investment fund if: (1) the fund is widely held, typically meaning more than 100 investors; (2) investors do not control and cannot control the financial interests held by the fund; and (3) the fund is publicly available.

#### **Endnote Convention for 278 Disclosures of Underlying Portfolio Holdings**

Because of the difficulty of providing information regarding underlying portfolio investments and underlying tiers of investment funds with respect to pooled investment vehicles on the face of the original Form 278, a convention was developed between OGE, filers and their legal advisors to include relevant information in endnotes attached to the 278. This is generally done in a Word document drafted by counsel with references to the endnote on the appropriate line on Schedule A of the Form 278, as it then existed. Endnotes are often used to describe intermediate partnership entities (e.g., in a “fund of fund” structure) and has been adapted to a variety of special investment fund disclosures. The endnote convention was accepted by OGE and the White House beginning in January 2003 and became widely used shortly thereafter. Although it has never been formalized in legal advisories, the endnote convention for information regarding underlying portfolio investments continue to be accepted practice

and has now been incorporated into the software for the 278e in the Integrity system.

### **Authority**

Cusick, R.I., U.S. Office of Government Ethics - DO-08-022: Financial Disclosure Requirements for Pooled Investment Funds. (July 22, 2008). Retrieved from

[https://www.oge.gov/web/oge.nsf/All%20Advisories/AD54F07936C7D6FA85257E96005FBE9B/\\$FILE/DO-08-022.pdf?open](https://www.oge.gov/web/oge.nsf/All%20Advisories/AD54F07936C7D6FA85257E96005FBE9B/$FILE/DO-08-022.pdf?open)

## **1.2 Excepted Investment Funds (“EIFs”)**

### **1.2.1 Precedent**

Disclosure of underlying assets of pooled investment vehicles continues to depend upon whether the fund qualifies as an EIF. OGE’s liberalization of certain tests for qualification as an EIF reduces disclosure requirements. These liberalized definitions are now documented on the OGE website, although not in any formal advisory guidance. Qualification as an EIF is only relevant for disclosure purposes; underlying portfolio investments do not avoid potential for financial conflicts of interest under section 208 merely because the fund that holds such investments is an EIF.

### **Precedent and Changes in Definitions**

Beginning in 2009, OGE adopted a more expansive definition of EIF by making it easier to meet the tests provided in the applicable regulations. This in turn made it easier for private equity funds and other private investment funds to qualify for EIF status. Thus, for example, with respect to the widely held or 100 investors test for qualification, OGE adopted the convention that all ultimate beneficial owners of interests in a pooled investment vehicle would be counted for purposes of meeting the test. As a result, many investment funds with institutional (e.g., pension plan) direct investors, or investment funds with multi-tiered ownership structures (so-called fund of funds structures), could meet the widely held test for qualification. In addition, OGE adopted a more expansive interpretation of the publicly held or available test for qualification. Under this interpretation, as long as a member of the public who met the objective qualification tests (e.g., qualified investor and net worth test, which are common to many private equity and other investment funds) could invest in the fund or purchase an interest in the fund, this test for qualification as an EIF would be met. As a result of these interpretive changes, many investment funds that previously did not qualify for EIF status began to qualify. Current standards for EIF qualification are now published on the OGE website.



**Authority**

Office of Government Ethics - Excepted Investment Fund. (2015).

Retrieved from

<https://www.oge.gov/Web/278eGuide.nsf/Content/Definitions~Excepted+Investment+Fund>

Cusick, R.I., U.S. Office of Government Ethics - DO-08-022: Financial Disclosure Requirements for Pooled Investment Funds. (July 22, 2008).

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[https://www.oge.gov/web/oge.nsf/All%20Advisories/AD54F07936C7D6FA85257E96005FBE9B/\\$FILE/DO-08-022.pdf?open](https://www.oge.gov/web/oge.nsf/All%20Advisories/AD54F07936C7D6FA85257E96005FBE9B/$FILE/DO-08-022.pdf?open)

### **1.3 Discretionary Trusts**

#### **1.3.1 Bush II Administration**

**Precedent**

In 2008 OGE considered the disclosure (and conflict of interest) implications of so-called discretionary trusts. In issuing its August 2008 memorandum, DAEOgram DO-08-024, exempting discretionary trusts from disclosure as well as conflict of interest concerns, OGE recognized the unique status of beneficial interests in irrevocable trusts as to which the beneficiary had no legal right to compel a distribution in favor of the beneficiary. The OGE memorandum implicitly recognized that state trust law determined the legal rights of beneficiaries, raising the question of whether a state trust law opinion or other legal authority must be cited to support discretionary trust status of a particular irrevocable trust. In a few cases, changes to the distribution provisions of the particular trust to cause the trust to be discretionary within the meaning of the memorandum were respected. However, the OGE memorandum restricted the application of the discretionary trust rule to those in which the filer was not the settlor or trustee of the trust, thus limiting the scope of the rule. Moreover, the memorandum provides that the approach described in the OGE ruling does not apply if the beneficiary also has a “vested remainder interest,” citing 5 C.F.R. § 2634.310(a)(2). The definition of vested remainder interest in the cited regulation has been interpreted by some trusts and estates practitioners as potentially at variance with the normal definition used for state law purposes. Under the 2008 OGE memorandum, the filer was required to report holdings of a discretionary trust if the filer, filer’s spouse or filer’s dependent child received income from the discretionary trust during the reporting period. This requirement, however, was changed in 2013 (see below), and under existing OGE guidance a filer will not need to disclose the assets of a qualifying discretionary trust even if a trust distribution is received by the filer or by an imputed party during the reporting period. The current rule is that a filer would merely need to identify the discretionary trust as a source of income and disclose the fact that a distribution from the trust occurred during the reporting period.

### **Authority**

Cusick, R.I., U.S. Office of Government Ethics - DO-08-024: Discretionary Trusts. (August 6, 2008). Retrieved from [https://www.oge.gov/web/oge.nsf/Legal%20Advisories/94CDD37DC8B2FF5F85257E96005FBE9C/\\$FILE/DO-08-024.pdf?open](https://www.oge.gov/web/oge.nsf/Legal%20Advisories/94CDD37DC8B2FF5F85257E96005FBE9C/$FILE/DO-08-024.pdf?open)

## **1.3.2**

### **Current Practice**

#### **Precedent**

A filer does not have to report holdings of discretionary trusts even if a payment was received from the discretionary trust during the relevant reporting period. Filers must still report any income received from the discretionary trust to the filer, or the filer's spouse or dependent child.

During the Trump administration, a number of filers used or attempted to use the discretionary trust framework to mitigate financial disclosure requirements. Informally, OGE indicated some concern regarding the increasing use of discretionary trusts and issued a notice in the Federal Register soliciting comments on whether OGE should revisit its prior guidance. Although OGE received a number of comments in response to that notice, it has not yet made any changes to its existing discretionary trust guidance.

### **Authority**

Shaub, Jr., W. M., U.S. Office of Government Ethics - LA-13-04: Reporting Requirements for Discretionary Trusts. (April 9, 2013). Retrieved from [https://www.oge.gov/Web/OGE.nsf/0/84366EACA265457E85257E96005FBEFC/\\$FILE/LA-13-04.pdf](https://www.oge.gov/Web/OGE.nsf/0/84366EACA265457E85257E96005FBEFC/$FILE/LA-13-04.pdf)

Request for Public Input on the Application of the Criminal Conflict of Interest Prohibition to Certain Beneficial Interests in Discretionary Trusts, 82 Fed. Reg. 122, Jan. 3, 2017 <https://www.govinfo.gov/content/pkg/FR-2017-01-03/html/2016-31583.htm>

## **1.4**

### **Partnership Income and “Distribution” Convention**

## **1.4.1**

### **Bush II Administration**

#### **Precedent**

Partnership income from fees, operations or other trade or business, as opposed to the types of mostly passive income in the investment categories specified in the 278e (such as gain, dividends, interest, etc.), sometimes referred to as “line 1 income” (taken from the first line of the partnership K-1 provided to partners in a normal partnership) is required to be reported in exact dollar amounts rather than in the brackets used for the investment categories. Line 1 income of a partnership ultimately can be determined in exact amounts from the K-1 to meet this requirement, but for many partnerships, the timing of reporting on K-1's for tax purposes

(generally no earlier than April and often as late as September following the end of the calendar tax year) does not coincide with reporting requirements for financial disclosure purposes and therefore such exact amounts may not be available for inclusion in the 278e. During the George W. Bush administration, the convention was developed to report cash distributions rather than taxable income for the reporting period for purposes of reporting such exact amounts on the 278. The cash distributed during the reporting period was in effect a surrogate for such income of the partnership. This approach to cash distributions permitted filers to provide some more accurate information by denoting “distribution” with the exact amount entered in the “other income” block.

#### **1.4.2 Current Practice**

##### **Precedent**

In general, partnership income should be disclosed as other income in Part 2 or Part 6 of the 278e. Using the convention noted above, the cash distribution convention should be used to report cash distributed by the partnership during the reporting period. Problems arise under this cash distribution convention in circumstances in which cash distributions and partnership income are substantially different, for example, when real estate partnerships distribute cash from refinancing, but have no taxable income for the tax year. As a practical matter, in general, consistency of treatment has remained of paramount importance in disclosure of partnership items.

##### **Authority**

OGE, [Public Financial Disclosure Guide](#), p. 48.

#### **1.5 Employee benefit plans exemption and diversified pooled investments**

##### **Precedent**

Beginning in the Trump administration, OGE determined that the income amount of retirement plans reported on the 278e should only require reporting of actual distributions, not of income earned in the account itself. This reduced the difficulty of the determination of such income, which often could not be determined with accuracy since financial services firms did not need to track it for reporting to their customers. A diversified pooled investment fund, if held through an otherwise exempt employee benefit fund, is also exempt from the restrictions of section 208(a): “Where a particular pooled investment fund meets the definition of ‘diversified’ in part 2640, see 5 C.F.R. § 2640.102(a), an employee may rely on the exemption as to that fund when the employee or other person specified in 18 U.S.C. § 208(a) holds the fund through a qualifying employee benefit plan.” This exemption applies only to diversified pooled investment funds: “[When the employee] has specifically designated a non-diversified asset for an allocation of contributions, the employee benefit plan exemption will be

unavailable as to that asset. For example, if a plan participant designates that contributions be divided between a diversified pooled investment fund and a non-diversified company stock fund, the employee benefit plan exemption will be available as to the diversified pooled investment fund, but will be unavailable as to the non-diversified company stock fund.”

### **Plans outside of the United States**

The same exemption applies to plans outside of the United States even though they are generally not covered by ERISA. ERISA coverage is not necessary for the exemption, but the plan must still “satisfy the criteria set forth at section 2640.201(c)(1)(iii) and the definition at section 2640.102(c) to qualify for the exemption.”

### **Authority**

Apol, D.J., U.S. Office of Government Ethics - LA-15-06: Employee Benefit Plans Through Which Employees Hold Diversified Pooled Investment Funds and Employee Benefit Plans Established or Maintained Outside of the United States. (May 5, 2015). Retrieved from [https://www.oge.gov/Web/OGE.nsf/0/7D7F24A707C3035F85257E96005FBF17/\\$FILE/839be259811a4b0da33edbf6bdc0e74c2.pdf](https://www.oge.gov/Web/OGE.nsf/0/7D7F24A707C3035F85257E96005FBF17/$FILE/839be259811a4b0da33edbf6bdc0e74c2.pdf)  
OGE, [Public Financial Disclosure Guide](#), p. 26.

## **II. FINANCIAL CONFLICTS**

The holdings disclosed on Form 278e are analyzed to determine whether a filer has potential conflicts under section 208. This process involves OGE, the appropriate designated agency ethics official and White House ethics counsel.

### **2.1 Regulatory Exemption**

#### **2.1.1 Current Practice**

##### **Precedent**

The so-called regulatory exemption to disclosure of certain portfolio holdings generally refers to the exemption from financial conflicts for diversified mutual funds provided in OGE regulations. 18 U.S.C. § 208(b)(2) authorizes OGE to issue regulatory exemptions for financial disclosure and conflict of interest purposes. On Dec. 18, 1996, OGE published a final rule, later codified as 5 C.F.R. §§ 2640.201-206, that exempted certain financial interests that were too remote to warrant disqualification under section 208. These included specifically diversified mutual funds and certain general categories of exemptions: (1) for pooled investment vehicles; (2) for securities; and (3) for miscellaneous items, which might only apply to certain agency employees.

**Authority**

5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. §208; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 1990 Comp., p. 306. (November 18, 2015)  
<https://www.govinfo.gov/app/details/CFR-2010-title5-vol3/CFR-2010-title5-vol3-part2640>

**2.2****Blind EIFs****2.2.1****Obama Administration****Precedent**

In 2009-2010, OGE determined that there is no section 208 conflict, and therefore no requirement for nominees to divest their interests in certain pooled investment vehicles, if the investments: (1) meet the requirements of an excepted investment fund; and (2) the filer is blind as to the vehicles' actual holdings. Blind EIFs include but are not limited to hedge funds that do not disclose their holdings to their investors (typical of hedge funds that have proprietary or black box trading strategies) and other investment funds that are not transparent as to their holdings.

**No Knowledge (Manager) Letters**

Before allowing a filer to take advantage of blind EIF status and avoid divestiture on that basis, OGE insisted that the filer provide a statement from the management of the fund attesting to the fact that the filer was blind to/had no knowledge of the fund's assets. Over time, OGE began to standardize the language required to qualify for a Blind EIF status, a version of which is set out below:

**Standardized Manager Letters**

The language of these no knowledge/manager letters became standardized has included the following: "I am writing in response to your request for information regarding the individual investment positions of XXX Investment Fund. Please accept this letter as written confirmation that XXX Investment Fund does not disclose these individual investment positions to its investors. We are unable to make an exception for you."

While this language was originally designed to relieve filers of the obligation to provide information concerning underlying portfolio holdings for disclosure purposes, no knowledge/manager letters became a component of the blind EIF analysis for conflict of interest relief. See separate discussion of blind EIF development in Section 2.4.

**Authority**

Cusick, R.I., U.S. Office of Government Ethics - DO-08-022: Financial Disclosure Requirements for Pooled Investment Funds. (July 22, 2008).

Retrieved from

[https://www.oge.gov/web/oge.nsf/All%20Advisories/AD54F07936C7D6FA85257E96005FBE9B/\\$FILE/DO-08-022.pdf?open](https://www.oge.gov/web/oge.nsf/All%20Advisories/AD54F07936C7D6FA85257E96005FBE9B/$FILE/DO-08-022.pdf?open)

## **2.2.2 Current Practice**

### **Precedent**

Because EIF status is only relevant for disclosure purposes and does not exempt underlying portfolio holdings from potential conflicts of interest, unless some other exemption or special rule applies, underlying portfolio holdings of private equity funds must be provided to ethics officials (although not publicly disclosed) in order to permit conflict of interest analysis. The formatting for reporting underlying portfolio holdings of EIFs has not been standardized, and can include a spreadsheet or other detailed information, or even brokerage statements, and does not need to include values or income.

## **2.3 Special Categories of Exempted Financial Interests**

### **2.3.1 Bush II Administration**

#### **Exchange Traded Funds**

The development of new financial products required analysis of these products under the regulatory exemption for widely diversified mutual funds. For instance, most Exchange Traded Funds (ETFs) were determined to meet the exemption. It should be noted that the definition of mutual fund in the OGE regulations is limited to mutual funds that are registered with the Securities and Exchange Commission. Some ETFs are registered with the Commodity Futures Trading Commission, and not with the SEC. Those funds are not eligible for treatment as diversified mutual funds for purposes of the regulatory exemption or for other purposes (such as “permitted property” under §1043).

#### **Authority**

Guidance for Reviewers of the OGE Form 450, Part I (Assets & Income), page 18. Retrieved from

[https://oge.gov/web/OGE.nsf/0/B766C6F48E44188F852583580059B3B4/\\$FILE/Confidential%20Fin%20Disc%20Guide\\_Jan2019.pdf](https://oge.gov/web/OGE.nsf/0/B766C6F48E44188F852583580059B3B4/$FILE/Confidential%20Fin%20Disc%20Guide_Jan2019.pdf)

OGE Advisory 00x8: Diversified and Sector Mutual Funds (2000).

Retrieved from

[https://www.oge.gov/web/oge.nsf/0/B34550F9C36529A085257E96005FBE9B/\\$FILE/00x8.pdf](https://www.oge.gov/web/oge.nsf/0/B34550F9C36529A085257E96005FBE9B/$FILE/00x8.pdf)

### **2.3.2 Obama Administration**

#### **Equity-linked Notes**

Equity-linked notes are debt instruments with contingent payment features tied to equity indices and similar securities, such as an S&P index fund or

other derivative instrument. Because the notes are not a direct interest in a mutual fund, but instead represent an indirect interest through the contingent payment feature, equity-linked notes do not meet the regulatory exemption for diversified mutual funds even though they are substantially the same as an investment in a diversified mutual fund. During the Obama transition team period, and early in the Obama administration, investment holdings in equity linked notes were added, de facto, to the regulatory exemption category and analyzed for conflict of interest purposes. OGE and ethics officials, including in White House counsel, developed an “automatic” 208(b)(1) waiver for equity-linked notes, providing the functional equivalent of a regulatory exemption for such securities.

#### **Authority**

See OGE Program Advisory PA-15-02, Mar. 23, 2015. Retrieved from [https://www.oge.gov/web/oge/nsf/Program%20Management%20Advisories/9EA51A6F90C1543085257E96005FBF10/\\$FILE/PA-15-01.pdf?open](https://www.oge.gov/web/oge/nsf/Program%20Management%20Advisories/9EA51A6F90C1543085257E96005FBF10/$FILE/PA-15-01.pdf?open)

## **2.4 Blind Non-EIF Investment Funds**

### **2.4.1 Bush II Administration**

#### **Precedent**

If the pooled investment fund did not meet the requirements for an excepted investment fund and the filer could not make full disclosure of the underlying assets as required by statute because he or she lacked the requisite information, the remedy prior to 2014 was divestiture of the fund interest in question. This was based on the grounds that the filer had failed to comply with his or her disclosure obligation (i.e., divestiture was required regardless of whether the interest in question posed any conflict concerns). This approach was widely criticized and later reversed. OGE could grant an extension to divest the interest if the terms of the fund only permitted divestiture during a certain period.

#### **Authority**

DAEOgram DO-08-022 (2008). Retrieved from [https://www.oge.gov/web/oge/nsf/All%20Advisories/AD54F07936C7D6FA85257E96005FBE9B/\\$FILE/DO-08-022.pdf?open](https://www.oge.gov/web/oge/nsf/All%20Advisories/AD54F07936C7D6FA85257E96005FBE9B/$FILE/DO-08-022.pdf?open)

### **2.4.2 Obama Administration**

#### **Precedent**

In September 2014, OGE announced at the Annual Ethics Summit that it was considering modification of its 2008 blind non-EIF ruling to eliminate, under certain circumstances, the per se requirement that blind non-EIFs be divested. OGE no longer requires divestiture for blind non-EIFs. Instead, “the question of divestiture should turn primarily on whether a PAS nominee is unable to disclose a fund’s holdings due to a lack of knowledge regarding those holdings.” However, “when a PAS nominee has access to information



about a fund's holdings but is unwilling to disclose those holdings because disclosure would violate a preexisting confidentiality agreement," divestiture remains appropriate.

**Authority**

Apol, D.J., OGE LA-14-05: Financial Disclosure Requirements for Pooled Investment Funds. (September 30, 2014). Retrieved from [https://www.oge.gov/Web/OGE.nsf/0/6796AE932D86D26E85257E96005FBF0B/\\$FILE/b1aa4ca489f74ef3b5bafc0af37fa2253.pdf](https://www.oge.gov/Web/OGE.nsf/0/6796AE932D86D26E85257E96005FBF0B/$FILE/b1aa4ca489f74ef3b5bafc0af37fa2253.pdf)

**2.5 Qualified Blind Trusts**

**2.5.1 Bush II Administration**

**Precedent**

OGE focused attention on the independence of trustees for purposes of qualified blind trust status. Under OGE guidance, "[a]n independent trustee cannot be affiliated with, associated with, related to or subject to the control or influence of anyone who has a beneficial interest in the trust." Non-institutional trustees were, for all practical purposes, unable to satisfy OGE requirements of independence. At least two trusts that satisfied congressional requirements for blind trust classification (congressional rules do not have the same independence requirements as does the executive branch rule) were deemed not to comply with the Independence requirement. Testing independence of trustees includes inquiry into the relationship between the trustee and the filer, and potentially an obligation to execute a relationship declaration or letter that includes representations regarding the relationship between the prospective trustee and the filer in order to police the independence requirement.

**Authority**

5 CFR § 2634.405

**2.5.2 Current Practice**

**Precedent**

One can establish either a qualified blind trust or a qualified diversified trust in order to avoid a section 208 conflict. The trust must be certified by OGE, and the employee must turn over "management of the trust assets to a trustee who is approved by OGE." In the case of a qualified blind trust, the independent trustee may not disclose any new assets purchased by the trust to the government employee in order to avoid creating a conflict. No qualified blind trusts were established in the Obama or Trump administrations.

**Authority**

<https://www.law.cornell.edu/cfr/text/5/part-2634/subpart-D>

U.S. Office of Government Ethics - Resolving Conflicts of Interest. (2015).



Retrieved from

<https://www.oge.gov/Web/OGE.nsf/Resources/Resolving+Conflicts+of+Interest>

## **2.6 Qualified Diversified Trusts**

### **Precedent**

A qualified diversified trust must be widely diversified, meaning that the value of assets concentrated in a particular economic or geographic sector is no more than 20 percent of the total and that no single entity other than the U.S. government makes up more than 5% of total value. 5 C.F.R. 2634.406(b)(2). Unlike a blind trust, the initial assets in a qualified diversified trust do not create a conflict “because the portfolio is so diversified that an official action taken by the employee would not have a direct and predictable effect on the value of the portfolio.” A qualified trust may contain both blind and diversified portfolios as a “hybrid qualified trust.” 5 C.F.R. § 2634.406(c) (2015). For various reasons, the qualified diversified trust rule is rarely used.

### **Authority**

See generally Subpart D of 5 C.F.R. § 2634.

## **III. SPOUSAL CONFLICTS**

### **3.1 Spousal Financial Conflicts**

Many of the disclosure and conflict of interest rules developed decades ago before two-career marriages became ubiquitous. Although disclosure and conflict rules generally consider the filer and her spouse to be a single economic unit, the application of such a principle can impinge upon the independent career and other interests of such spouses.

#### **3.1.1 Current Practice**

##### **Precedent**

OGE’s website explains that a nominee “who is divorced or permanently separated need not report a spouse’s interests for the period before or after the divorce or permanent separation.” Otherwise, there are four criteria that a filer must be able to certify in order to avoid having to disclose their spouse’s assets: (1) the assets are solely their spouse’s (2) they have no knowledge of the assets (3) the assets have not been derived in any way from their income, assets or activities, and (4) they neither derive, nor expect to derive, any financial or economic benefit from the assets.

As a practical matter, the requirements for the innocent spouse rule are almost never satisfied. For example, if the filer and the spouse are co-signatories on a mortgage or jointly hold significant amounts of property, separation of assets is not sufficient to avoid disclosure. Additionally, in

situations in which there is no reporting requirement, 18 U.S.C. § 208 will still apply to particular matters in which an employee knows his or her separated spouse has a financial interest.

**Authority**

5 C.F.R. 2634.309

U.S. Office of Government Ethics. (2015). Public Financial Disclosure Guide, Section 2.02: Spouses and Dependent Children. Retrieved from <https://www.oge.gov/Web/278eGuide.nsf/2cf9ac792bc0654a85257ea1005f838a/6956138088b7033b85257f45007529ae?OpenDocument>

U.S. Office of Government Ethics. (2015). Filing Requirements Related to Spouses and Children. Retrieved from <https://www.oge.gov/Web/278eGuide.nsf/2cf9ac792bc0654a85257ea1005f838a/6956138088b7033b85257f45007529ae?OpenDocument>

Kushner/Ivanka ethics agreements. Karni, “Kushner to resign from exec posts, divest sizable assets,” Politico, July 9, 2017.

## **3.2 Spousal Employment Conflicts**

### **3.2.1 Bush II Administration**

**Case Study**

The Department of Defense withdrew Rear Adm. Elizabeth Hight’s appointment to head the Defense Information Systems Agency because her husband was the vice president of business development and sales for the mission systems sector, defense mission systems division at Northrop Grumman. The DOD withdrew the nomination after a member of the Senate Armed Services Committee blocked the nomination because of the potential conflict of interest with these two jobs.

**Authority**

Brewin, B., Defense plans to withdraw Hight’s nomination to head DISA. Nextgov.com. (June 20, 2008). Retrieved from <https://www.nextgov.com/cio-briefing/2008/06/defense-plans-to-withdraw-hights-nomination-to-head-disa/42165/>

### **3.2.2 Current Practice**

#### **A. General Issue**

**Precedent**

While the disclosure and conflicts rules concerning assets owned by spouses (and dependent children) of filers are well-established, potential conflicts raised by careers conducted by spouses are not, under 18 USC § 208. However, under 5 U.S.C. § 2634.502, so-called “appearance of conflict” restrictions might apply to spousal financial interests represented by their careers. Restrictions on employment activities of a filer’s spouse are sometimes included in the filer’s ethics agreement, and the form of

these restrictions vary widely depending upon the filer's position and the spouse's career.

### **Case Study**

The publicly available ethics agreement from Thomas Nides for the position of deputy secretary of state for management and resources included restrictions on his interaction with his wife, who is a journalist. The ethics agreement stated: "I will seek a waiver to participate in certain particular matters related to media strategy. However, I understand that any such waiver will not cover particular matters involving specific parties in which the American Broadcasting Company is the sole party."

### **Authority**

[Thomas Nides ethics agreement](#).

See William Schultz ethics agreement (containing no "media strategy" provision for spouse's position as a reporter at The Washington Post).

See Susan Rice ethics agreement (containing no "media strategy" provision for spouse's position as a producer at ABC News).

### **Case Study**

David Ogden, deputy attorney general in the Justice Department, received an ethics pledge waiver for work involving his former employer and his spouse's current employer, WilmerHale. As part of the waiver, Ogden's spouse agreed to a screening arrangement wherein she would not receive any portion of the fees from WilmerHale's involvement in the matter.

### **Authority**

Lofthus, L. Certificate of Public Interest Waiver for David Ogden. (May 6, 2009). Retrieved from

[https://extapps2.oge.gov/Web/OGE.nsf/0/D5A3829B3E87715085257EBC00669521/\\$FILE/8c33143bfb3b49cddb06ad700898b3c23.pdf](https://extapps2.oge.gov/Web/OGE.nsf/0/D5A3829B3E87715085257EBC00669521/$FILE/8c33143bfb3b49cddb06ad700898b3c23.pdf)

## **B. Performance-Based Bonuses**

### **Precedent**

When there is little likelihood that the nominee will be involved in any matters affecting the spouse's employer, and the spouse receives a performance-based bonus and does not have an equity interest in their employer, the ethics agreement only contains a section 2635.502 recusal.

### **Authority**

[Samantha Power ethics agreement](#) (containing only a section 2635.502 recusal with respect to spouse's position as tenured faculty member at Harvard Law School).

[Christina Romer ethics agreement](#) (containing only a section 2635.502 recusal with respect to spouse's position as unpaid scholar at the International Monetary Fund).

[Tim Broas ethics agreement](#) (containing only a section 2635.502 recusal

with respect to spouse's position as an attorney for the Washington Legal Clinic for the Homeless).

### **Precedent**

When there is a substantial likelihood that the nominee will be involved in some matters that affect a spouse's employer, and the spouse receives a performance-based bonus and does not have an equity interest in the employer, the ethics agreement contains a section 2635.502 recusal and a "limited" section 208 recusal.

### **Case Study**

Deputy Secretary of the Treasury Sarah Raskin, whose spouse was a Maryland state senator, agreed to "not participate personally and substantially in any particular matter involving specific parties in which the State of Maryland is a party or represents a party, unless [she is] first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d)." In addition, she agreed to a "limited" section 208 recusal in which she would "not participate personally and substantially in any particular matter that has a direct and predictable effect on [her] spouse's compensation or employment with the State of Maryland, unless [she] first obtain[s] a written waiver pursuant to 18 U.S.C. § 208(b)(1)." A "limited" section 208 recusal requires the nominee to recuse herself only from matters affecting her spouse's compensation and employment, as opposed to a "full" section 208 recusal that requires the nominee to recuse herself from any matter affecting the financial interests of her spouse's employer.

### **Authority**

[Sarah Raskin ethics agreement](#).

See [Lisa Jackson ethics agreement](#) (containing a limited section 208 recusal with respect to spouse's position as a computer analyst for Merrill Lynch).

See [William Schultz ethics agreement](#) (containing a limited section 208 recusal with respect to spouse's position as a reporter for the Washington Post).

See description of Mary Jo White's husband's arrangements in Section D, below.

## **C. Spousal Profit-Sharing Agreements or Other Equity-Related Compensation**

### **Precedent**

When the spouse has an equity interest in their employer, a profit-sharing agreement with the employer, or receives compensation based on their employer's profitability, the nominee's ethics agreement may contain a "full" section 208 recusal.

### **Case Study**

Former Secretary of Labor Hilda Solis, whose spouse owned an auto body shop in southern California, agreed to a full section 208 recusal in which she would “not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of [Sam’s Foreign and Domestic Auto Center] unless [she] first obtain[s] a written waiver, pursuant to 18 U.S.C. § 208(b)(1). . . .” Despite the “likelihood that [her] duties will involve a matter affecting this entity is remote,” the Department of Labor nonetheless incorporated a “full” section 208 recusal into her ethics agreement.

### **Authority**

[Hilda Solis ethics agreement](#).

See [Charles Rivkin ethics agreement](#) (containing a full section 208 recusal with respect to spouse’s position at Capital Research & Management Company).

See [Susan Rice ethics agreement](#) (containing a full section 208 recusal with respect to spouse’s position at Disney).

See [Margaret Hamburg ethics agreement](#) (containing a full section 208 recusal with respect to spouse’s position at an investment fund).

## **D. Spouse is Equity Partner at Law Firm**

### **Precedent**

When the spouse is an equity partner in a law firm, the nominee’s ethics requirement typically contains a full section 208 recusal, a section 2635.502 recusal for matters affecting clients of the law firm and a communications limitation. But see Mary Jo White case study below in which a spouse transitioned from equity partnership to non-equity position upon nominee’s confirmation.

### **Case Study**

SEC Commissioner Daniel Gallagher, whose spouse was an equity partner at Levin & Gallagher, agreed to a full section 208 recusal in which he would not “participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of the firm, unless [he] receives a written waiver, pursuant to 18 U.S.C. § 208(b)(1).” He also agreed to a section 2635.502 recusal provision for issues involving clients of Levin & Gallagher: “I also will not participate personally and substantially in any particular matter involving specific parties in which a client of my spouse is a party or represents a party, unless I have been authorized pursuant to 5 C.F.R. § 2635.502(d).” Finally, the ethics agreement contains a commitment on the part of Commissioner Gallagher’s spouse to not communicate with the SEC: “[M]y spouse has agreed not to communicate with the Securities & Exchange Commission on behalf of the firm or any client.”

**Authority**

[Gallagher ethics agreement.](#)

See [Denise Bauer ethics agreement](#) (containing a full section 208 recusal, a section 2635.502 recusal and a communications limitation with respect to spouse's position as an equity partner at Latham & Watkins, LLP).

U.S. Office of Government Ethics. Legal Advisory 95x1: Conflict of Interest Issues Raised by Spouse's Position as Partner in Law Firm. (February 13, 1995). Retrieved from

<https://www.oge.gov/Web/OGE.nsf/All%20Documents/8260B300B06CEDDF85257E96005FBCDC/%24FILE/f65a75777639422eae4927637009319d3.pdf>.

**Case Study**

SEC Chairwoman Mary Jo White's spouse had been an equity partner at Cravath, Swaine, and Moore LLP, but converted to a non-equity partner status upon White's confirmation. Her spouse could receive a fixed salary and annual performance bonus. Her ethics agreement contains only a limited section 208 recusal in which White agreed to "not participate personally and substantially in any particular matter that has a direct and predictable effect on my spouse's compensation or employment at the firm, unless [she] first obtain[s] a written waiver, pursuant to 18 U.S.C. § 208(b)(1)." The ethics agreement also contains unique section 2635.502 recusal language in which White agreed to "not participate personally and substantially in any particular matter involving specific parties in which" Cravath or her husband's clients are "a party or represent[] a party, unless [she is] first authorized to participate, pursuant to § 2635.502(d)." However, if White "know[s] that [her] spouse has consulted for fewer than 16 hours on a matter involving a client, [she] will consult [the SEC ethics office] for a determination under 5 C.F.R. § 2635.502(c) as to the appropriateness of participating personally and substantially in any particular matter involving specific parties in which that client is a party or represents a party." Finally, the ethics agreement contains a communications limitation: "[M]y spouse has agreed that he will not communicate directly with the SEC on behalf of the firm or any client in connecting with a rulemaking proposed by the SEC and that he will not sign any such comment letters that the law firm submits to the SEC."

**Authority**

[Mary Jo White ethics agreement.](#)

**E. Restrictions on Spousal Communications****Precedent**

Although an ethics agreement is only executed by the nominee, several agreements contain promises that the spouse would not communicate directly with the nominee's agency. The OGE Ethics Agreement Guide

states that this language is needed when the nominee's agency "occasionally receives communications from the spouse's employer."

### **Case Study**

Current NIH Director Francis Collins, whose wife was an officer of the Genetic Alliance and an active participant in the National Society of Genetic Counselors, signed an ethics agreement that limited his spouse's ability to communicate with the NIH. In addition to standard limited section 208 and section 2635.502 recusals, Collins' ethics agreement states that his "spouse has agreed not to communicate with NIH on behalf of either of these entities or other organizations during [his] appointment as director."

### **Authority**

Francis Collins ethics agreement.

### **Case Study**

Former Ambassador to Hungary Eleni Tsakopoulos-Koulanakakis, whose spouse was an employee of California-based AKT Development Corporation, entered into an ethics agreement that stated her "spouse has agreed not to communicate with the U.S. Department of State on behalf of AKT Development Corporation during [her] appointment to the position of Ambassador to the Republic of Hungary."

### **Authority**

[Eleni Tsakopoulos-Koulanakakis ethics agreement.](#)

### **Case Study**

Anne Richard, the Assistant Secretary of State for the Bureau of Population, Refugees and Migration, was married to a United Nations employee, and signed an ethics agreement with a number of unique communications limitations, in addition to a typical section 2635.502 recusal. Richard agreed to "not participate in any meeting in which [her] spouse is participating as a UN employee," to "not communicate with [her] spouse in his capacity as a UN employee," and to "not communicate individually with [her] spouse's employing UN organization, unless [she is] first authorized to participate pursuant to 5 C.F.R. § 2635.502(d)."

### **Authority**

[Anne Richard ethics agreement.](#)

## **F. Miscellaneous**

### **Precedent**

If the spouse is a salaried employee of an agency contractor, then the nominee must sign an ethics agreement that contains a limited section 208 recusal (nominee will not participate in matters affecting her spouse's compensation and employment) and a section 2635.502 recusal (to avoid the "appearance of loss of impartiality").



**Authority**

OGE Legal Advisory 85x10: Conflict of Interest Issues Raised by Spouse's Employment at Government Contractor (July 15, 1985)

(U.S. Office of Government Ethics. 85x10: Conflict of Interest Issues Raised by Spouse's Employment with Government Contractor. (July 15, 1985). Retrieved from

[https://www.oge.gov/Web/OGE.nsf/0/36030E88C0F4EC3A85257E96005FBC0F/\\$FILE/9ee1d961f3d744439bfa08925cd37aa32.pdf](https://www.oge.gov/Web/OGE.nsf/0/36030E88C0F4EC3A85257E96005FBC0F/$FILE/9ee1d961f3d744439bfa08925cd37aa32.pdf)

OGE Legal Advisory 84x6: Conflict of Interest Issues Raised by Spouse's Employment on Retainer with a Government Contractor (May 1, 1984)

(U.S. Office of Government Ethics. 84x6: Conflict of Interest Issues Raised by Spouse's Employment on Retainer with a Government Contractor. (1984, May 1). Retrieved from

[https://www.oge.gov/Web/OGE.nsf/All%20Documents/0A017F8E497197BE85257E96005FBC00/\\$FILE/b590f7160965476f9ac4889ae9853a032.pdf](https://www.oge.gov/Web/OGE.nsf/All%20Documents/0A017F8E497197BE85257E96005FBC00/$FILE/b590f7160965476f9ac4889ae9853a032.pdf)

**Precedent**

When a spouse receives royalties from a publication, the nominee must agree to recuse herself from participating in matters that would affect the "ability or willingness" of the publisher to honor its contract.

**Case Study:** Christina Romer, former chairperson of the Council of Economic Advisers, is married to an economics professor who receives royalties from McGraw-Hill Companies and Authors Registry for sales of his textbook, *Advanced Macroeconomics*. Romer's ethics agreement states: "I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the ability or willingness of McGraw-Hill Companies and Authors Registry to honor their contractual obligations regarding these royalties, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1)."

**Authority**

[Cristina Romer ethics agreement](#).

See [Francis Collins ethics agreement](#) (containing an ability and willingness recusal with respect to spouse's book publisher).

See [Sarah Raskin ethics agreement](#) (containing an ability and willingness recusal with respect to spouse's book publisher).

**Case Study**

Maria Contreras-Sweet agreed to remove her name from her and her spouse's executive search consulting business, the Contreras Sweet Company, upon her confirmation as Small Business Administration administrator. As her spouse remained sole proprietor of the firm, Contreras-Sweet agreed in her ethics agreement that she "will not participate personally or substantially in any particular matter that has a direct and predictable effect on the financial interests of the Contreras



Sweet Company, or its successors, unless [she] first obtain[s] a written waiver pursuant to 18 U.S.C. § 208(b)(1).”

**Authority**

[Maria Contreras-Sweet ethics agreement.](#)

See [Lael Brainard ethics agreement](#) (containing an agreement to remove her name from consulting firm shared with her spouse).

## **IV. REMEDIES FOR CONFLICTS**

### **4.1 Recusals**

#### **4.1.1 Clinton Administration**

**Precedent**

An employee may be recused from working on a matter under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or 5 C.F.R. § 2635.503. Often documents containing recusal requirements are included with the employee’s ethics agreement. A recusal document typically outlines the topic of recusal, the gatekeeper who will screen the employee’s communications to make sure they are not involved with the covered matter, and the agency person who will handle the topic in the recused employee’s place.

**Authority**

U.S. Office of Government Ethics - 99x8: Recusal Obligation and Screening Arrangements. (2015). Retrieved from [https://www.oge.gov/Web/OGE.nsf/0/FC5E4250FAED2F8085257E96005FBCFD/\\$FILE/99x8.pdf](https://www.oge.gov/Web/OGE.nsf/0/FC5E4250FAED2F8085257E96005FBCFD/$FILE/99x8.pdf)

#### **4.1.2 Bush II Administration**

**Precedent**

Treasury Secretary Henry Paulson’s ethics agreement required him to recuse himself from matters involving his (small) pension plan at Goldman Sachs for his tenure as secretary of the Treasury. During the 2008 financial crisis, Paulson received a 208(b)(1) waiver in order to communicate with Goldman. This recusal was separate from one under 5 C.F.R. § 2635.502, restricting communication with a former employer.

**Authority**

[Henry Paulson ethics agreement](#)

See During Crisis, Paulson’s Calls to Goldman Posed Ethics Test. “The New York Times.” (2015). Retrieved from <https://www.nytimes.com/2009/08/09/business/09paulson.html?pagewanted=all&r=0>

**Precedent**

Secretary of State John Kerry during the Obama administration was recused from participating in matters in which the H.J. Heinz Company or its subsidiaries are a party or represent a party because of his wife's large financial holdings in the Heinz Company.

**Authority**

[John F. Kerry ethics agreement](#)

**4.1.3****Current Practice****Precedent**

Ethics officials have discretion to determine when a recusal arrangement is appropriate and how politically appointed, Senate confirmed officials should demonstrate compliance. A screening arrangement may be unnecessary for stocks that will be quickly divested, for an inactive company that exists only for administrative reasons, or for an entity that has little chance of coming before the official's agency. If a screening arrangement is not used, the official must issue a written recusal statement "reaffirming his or her agreement to not engage in matters implicating the ethics agreement signed in connection with the PAS official's nomination." OGE considers this "acceptable evidence of compliance with recusal obligations."

**Authority**

Apol, D. J., U.S. Office of Government Ethics - LA-14-06: Flexibility in Ensuring and Documenting Compliance with Ethics Agreements. (November 4, 2014). Retrieved from

[https://www.oge.gov/Web/OGE.nsf/0/ECDADA000D6612BF85257E96005FBF0C/\\$FILE/eecebe744513c40b7a3c049def23f2fdd3.pdf](https://www.oge.gov/Web/OGE.nsf/0/ECDADA000D6612BF85257E96005FBF0C/$FILE/eecebe744513c40b7a3c049def23f2fdd3.pdf)

**4.2****Section 208(b)(1) Waivers****4.2.1****Clinton Administration****Precedent**

18 U.S.C. § 208(b)(1) is the authorizing statute that permits a waiver for financial conflicts. On Dec. 18, 1996, OGE promulgated a final rule, codified as 5 C.F.R. § 2640.301, which provides guidance on issuing a section 208(b)(1) waiver. Under Executive Order 12674, agencies must consult with OGE "when practicable" before issuing such waivers. Agencies decide whether to grant a waiver, but they must send copies to OGE. Typically, waivers are not granted unless the other curing mechanisms, e.g., exemptions, recusal, divestitures, are unavailable or impracticable. The waiver must: (1) be issued in writing by the person responsible for the employee's appointment (often the designated agency ethics official); (2) be issued prior to the employee's participation in a particular matter covered by the waiver; (3) disclose the disqualifying financial interest and

nature of the matter the employee will work on; and (4) conclude that the disqualifying financial interest is not so substantial as to be deemed likely to affect the employee's integrity. OGE lists other factors to consider before granting a waiver in the case study linked below.

**Authority**

Cusick, R.I. U.S. Office of Government Ethics - DO-07-006: Waivers under 18 U.S.C. §§ 208(b)(1) and (b)(3). (February 23, 2007). Retrieved from [https://www.oge.gov/web/oge.nsf/Legal%20Advisories/328CE4B5A300EAEB85257E96005FBDE5/\\$FILE/do-07-006.pdf?open](https://www.oge.gov/web/oge.nsf/Legal%20Advisories/328CE4B5A300EAEB85257E96005FBDE5/$FILE/do-07-006.pdf?open)

**4.2.2 Bush II Administration**

**Precedent**

Henry Paulson retained his interest in a Goldman Sachs defined benefit pension plan, which met the definition of a disqualifying financial interest under 18 U.S.C. § 208. During the 2008 financial crisis, Paulson received a section 208(b)(1) waiver, which allowed him to communicate with Goldman Sachs.

**Authority**

The Paulson Ethics Waiver | Bear Market Investments. (August 11, 2009). Retrieved from <http://web.archive.org/web/20090822134624/https://www.bearmarketinvestments.com/the-paulson-ethics-waiver>

**4.2.3 Obama Administration**

**Precedent**

Cheryl Mills, former counselor and chief of staff, Department of State, received a waiver in order to serve as the government's representative on the Board of the Interim Haiti Recovery Commission (IHRC). Mills began her position at the State Department in 2009 and requested the waiver in 2011 after the IHRC was set-up. The waiver was approved on the grounds that Mills had no financial interest in the activities of the IHRC and that the goals of the IHRC and the State Department did not conflict and, in fact, were somewhat coextensive.

**Authority**

Cheryl Mills 208(b)(1) Waiver, pages 12-13.

**4.2.4 Current Practice**

**Precedent**

Various rules and standards of varying formality have been developed in connection with section 208(b)(1) waiver requests, primarily relating to the size of the conflicted financial interest as to which the waiver is requested relative to the filer's total net worth. Thus, in general, if the conflicted interest is a small fraction of the filer's wealth, a waiver request could be granted by

the agency and supported by OGE. Several variables impact this analysis. For example, the denominator of the fraction is generally limited to the filer's investable net worth, excluding residential real estate and other non-investment type assets. Establishing support for the denominator, especially where the filer's investments include illiquid investment funds, is necessary. In the case of an investment fund, since the waiver is granted with respect to the interest in the fund itself, rather than with respect to the individual portfolio holdings of the fund, analysis may be required as to the relative value of both the interest in the fund, and the proportionate interest in the underlying portfolio holdings that have created potential conflicts of interest.

#### **Authority**

Cusick, R.I. U.S. Office of Government Ethics - DO-07-006: Waivers under 18 U.S.C. §§ 208(b)(1) and (b)(3). (February 23, 2007). Retrieved from [https://www.oge.gov/web/oge.nsf/Legal%20Advisories/328CE4B5A300EAE85257E96005FBDE5/\\$FILE/do-07-006.pdf?open](https://www.oge.gov/web/oge.nsf/Legal%20Advisories/328CE4B5A300EAE85257E96005FBDE5/$FILE/do-07-006.pdf?open)

### **4.3 Section 208(b)(3) Waiver**

#### **4.3.1 Clinton Administration**

##### **Precedent**

A waiver under section 208(b)(3) is available for Special Government Employees serving on advisory committees established under the Federal Advisory Committee Act. On Dec.18, 1996, OGE published a final rule giving guidance on section 208(b)(3) waivers. Agencies and not OGE decide whether to grant a waiver. The link below to a 2007 OGE document explains the suggested factors considered.

##### **Authority**

Cusick, R.I. U.S. Office of Government Ethics - DO-07-006: Waivers under 18 U.S.C. §§ 208(b)(1) and (b)(3). (February 23, 2007). Retrieved from [https://www2.oge.gov/web/oge.nsf/0/328CE4B5A300EAE85257E96005FBDE5/\\$FILE/do-07-006.pdf](https://www2.oge.gov/web/oge.nsf/0/328CE4B5A300EAE85257E96005FBDE5/$FILE/do-07-006.pdf)

#### **4.3.2 Current Practice**

##### **Precedent**

Waivers for certain special government employees are authorized under 18 U.S.C. § 208(b)(3). Under OGE regulations, waivers issued under section 208(b)(3) must be issued “prior to the individual taking any action in the matter or matters” for which the waiver is sought. 5 C.F.R. § 2640.302(a)(6). The “agency official first must review the special government employee’s financial disclosure form before determining that a waiver is appropriate in light of the information disclosed by the employee.”

Fox, D. W. U.S. Office of Government Ethics - DO-10-005: Guidance on Waivers under 18 U.S.C. § 208(b), Authorizations under Agency Supplemental Regulations. (April 22, 2010). Retrieved from [https://www.oge.gov/Web/OGE.nsf/All+Advisories/F0D8053747931EAD85257E96005FBB7A/\\$FILE/438cb0a3fe89437e877ef22c26c6fada4.pdf?open](https://www.oge.gov/Web/OGE.nsf/All+Advisories/F0D8053747931EAD85257E96005FBB7A/$FILE/438cb0a3fe89437e877ef22c26c6fada4.pdf?open)

### **Case Study**

In 2009, the Food and Drug Administration granted a waiver to Dr. Richard Mann, a transplant nephrologist, to serve as a temporary voting member to the Cardiovascular and Renal Drugs Advisory Committee in the matter of a new drug application for a drug to be used in kidney transplants. His employer, Robert Wood Johnson Medical School, had received a research contract for a competing drug. The committee needed the “input of physicians who [had been] responsible for the day-to-day management of kidney transplant patients.” Because of Mann’s extensive experience conducting kidney transplants, the need for his input outweighed the concerns over a potential for a conflict of interest. Out of the 16 transplant nephrologists who were invited, Mann was the only one who could attend the meeting.

### **Authority**

Peterson, J. E. 18 U.S.C. 208(b)(3) Waiver to Allow Participation in a Food and Drug Administration Advisory Committee. (November 4, 2009). Retrieved from <https://wayback.archiveit.org/7993/20170405212552/https://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/CardiovascularandRenalDrugsAdvisoryCommittee/UCM191574.pdf>

## **4.4 Divestitures**

### **4.4.1 Bush I Administration**

#### **Precedent**

In order to comply with 18 U.S.C. § 208, nominees may have to divest certain financial holdings that pose a conflict of interest. Since 1989, section 1043 of the Internal Revenue Code allows the director of OGE to issue a certificate of divestiture, which allows the employee to sell the financial interest and reinvest the proceeds into “permitted property” (as narrowly defined). If these requirements are met, any tax on capital gains owed on the sale of the conflicting property is deferred until the replacement permitted property is sold. There is no required holding period for the property sold or of the replacement property, and there is no length of government service requirement for the filer.

### **Authority**

26 U.S.C. § 1043 - Internal Revenue Code. (2009). Retrieved from <https://www.gpo.gov/fdsys/pkg/USCODE-2009-title26/html/USCODE-2009-title26-subtitleA-chap1-subchapO-partIII-sec1043.htm>

Herzig, Tillerson, Section 1043 and the Myth of the One-Year Rule, Forbes, May 16, 2018

<https://www.forbes.com/sites/davidherzig/2018/03/16/tillerson-section-1043-and-the-myth-of-the-one-year-rule/#42b360c48aaf>

## **4.4.2 Current Practice**

### **Precedent**

Divestitures have become the default remedy for many potential conflicts of interest, eclipsing the use of recusals and waivers in many situations in which such alternative remedies might have been viable but were viewed as less effective or less politically palatable. This continues to be the case.

## **V. EXECUTIVE COMPENSATION ARRANGEMENTS**

### **5.1 General Issues Relating to Executive Compensation Arrangements**

Executive compensation arrangements constitute one of the most complicated areas for government ethics compliance. These arrangements pose disclosure, conflict of interest, and remedial challenges. Executive compensation arrangements, as individualized contractual arrangements between employers and executives, take a range of forms. OGE has focused on such arrangements in a number of ways, including through the reorganization of the public disclosure form (now 278e) into separate Parts (primarily Parts 2 and 3) that address employment related arrangements and financial interests. The treatment of executive compensation arrangements in ethics agreements is subject to a considerable degree of flexibility. Significant amounts of time are dedicated to resolving potential conflicts related to executive compensation arrangements. Little standardization of treatment has developed. No administration has utilized a single template to handle all executive compensation arrangements in a consistent manner.

Disclosure and related technical issues are addressed in Public Financial Disclosure: A Reviewer's Reference (Second Edition) section 6 (Nov. 2004). OGE's new electronic 278e highlights executive compensation issues, moving disclosure of such arrangements to the front of the on-line reporting system, and separating these issues from "other" financial interests (in part 6).

Some elements of executive compensation arrangements in private industry exacerbate the complexity and lack of standardization for purposes of government ethics, including the absence of clear definitions, frequent

lack of clarity, and even misunderstandings on the part of the filers as to the relevant features of their own executive compensation arrangements. Filers themselves often confuse different categories and features of executive compensation arrangements, e.g., stock options, restricted stock units and phantom stock, even if they understand the economics of their arrangements.

Direct discussions with human resources and other components of the employer are often necessary in order to address disclosure and conflict issues adequately and to maintain consistency with Securities and Exchange Commission filings. However, such contacts raise confidentiality concerns, exacerbating some of the practical problems of dealing with such arrangements in the vetting process. For example, certain executive compensation arrangements may raise potential 208 issues that could be resolved by amendments to such arrangements, but such changes require compensation committee or board action, or raise issues under ERISA rules and tax rules, especially IRC § 409A.

Recently, OGE has raised concerns relating to the ban on outside earned income in connection with any activities that are connected to the filer and that occur following appointment. This is an evolving area.

## **5.2 Bonus Payments**

### **5.2.1 Obama Administration**

#### **Precedent**

To an extent not evident in vetting during prior administrations, the Obama administration focused extensively on bonus payments paid to filers by their employers, especially bonus payments made for the portion of the current calendar year prior to the start of government service and any other bonus payments made in connection with termination of employment. This focus was in part tied to the financial crisis in late 2008, and the emphasis in the press concerning large bonuses paid to executives in private industry.

All bonus payments are necessarily made prior to the beginning of government service, in order to avoid supplementation issues under 18 U.S.C. § 209. Under *Crandon v. United States*, 494 U.S. 152 (1990), as long as the payments are received prior to the beginning of government service, a safe harbor precluded the application of section 209. Thus, regardless of whether the bonus evidences an intent to make up for reduced compensation while in government, as long as the payment is received under the terms of the *Crandon* decision, no section 209 issue can arise. (Issues under the extraordinary payment restructures in 5 CFR § 2634.203 were separate and less significant because of the Obama pledge.) Acceptance of this safe harbor preclusion of section 209 by ethics officials with respect to all payments to individuals entering government



service has been uneven, notwithstanding the clear instruction of the Supreme Court on this issue.

In a number of vetting cases in the Obama administration, questions were raised concerning how the employer determined the amount of the bonus, and whether the determination was based upon objective factors (viewed as a positive). These questions may reflect limited familiarity with how such bonuses are determined in the private sector, especially for senior executives. Sometimes, an explanation that bonus determinations are not purely discretionary could satisfy these concerns.

### **5.2.2 Current Practice**

In the Trump administration, OGE continues to scrutinize bonus payments and to require explanations concerning the method by which such bonuses were computed.

## **5.3 Deferred Compensation Arrangements**

### **5.3.1 General Issues**

Deferred compensation arrangements, sometimes also referred to as nonqualified retirement plans, involve the agreement by the employee to forgo receipt of current salary in exchange for an unsecured and unfunded promises by the employer to pay an amount in the future that reflects the foregone salary plus some return or yield. The total amount, including yield, is tracked in a deferred compensation account. The employee does not have any security interest in the account, which remains subject to the claims of general creditors of the employer, and therefore the amount is at risk of the solvency of the employer.

A contractual obligation of the employer to pay the deferred compensation account to the employee or former employee represents a financial interest by the employee in the employer for purposes of section 208.

Deferred compensation arrangements take a number of forms. Some deferred compensation arrangements involve establishment of a contractual obligation by the employer to pay the employee the amount of the compensation that has been deferred, plus some fixed yield, and therefore raise only the ability or willingness issue described below. Other deferred compensation arrangements replicate investment accounts, because the deferred compensation account is invested in securities, or a basket of securities, selected by the employee, much like a qualified defined contribution plan. The amount paid out in the future is increased by the investment return of those selected securities. These arrangements, in which the yield tracks selected securities, do not involve actual investments in the securities; the yield is simply adjusted by an amount calculated based upon the investment performance of the securities.



### **5.3.2 Clinton Administration**

#### **Precedent**

A financial interest represented by deferred compensation account in favor of a filer gives rise to potential conflicts of interest under section 208 as a financial interest with respect to the obligor (the employer or former employer). Such a potential conflict of interest could be mitigated by purchasing a surety bond or other insurance product from a third-party insurance company. The surety bond covered the risk that the employer could not or would not pay the deferred compensation obligation in the future. Such a mechanism in effect ensured the solvency of the employer and therefore eliminated the conflict of interest with respect to the employer (at least if the deferred compensation arrangement paid a fixed yield on the account balance).

### **5.3.3 Bush II Administration**

#### **Precedent**

During the George W. Bush administration, the cost of surety bond premiums, as used in the Clinton administration, increased, and their availability decreased (only a few insurers, including Lloyds and Chubb were willing to issue such policies). Therefore, the ability to mitigate conflicts of interest represented by deferred compensation arrangements was threatened.

Faced with this concern, the treatment of deferred compensation arrangements for purposes of potential conflicts of interest was revised during the Bush II administration. Under the revised policy, no surety bond or other insurance was required to annul the obligation represented by the deferred compensation arrangement. Instead, the potential section 208 conflict was deemed to be limited to the ability of the filer to impact the employer's ability or willingness to pay the amount due under the deferred compensation arrangement. In other words, the filer was only recused from particular matters that could affect the solvency of the employer. Based on this limited scope, the filer's ethics agreement included a commitment that the filer would recuse herself from any particular matters that could affect the ability or willingness to pay of the employer. Since such particular matters are relatively rare (although not unheard of, especially in connection with the financial collapse in 2008), the ability or willingness approach adopted in such provision of the ethics agreement has become the norm.

However, this approach does not address the situation in which the yield on the deferred compensation account balance is not fixed. For example, many such account balances generate a yield that is based upon, or tracks the value of the employer stock, or upon a basket of securities determined under the arrangement. Under such circumstances, the potential 208 conflict raised by the deferred compensation arrangement will be deemed

to be the potential 208 conflict raised by the tracked asset or assets (e.g., if the deferred compensation arrangement tracks the filer's employer's stock, then the filer will be deemed to have potential 208 conflict with his or her former employer by virtue of the deferred compensation arrangement).

#### **Authority**

DAEOgram 99x6 (Apr. 14, 1999) (concerning only qualified pension plans, not deferred compensation arrangements). Retrieved from [https://www.oge.gov/web/oge.nsf/All%20Advisories/72A887D63D64192185257E96005FBCFB/\\$FILE/bf65b709bbb841598a91b1f52db4c9be3.pdf?open](https://www.oge.gov/web/oge.nsf/All%20Advisories/72A887D63D64192185257E96005FBCFB/$FILE/bf65b709bbb841598a91b1f52db4c9be3.pdf?open)

### **5.3.4 Current Practice**

#### **Precedent**

A straight deferred compensation arrangement, involving an obligation to pay an amount equal to deferred salary plus a fixed yield can be addressed through the ability or willingness recusal mechanism developed in the George W. Bush administration. Deferred compensation arrangements that included a tracking mechanism that permitted the deferred compensation account to be adjusted based upon the investment results of selected securities or a basket of securities in which the deferred compensation balance was "invested" gives rise to potential section 208 conflicts (see above).

### **5.4 Special Categories of Executive Equity Compensation Interests**

As noted, executive compensation arrangements take a wide array of forms, ranging from special bonus payments to interests that resemble stock. Each of these forms raises separate issues in the vetting process.

#### **5.4.1 Current Practice**

##### **Precedents**

##### **A. Stock options.**

Compensatory stock options for section 208 purposes represent financial interests in the issuer of the options, identical to the financial interest represented by outright ownership of shares. Compensatory stock options are often issued with vesting restrictions, which provide that the filer as holder of the stock option will forfeit the option under certain circumstances, generally including termination of employment before vesting dates (sometimes conditioned upon termination without good cause, or other contractual complexities).

Compensatory stock options issued by public companies are almost always issued at fair market value, that is, the exercise price that must be paid in order to receive the underlying stock is generally equal to the fair market value of the stock at the time the options were issued., Therefore the

spread representing net fair market value to the holder is initially zero. In addition, fair market value of the underlying stock may decline below the exercise price, in which case the options are underwater and therefore the options themselves may have little or no current value. However, this nominal value for compensatory stock options does not reduce the attention paid to such options in the vetting process.

OGE's Public Financial Disclosure Guide reference details the way in which compensatory stock options should be reported, generally on Parts 2 and 3 of the current 278e. In the Obama administration, additional details concerning compensatory stock options were often required as part of 278 disclosure. Detailed exhibits were sometimes attached to the 278 to describe compensatory stock options. These attachments included details concerning the number of options, the forfeiture conditions (that is, the dates on which the forfeiture conditions would be satisfied or would lapse), the strike price and whether the stock options were underwater. This detail was believed to be necessary by OGE and ethics officials in order to provide sufficient information to the public concerning compensatory options, and reflected a suspicion that such options might have little current fair market value. (which ordinarily would be reflected on Part 2) but could represent substantial optionality value in the future, for example for issuing companies in the technology sector.

The complexity of and concerns regarding various compensation option arrangements contributed to an expanded amount of disclosure concerning options (as well as other executive compensation arrangements) and led during the Obama administration to extraordinary attention to the details of disclosure concerning such arrangements on the various parts of the 278. During the Obama administration, such disclosure often required negotiation among various stakeholders in order to satisfy all constituencies that the arrangements had been adequately disclosed, and there was no standardized approach developed for such disclosure. Filers often omitted supplying text for such disclosure, deferring to OGE and ethics officials as to their preferred format on initial drafts of public financial disclosure reports.

## **B. Restricted stock**

Unlike compensatory options, stock issued in connection with services represents outright ownership of shares and does not require payment of an exercise price to receive the shares. Forfeiture conditions cause compensatory stock to be restricted stock, and those vesting restrictions would be included in the details disclosed in the 278, including in an attachment to the 278 (see above). Ordinarily, compensatory stock is issued without payment, or at a steep discount. Any discount is taxable as compensation income, as soon as the forfeiture conditions end, or lapse. Such lapse can occur as a result of accelerated vesting. Some executive compensation plans involving grants of restricted stock permit acceleration of vesting upon taking a position in a university, a nongovernmental

organization, or the government. If restricted stock is subject to accelerated vesting, acceleration must occur prior to government service, in order to avoid concerns under section 209.

**C. Restricted stock units**

Restricted stock units, or RSUs, represent a right, in the hands of an employee, to receive a certain number of employer shares upon certain events, and are generally granted for no consideration to be paid by the employee. RSUs constitute a contractual right, not a direct interest in the employer shares themselves. In practice, the value represented by RSUs is converted into cash based on the fair market value of the shares represented by the units at some designated vesting or other maturity date, although occasionally employees convert RSUs into shares and hold the compensatory shares.

A financial interest in employer equity represented by RSUs is often confused with stock options.

**D. Phantom stock**

As in the case of RSUs, phantom stock, or phantom stock rights, represent at best an indirect interest in employer shares. Phantom shares are converted into cash upon certain events, based upon the appreciation in the index shares, and unlike RSUs are never convertible into actual shares. For purposes of section 208, phantom stock is a financial interest identical to employer stock.

Phantom stock or phantom stock rights are often confused with stock options and RSUs.

**E. Carried interests**

Carried interests, also sometimes referred to as promoted interests, are a creature of partnership tax law, where the technical term is profits interests. Profits interests represent an interest in a partnership (including a limited liability company treated as a partnership for U.S. tax purposes) other than a capital interest (which is a partnership interest that reflects an interest in capital, often in the form of a capital account; a profits interest has a zero capital account). Carried interests permit holders to receive allocations of capital gain in connection with services to the partnership, in effect as a substitute for compensation for services (which would be taxed at the maximum rate applicable to ordinary income). Profits interests are generally issued to the managers of such funds and are the subject of several IRS administration guidelines and safe harbors. Carried interests are common in real estate partnerships and are practically universal in investment partnerships, including private equity and, to a limited degree, hedge fund arrangements. As the holder or owner of a carried interest, a filer is treated as a full owner of an equity interest in a partnership, including

in the profits and losses of the partnership, and not simply as right to get cash compensation.

Carried interests carry with them both a political and a conflict of interest dimension. Politically, carried interests have been the subject of tax reform efforts. The reform proposals would charge holders income taxed as ordinary income rates. These reform efforts have been ongoing for many years and have been blocked during the Obama administration.

From a conflict point of view, the holder of a carried interest is a partner for all relevant purposes, and therefore the holder of the carried interest has a conflict with respect to each of the portfolio companies or other investments held in the fund.

On its website, OGE has referred to carried interests as a contract right, and stated that, for purposes of financial disclosure, a carried interest is an arrangement that stipulates the right to future payments based on the performance of an investment fund or business. OGE has also suggested informally that carried interests held in connection with any services provided to a partnership might raise outside earned income issues under Executive Order 12674 (as modified by Executive Order 12731), and implemented in 5 CFR § 2635.804.

Analysis of carried interests during the vetting of appointees during the Obama administration confronted the increasing complexity of carried interest arrangements. For example, multitier private equity funds might issue a single carried interest that would represent an indirect interest in the profits of numerous lower-tier partnerships and therefore in each of the portfolio companies of those partnerships. Although in substance a performance bonus related to the performance of the investment funds, carried interests transformed such bonus arrangements into an analysis similar to the analysis required with respect to EIF-type investments.

#### **F. Qualified plans**

Filers have often failed to consider assets held in 401(k) or other ERISA qualified plans or in section 529 plans established for purposes of paying for children's tuition. Each of these qualified plans, to the extent that it holds interests in underlying securities, is treated as holding financial interest on behalf of filers and all holdings must be disclosed. Qualified plans raise a number of disclosure issues that are exacerbated by the fact that filers fail to focus on these plans, because they do not generate K-1's or 1099s to report their income for tax purposes, and therefore can be overlooked if financial information is being compiled using tax returns.

Section 529 plans pose unique issues, because of the asset mix of such plans. Generally, each state plan provides for a limited menu of investment options. As the maturity of the plan evolves closer to the date on which the

funds will be used for college expenses, the mix of investment options tends towards fixed income and away from equity investments (in order to reduce the risk profile of the investments), and therefore section 529 plan investments will change, and the conflict profile may also change.

## **5.5 Treatment of Payments That Raise “Emolument” Issues**

Under Article I, Section 9, Clause 8 of the Constitution (the “Emoluments Clause”) certain federal employees are prevented from receiving payments from foreign governments. For these purposes, foreign governments can include investment funds owned by such governments (including sovereign wealth funds), and therefore to the extent certain federal employees receive payments the source of which is a sovereign wealth fund, the payments can be subject to the Emoluments Clause. The definition of an emolument is uncertain (and has been the subject of considerable litigation) – while it appears to clearly encompass gifts from covered parties, it is less clear whether and under what circumstances it applies to compensatory arrangements and arm’s-length transactions.

Application of the Emoluments Clause to categories of appointees, e.g., part-time employees who retain an interest in law partnerships, is subject to considerable uncertainty, in part because of changes in advice received from the Office of Legal Counsel in the Department of Justice during different administrations.

### **5.5.1 Current Practice**

The scope of the Emoluments Clause is currently the subject of several lawsuits, including in the Second Circuit, Fourth Circuit and the D.C. Circuit. The Defense Department has been proactive in applying the Emoluments Clause to compensation received by reserve military officers, where such compensation is sourced in sovereign wealth funds and other similar entities. Similarly, attorneys serving as special government employees or SGE’s on certain advisory boards may be subject to Emoluments Clause treatment with respect to legal fees received through their law firms from such sources.

#### **Authority**

Yoder, E. “Federal Employees Warned to Watch Out for Emoluments,” The Washington Post. (April 2, 2013). Retrieved from

<https://www.washingtonpost.com/news/federal-eye/wp/2013/04/02/federal-employees-warned-to-watch-out-for-emoluments/>

OLC Opinion, “Application of the Emoluments Clause to a Member of the FBI Director’s Advisory Board” (Jan. 15, 2007). Retrieved from

[https://www.oge.gov/web/oge.nsf/Legal%20Interpretation/6FB719825F20112885257EF2004DFF4D/\\$FILE/fbi\\_advisory\\_board\\_opinion\\_061507\\_0.pdf?open](https://www.oge.gov/web/oge.nsf/Legal%20Interpretation/6FB719825F20112885257EF2004DFF4D/$FILE/fbi_advisory_board_opinion_061507_0.pdf?open)



OLC Opinion, “Applicability of the Emoluments Clause to Nongovernmental Members of ACUS” (Jun. 3, 2010). Retrieved from <https://www.justice.gov/file/18411/download>

## **VI. FORM 86 SUPPLEMENT**

The Supplement to Standard Form 86 is technically associated with the National Security Questionnaire (Standard Form 86, or SF-86), but is only tangentially related to that form or to security clearances generally. The 86 supplement has been generated, modified and reformatted by White House officials in several administrations, and different versions have been issued by different administrations, including the Trump administration. To some degree, the 86 supplement helps provide vetting officials with information about topics that, in the past, have led to scandals or other concerns. The questions in the form should be read in the context of past scandals. As a prophylactic screening mechanism, the 86 supplement provides somewhat fragmented information, and the requested information overlaps with other disclosure forms, therefore requiring extra care to make sure such information is consistently reported across forms. Moreover, the questions in the 86 supplement are, in some cases, not well-drafted. This requires answers to be carefully conditioned and qualified to assure accuracy. The 86 supplement used in the Obama administration kept many of the same questions used in the Bush administration (other than changing the layout of the Word document). The supplement used in the Trump administration is considerably different. Both editions are outlined in detail below.

### **6.1 Obama Administration**

#### **6.1.1 Positions and Former Positions**

##### **Precedent**

The 86 supplement (Question 1S. [for supplement] Part a) asks for detailed information about positions and former positions with organizations and companies, and therefore overlaps with the disclosure required in other documents, including in the 278, Schedule C, Part I. Therefore, this question should be completed at the same time, with the same information.

#### **6.1.2 Positions with Potential Conflicts**

##### **Precedent**

Question 1S. Part b) in the 86 supplement asks (among other things) if the filer now holds any positions that will create a conflict in a future executive branch position. Because all presidential appointees must terminate their outside positions before government service begins, position conflicts will be resolved prior to federal service. As with a number of the responses, the filer might be able to use standardized language for the response to this question. For example, a response that states: “I do not believe that any of my current positions will present a conflict or an appearance of conflict, and

any such potential conflicts will be resolved in connection with my ethics agreement” may be appropriate.

### **6.1.3 Violation of Laws**

#### **Precedent**

The violation-of-laws question (Question 3S) is an example of drafting problems in the 86 supplement. For purposes of responding to this question, it should be noted that the literal language of the question means that any criminal investigation targeting any business with which the filer has been associated would be responsive. For filers who have been employed by large companies, there will often be some violation of law in the history of the company (for example, an OSHA violation). If the filer knows of such a violation, of course, it should be disclosed. If not, an answer with standard language along the following lines has been accepted: “I have not been convicted of a violation of law. However, in the course of my career, businesses with which I have been associated may have been convicted of such violations. I am not, however, aware of any such specific violation.”

### **6.1.4 Investigations**

#### **Precedent**

As with the immediately prior question, Question 4S is worded broadly, and could encompass any investigation (an undefined term) of any business or organization with which the filer has been associated, presumably because such investigation might cause embarrassment by association. If the filer has direct knowledge of any such investigation that might be publicly or otherwise known, of course, it should be specifically disclosed. However, in order to address the possibility of an investigation that is tangentially related to the filer, a standardized response to this question along the following lines has been accepted: “In the course of my career, I have been associated with a large number of companies or organizations, and some of these companies may have been subject to an investigation for possible violation of law. However, I have not been personally subject to any such investigation [and I do not know of any such investigation of any of the businesses with which I have been directly associated].”

### **6.1.5 Litigation**

#### **Precedent**

A thorough search of public litigation databases should be conducted in connection with Question 5S.

### **6.1.6 Political Committees and Issues**

#### **Precedent**

The breadth of Question 7S. Part a) has been expanded to include the following clause: “or have been identified in a public way with a particular



organization, candidate or issue.” Although the origin of this question is unclear, it may encompass a wide range of political issues.

### **Case Study**

The Senate voted 47-52 to reject President Obama’s nomination of Debo Adegbile to head the Justice Department’s Civil Rights Division. During his time as litigation director of the NAACP Legal Defense Fund, Adegbile was involved in filing an amicus brief for controversial figure Mumia Abu-Jamal. Abu-Jamal had been convicted of murdering a Philadelphia police officer in 1981.

### **Authority**

Weisman, J., & Shear, M. D. Democrats in Senate Reject Pick by Obama. “The New York Times.” (March 5, 2015). Retrieved from [https://www.nytimes.com/2014/03/06/us/politics/senate-rejects-obama-nominee-linked-to-abu-jamal-case.html?\\_r=0](https://www.nytimes.com/2014/03/06/us/politics/senate-rejects-obama-nominee-linked-to-abu-jamal-case.html?_r=0)

## **6.1.7 Lobbyist Activities**

### **Precedent**

Question 7S. Part b) seeks information not only with respect to LDA-type registration by the filer, but also whether the filer has acted as a lobbyist, asking the filer to indicate whether he has been carrying on lobbying-type activities, which could raise risks to the filer, if the filer has not registered.

## **6.1.8 Discriminatory Clubs**

### **Precedent**

Following the controversy over Griffin Bell’s nomination as attorney general during the Carter administration, the 86 supplement included a question about a nominee’s membership (or past membership) in a social club that discriminates on racial, religious, or other grounds. Bell had been a member of at least one such club and faced heavy questioning about it during his Senate confirmation.

### **Authority**

Lyons, Patrick J. Griffin Bell, Ex-Attorney General, Dies at 90. “The New York Times” (January 5, 2009). Retrieved from [https://www.nytimes.com/2009/01/06/washington/06bell.html?\\_r=0](https://www.nytimes.com/2009/01/06/washington/06bell.html?_r=0)

### **Case Study**

Webster Hubbell’s nomination during the Clinton administration for associate attorney general, the number three position in the Department of Justice, sparked controversy because of his membership in a previously whites-only country club.

### **Authority**

Hackett, M. “Clinton Nominee in the Rough Over Golf Club.” Chicago Tribune (May 13, 1993). Retrieved from

<https://www.chicagotribune.com/news/ct-xpm-1993-05-13-9305130234-story.html>

### **Precedent**

Policies against membership in discriminatory social clubs were enforced through Question 8S of the Obama administration 86 supplement. Question 8S in its current form asks whether the filer has ever belonged to a social club that ever discriminated. Question 8S covers discriminatory policies that existed before filer was a member of the social club and even if filer was never aware of such past policies.

It appears that the principal focus concerning discriminatory organizations is on golf and social clubs, not other types of social and other organizations. For example, it does not appear that membership in college fraternities or sororities, which all had policies of discriminating on grounds of gender, might be disqualifying. Also unclear is whether membership in certain national fraternities and sororities, many of which had policies of racial discrimination before the 1960s, would be disqualifying.

## **6.1.9 Immigration Issues**

The scope of Question 9S. Part a) concerning immigration (in contrast to the broad scope of other questions in the 86 Supp), is to individuals who are “currently living with you.”

### **Precedent**

For the most part, during the George W. Bush administration, immigration status of household workers was not considered to be a disqualifying issue in the vetting process, although a number of exceptions are noted.

### **Case Study**

#### **Authority**

Linda Chavez was nominated to be secretary of the Department of Labor in 2001 by incoming president George W. Bush. She withdrew after political attention surrounding an illegal immigrant from Guatemala who had lived with Chavez in the early 1990s had become a distraction to the administration. Fournier, R., Chavez Withdraws As Labor Nominee, “The Washington Post” (January 9, 2001) Retrieved from [https://www.washingtonpost.com/wpsrv/aponline/20010109/aponline172303\\_000.htm](https://www.washingtonpost.com/wpsrv/aponline/20010109/aponline172303_000.htm)

### **Precedent**

Focus on hiring undocumented workers as a threshold issue for vetting increased during the course of the Obama administration, and was potentially disqualifying.

### **Independent Contractor Exception**

The vetting standard may differ depending upon whether the household workers are employees or independent contractors.

### **Accountant Letters**

In order to substantiate the status of a household worker as an independent contractor for both tax (see below) and immigration purposes, vetting attorneys will often request a letter from the filer's tax accountant or other professional advisor.

### **Authority**

Committee on Finance U.S. Senate. Nominations of Dr. Lael Brainard, Mary John Miller, and Charles Collyns. (November 20, 2009). Retrieved from

<https://permanent.access.gpo.gov/gpo9505/659342.pdf>

## **6.1.10 Nanny Tax Issues**

### **Precedent**

The “nanny tax” question in the 86 supplement used in the Obama administration (Question 9S. Part b) asks about adults that the filer “employ[s]” (not “have employed”). The present tense used in this question appears to limit the inquiry to current service providers.

## **6.1.11 Embarrassment to the President**

### **Precedent**

The answer to Question 10S in the 86 supplement used in the Obama administration is generally “no” and any responses other than “no” likely would be discussed directly with White House counsel staff in the initial vetting process, rather than included in detail in the form.

## **6.2 Current Practice**

The Trump administration substantially revised and reduced the scope of the 86 supplement (captioned “SF-86 Supplement”), although it retained a number of the subject areas from the prior versions. Many of the issues in prior 86 supplement forms were transferred to and included in the Trump administration’s “Personal Data Statement.” (The Obama administration did not utilize a personal data statement of any kind after the initial period of the administration, but instead for Senate confirmed nominees primarily relied upon Senate committee questionnaires to elicit information that had been targeted in the PDS from prior administrations.) The most important of these subject areas and some of the issues raised in connection with those question areas in the current 86 supplement are discussed below.

### **6.2.1 Foreign Business or Other Contacts**

The wording of this question in the 86 supplement issued by the Trump administration is somewhat ambiguous but is designed to determine contacts with foreign organizations that are not otherwise disclosed in the SF 86. For example, it is unclear what is meant by a “nonprofit organization with any foreign government ownership” means, because a nonprofit organization might be controlled by a foreign government but is not likely to be “owned?”

### **6.2.2 Harassment Claims**

Q3 asks, “Have any claims of sexual harassment, racial discrimination, or any other workplace misconduct, ever been made against you or any employee directly supervised by you?” Any allegations, even if settled and dismissed, can become the subject of a detailed background investigation.

### **6.2.3 Litigation**

Q5 is broadly worded: “To your knowledge, have you or your spouse, or has either of your conduct been the subject of any civil or criminal case, administrative proceeding, or government investigation, other than a minor traffic infraction?” Since the question could bring in routine administrative inquiries against the business with which the filers associated (for example a company tax audit), the question may merit a qualified response such as: “In the normal course of business, companies and entities with which I have been associated have been the subject of various legal proceedings, but I have not personally been the subject of such proceedings.”

### **6.2.4 Embarrassment to the President**

#### **Precedent**

The equivalent of Question 10S of the 86 supplement of the Obama administration is question 7 in the current version used by the Trump administration. It reads in full as follows: “With as much detail as possible, please provide any other information, including information about other members of your family, which could suggest a conflict of interest, be a possible source of embarrassment, or be used to coerce or blackmail you.” The appropriate answer to Question 7 is generally “no” and any responses other than “no” likely would be discussed directly with White House counsel’s staff in the initial vetting process, rather than included in the form.

## **VII. OUTSIDE EMPLOYMENT & ACTIVITIES**

### **7.1 Outside Earned Income**

#### **7.1.1 Bush I Administration**

##### **Precedent**

The George H.W. Bush administration restricted outside earned income for various types of appointees. Restriction was proposed by a presidential committee appointed to address the political fall-out from ethical scandals involving former Reagan administration officials.

##### **Authority**

Executive Order 12674 (Apr. 12, 1989) modified by Executive Order 12731 (Oct. 17, 1990)

G. Calvin Mackenzie with Michael Hafken, *Scandal Proof: Do Ethics Laws Make Government Ethical?* 50 (2002).

#### **7.1.2 Current Practice**

##### **Precedent**

The definition of earned income for purposes of the outside earned income limitation is similar to the definition used for purposes of the tax on self-employment income under section 1401 et seq. of the tax code, and also parallels the difference between earned income and investment income under now repealed provisions of the tax code that provided for differential tax rates depending upon character of income. Questions were raised during the administration of George W. Bush concerning whether “line 1” income for partnership tax return purposes (i.e., line 1 on the K-1 Form issued to partners to indicate the partner’s share of business or operating income of the partnership) would be considered earned income, especially if the executive branch employee were a general partner of the partnership (even if the employee provided no services to the partnership), but these questions were not definitively answered.

It appears that line 1 income allocated to limited partners of a limited partnership, or, by extension, holders of LLC membership interests in a limited liability company, where no services are provided to the limited partnership or the LLC, should not be treated as earned income for these purposes, even though it might be earned income for purposes of self-employment tax.

## **7.2 Participation in Non-profit Organizations in Official Capacity**

### **7.2.1 Current Practice**

#### **Precedent**

Government employees may participate in particular matters that affect the financial interests of nonprofits in which they serve or seek to serve in their official government capacity. (This does not apply to government officials serving in nonprofits in their personal capacity). The exemption applies only to the prohibition of 18 U.S.C. § 208(a). Additionally, the employee still requires permission from a supervisor to be permitted to participate in a nonprofit in an official capacity. The employee remains subject to government ethics rules and other applicable statutes while serving in the nonprofit organization. Nonprofits for this purpose are those organizations that receive tax-exempt status under section 501 of the Internal Revenue Code. If an entity does not qualify, a section 208(b)(1) waiver is still an option.

#### **Authority**

5 C.F.R. § 2640.203(m). LA-13-05: 18 U.S.C. § 208(b)(2) Exemption for Official Participation in Nonprofit Organizations.

Shaub, W. M. U.S. Office of Government Ethics - LA-13-05: 18 U.S.C.

§ 208(b)(2) Exemption for Official Participation in Nonprofit Organizations.

(April 9, 2013). Retrieved from

[https://www.oge.gov/web/oge.nsf/All%20Advisories/CE1F23774940E1E685257E96005FBEFB/\\$FILE/9182469fbb6f484db9fc9c2e6dc837a92.pdf?open](https://www.oge.gov/web/oge.nsf/All%20Advisories/CE1F23774940E1E685257E96005FBEFB/$FILE/9182469fbb6f484db9fc9c2e6dc837a92.pdf?open)

## **7.3 Stock Purchases in IPOs**

### **7.3.1 Current Practice**

#### **Precedent**

Section 12 of the STOCK Act prohibits certain government employees from purchasing securities that are subject to an IPO if “done in a manner that is not available to members of the public generally.” According to the Securities and Exchange Commission, an employee who has acquired stock from a former private employer will not be considered to have purchased the stock if, during her time in the government, her shares are automatically converted to common stock when that company goes public. Additionally, in the similar case of an employee exercising a pre-existing right to convert previously held shares to common stock, the employee would not be considered to have purchased the stock. Importantly, neither agency ethics officials nor the OGE will be able to advise employees concerning the application of this section of the STOCK Act because it is a matter of securities law.

**Authority**

LA-14-02: Participation in Initial Public Offerings by Certain Employees  
Apol, D. J. U.S. Office of Government Ethics - LA-14-02: Participation in Initial Public Offerings by Certain Employees. (March 7, 2014). Retrieved from

[https://www.oge.gov/web/oge.nsf/All%20Advisories/B8EAA52BEB5BB52685257E96005FBF06/\\$FILE/29e20ef2652d455e9242bd382b0acd882.pdf?open](https://www.oge.gov/web/oge.nsf/All%20Advisories/B8EAA52BEB5BB52685257E96005FBF06/$FILE/29e20ef2652d455e9242bd382b0acd882.pdf?open)

**7.4 Future Employment Restrictions****7.4.1 Current Practice****Precedent**

The Obama Ethics Pledge, E.O. 13490 Sec. 1, Paragraph 4, restricted post-government communications with employees of former agency that otherwise might be banned for one year under 18 USC § 207(c) instead for two years. The Trump Ethics Pledge, E.O. 13770, Secs. 2 and 3, which replaced the Obama Ethics Pledge, simply requires former officials to comply with § 207(c) if otherwise required, and also requires signatories to the Pledge to agree, upon leaving government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration. Section 208 also provides criminal sanctions related to negotiations regarding future employment after government service.

**Case Study**

Capricia Marshall needed a waiver to serve on the Board of Trustees of the Blair House Restoration Fund, which has a close relationship with Marshall's former government employer, the State Department.

**Authority**

Vissek, R. C. Limited Waiver Pursuant to Section 3 of Executive Order 13490, p. 67-69. (November 5, 2014). Retrieved from

[https://www2.oge.gov/web/oge.nsf/Special%20Reports/876E1CFDE699F4C285257EBC00669563/\\$FILE/2014%20Ethics%20Pledge%20Assessment%20Report-%20EO%2013490%20\(FINAL\).pdf?open](https://www2.oge.gov/web/oge.nsf/Special%20Reports/876E1CFDE699F4C285257EBC00669563/$FILE/2014%20Ethics%20Pledge%20Assessment%20Report-%20EO%2013490%20(FINAL).pdf?open)

Ethics Commitments by Executive Branch Appointees (January 28, 2017)

<https://www.whitehouse.gov/presidential-actions/executive-order-ethics-commitments-executive-branch-appointees/>



## **VIII. TAXES**

### **8.1 Nanny Taxes**

#### **8.1.1 Clinton Administration**

##### **Precedent**

Prior to 1994, if the taxpayer paid a nanny, babysitter, or other household worker more than \$50 in a calendar quarter, the taxpayer had to withhold FICA contributions from that person's wages and remit those taxes along with share of FICA tax to the IRS using IRS Form 942. Following Zoe Baird's failed nomination for attorney general during the Clinton administration, in which it was revealed Baird hired undocumented workers and failed to pay their FICA contributions, Congress adopted the nanny tax law, raising the amount that triggered FICA payments from \$50 a quarter to \$1,000 a year and indexing it to inflation, and creating a new annual tax filing on Form 1040, Schedule H.

##### **Authority**

Klott, G., "Taking Care of 'Nanny Tax' is a Little Easier Block." Chicago Tribune (February 27, 1996). Retrieved from <https://www.chicagotribune.com/news/ct-xpm-1996-02-27-9602270041-story.html>

#### **8.1.2 Bush II Administration**

##### **Precedent**

During the administration of George W. Bush, many nominees and appointees came forward with potential nanny tax liabilities, seeking to cure such issues. For the most part, the administration adopted the position that if such tax liabilities were fully satisfied by filing amended returns and paying all back taxes, interest and penalties, prior liability for unpaid taxes for household workers (including gardeners, housekeepers, and childcare workers) would not prevent a nomination from proceeding, with the exception of nominations for positions in the Treasury Department (because of its authority over tax collection).

##### **Case Studies**

The Linda Chavez and Bernard Kerik nominations during the George W. Bush administration for Secretary of Labor and Secretary of Homeland Security respectively were withdrawn, in part, for failing to pay the post-1994 nanny tax, although in the case of Kerik, it was not clear whether the nanny tax issue was the actual reason for his withdrawal. In the case of Chavez, immigration issues were at least as important as tax issues in the withdrawal.

##### **Authority**



Lipton, E and W. K. Rashbaum. Kerik Pulls Out as Bush Nominee for Homeland Security Job. "The New York Times." (December 11, 2004). Retrieved from [https://www.nytimes.com/2004/12/11/politics/kerik-pulls-out-as-bush-nominee-for-homeland-security-job.html?\\_r=0](https://www.nytimes.com/2004/12/11/politics/kerik-pulls-out-as-bush-nominee-for-homeland-security-job.html?_r=0)

### **8.1.3 Obama Administration**

#### **Precedent**

Liability for nanny taxes and other taxes of household employees became a "threshold" question in initial due diligence. The Obama administration put significant emphasis on worker classification issues. On the independent contractor issue, support in the form of an accountant letter is often sufficient to provide support.

#### **Case Study**

Nancy Killefer withdrew her candidacy to become Chief Performance Officer (within the Office of Management and Budget) during the Obama administration in part because she failed to pay a nanny tax.

#### **Authority**

Kravitz, D. 'Nanny' Problems Ensnare Another Obama Pick. "Washington Post Investigations." (February 3, 2009). Retrieved from [http://voices.washingtonpost.com/washingtonpostinvestigations/2009/02/tax\\_problems\\_ensnare\\_another\\_o.html](http://voices.washingtonpost.com/washingtonpostinvestigations/2009/02/tax_problems_ensnare_another_o.html)

### **8.1.4 Trump Administration**

Although difficult to generalize, it appears that nanny tax issues have become less critical in connection with nominees in the Trump administration, and in any event, are not a negating item for nominations. Instead, there is significant opportunity for curing past nanny tax liabilities, and for paying any tax liability, or otherwise committing to pay any back-tax liability (including interest and penalties). Tax accountant letters are also useful.

#### **Case study**

Andrew Puzder withdrew his candidacy during the Trump administration to become secretary of labor, based upon a number of vetting issues, including unpaid nanny taxes. Mick Mulvaney was confirmed during the Trump administration as the head of the Office of Management and Budget, notwithstanding unpaid nanny taxes.

#### **Authority**

"Puzder Paid Taxes on Undocumented Employee After Labor Secretary Nomination," Wall St. J., Feb. 7, 2017

<https://www.wsj.com/articles/puzder-paid-taxes-on-undocumented-employee-after-labor-secretary-nomination-1486498560>

"Labor Nominee Puzder Admits to Employing a Housekeeper Who Was in the U.S. Illegally," L.A. Times, Feb, 7, 2017

<https://www.latimes.com/business/la-fi-puzder-nanny-20170207-story.html>

## **8.2 Errors with Respect to Personal Income Taxes**

### **8.2.1 Current Practice**

#### **Precedent**

A focus on avoiding income tax errors or anticipating questions that might be raised concerning individual income tax returns became a principal part of the review of Obama nominations, especially in connection with nominations under the jurisdiction of the Senate Finance Committee. A full-time detailee from the Internal Revenue Service reviewed individual tax returns for the committee. Although the then ranking member, Sen. Grassley (R-Iowa), asserted that the reviews of returns of nominees was not an “audit,” the reviews were the functional equivalent of a detailed IRS review of all tax issues raised in the returns. In reaction, the Obama administration hired a detailee from the Tax Division of the Justice Department with tax expertise, to review tax returns of nominees needing Senate confirmation in advance of submission to the committee. The staff of the Senate Finance Committee continued its practice of detailed reviews of tax returns of nominees (for example, the nominee for Secretary of the Treasury) during the Trump administration.

#### **Amended returns**

Normally, if inadvertent errors are identified in already-filed tax returns, a taxpayer has the legal right to correct those errors by filing an amended return (Form 1040X). However, during the Obama administration, amended tax returns were viewed with disfavor.

#### **Case Study**

Tom Daschle withdrew his nomination for Secretary of Health and Human Services during the Obama administration because of numerous tax problems, including his failure to pay income taxes on a luxury car and driver.

#### **Authority**

U.S. Senate Committee on Finance. Finance Committee Releases Memo Regarding Brainard Nomination. “The United States Senate Committee on Finance.” (November 18, 2009). Retrieved from

<https://www.finance.senate.gov/release/finance-committee-releases-memo-regarding-brainard-nomination>

Hulse, C., & Pear, R. Daschle Apologizes Over Taxes as Allies Give Support. “The New York Times.” (February 2, 2009). Retrieved from <https://www.nytimes.com/2009/02/03/us/politics/03daschle.html>

## **8.3 Non-income Taxes and Tax Liens**

### **8.3.1 Obama Administration**

#### **Case Study**

During Timothy Geithner's nomination for Secretary of the Treasury during the Obama administration, the Senate Finance Committee disclosed that Geithner failed to pay over \$30,000 in FICA taxes from his time with the International Monetary Fund (IMF). The IMF is a tax-exempt organization and it does not withhold taxes for Social Security and Medicare although U.S. citizens must still pay the FICA taxes.

#### **Authority**

Bernard, T. S. Geithner's Tax Mistake Was Honest, Experts Say. "The New York Times." (January 14, 2009). Retrieved from [https://www.nytimes.com/2009/01/15/us/politics/15tax.html?\\_r=0](https://www.nytimes.com/2009/01/15/us/politics/15tax.html?_r=0)

### **8.4 Foreign Bank Account Reporting**

#### **8.4.1 Current Practice**

##### **Precedent**

New emphasis on foreign bank account reporting and international transparency.

### **8.5 Tax Penalties**

#### **8.5.1 Current Practice**

##### **Precedent**

Since 2009, tax penalties have taken on special significance, especially for nominations under the jurisdiction of the Senate Finance Committee. For these purposes, tax penalties might include amounts assessed for underpayment of estimated taxes, even though underpayment of estimated taxes are in effect a delayed payment, rather than negligence or fraud and the "penalties" under the applicable sections of the Internal Revenue Code are equivalent to an interest charge.

### **8.6 Substantiation of Charitable Contributions**

#### **8.6.1 Obama Administration**

##### **Precedent**

A nominee who receives income from an honorarium cannot avoid tax liability by assigning it to a charity and must both substantiate the contribution and pay taxes on the payment of the honorarium.

##### **Case Study**

During the Obama administration, U.S. Trade Representative nominee Ronald Kirk asked for his speaking engagement honoraria to be given to

his alma mater to fulfill a scholarship fund pledge.

**Authority**

Senate Finance Committee Memorandum, "Mayor Ronald Kirk Nomination," Mar. 2, 2009

<https://www.finance.senate.gov/imo/media/doc/prb030209.pdf>

**IX. DRUG AND ALCOHOL ISSUES**

**9.1 General Policy Issues**

Current drug use is rarely an issue in the vetting process. Prior drug use is subject to a complex analysis that varies depending upon elapsed time (how long since the last use of drugs), types of drugs (essentially, marijuana versus other drugs), frequency of use (including specific timelines), and other factors, all in context of rapid changes in societal norms and generational views of drug use.

**9.2 Forms and Reporting**

Detailed reporting concerning drug use is provided in SF-86, section 23 ("illegal use of drugs and drug activity") and a yes answer to any question in this section will likely elicit further questions. In addition, certain preliminary questionnaires separate from the SF-86 used as screening mechanisms have asked for information about illegal use of drugs. For all such purposes, illegality is determined by federal, not state or local, law (which have in many cases either eliminated statutes prohibiting the use of certain drugs, or have sharply reduce the penalties for such use, e.g., to a misdemeanor or an administrative fine). Illegality could include use of certain prescription drugs without proper prescriptions, and depressants and tranquilizers are listed as types of drugs or controlled substances in section 23 of SF-86.

**9.3 Past Illegal Drug Use**

**9.3.1 Reagan Administration**

**Case Study**

In November 1987, Judge Douglas H. Ginsburg withdrew his nomination to the Supreme Court after publicly disclosing that he used marijuana before becoming a judge, and while a professor at Harvard Law School. Subsequent FBI investigations indicated the possibility that individuals with knowledge of Ginsburg's past drug use had lied to investigators in the course of his security investigation. As a result of the Ginsburg matter, at the end of the Reagan administration, and during the administration of Pres. George W. Bush, in a change in procedure, all candidates for positions such as federal judges were to be asked directly if they had used illegal drugs.

**Authority**

Shenon, P., F.B.I. Study Hints Some Lied to Hide Ginsburg Drug Use. "The New York Times." (January 13, 1988). Retrieved from <https://www.nytimes.com/1988/01/13/us/fbi-study-hints-some-lied-to-hide-ginsburg-drug-use.html>

### **9.3.2 Bush I Administration**

#### **Precedent**

Initially, applicants for senior positions were disqualified for any illegal drug use in the past 15 years. This restriction was later reduced to 10 years, apparently in recognition that some drug use was common among Baby Boomers.

#### **Authority**

Barr, S., & White, B. Agencies Vary in Handling Drug Issue. "Washington Post." (August 23, 1999). Retrieved from <http://www.washingtonpost.com/wp-srv/politics/campaigns/wh2000/stories/frules082399.htm>

### **9.3.3 Clinton Administration**

#### **Precedent**

The White House asked appointees to disclose all illegal drug use going back to age 18. There were no automatic disqualifications based on past drug use. Each appointee was judged on a case-by-case basis.

#### **Authority**

Barr, S., & White, B. Agencies Vary in Handling Drug Issue. "Washington Post." (August 23, 1999). Retrieved from <https://www.washingtonpost.com/wp-srv/politics/campaigns/wh2000/stories/frules082399.htm>

### **9.3.4 Bush II Administration**

#### **Precedent**

In 2006, the State Department's website published adjudicative guidelines for determining eligibility for access to classified information. Under the section titled "Guideline H: Drug Involvement," the department outlined potentially disqualifying activities. These included: drug abuse (defined as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction"), testing positive for illegal drug use, illegal drug or drug paraphernalia possession (including cultivation, processing, manufacture, purchase, sale, or distribution), diagnosis by a qualified medical professional of drug abuse/dependence, evaluation of drug abuse/dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program, failure to successfully complete a properly prescribed drug treatment program, any illegal drug use after being granted a security clearance, expressed intent to continue

illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

The department also published a list of mitigating factors. These included: infrequent use, a significant amount of time having been passed after the behavior, a demonstrated intent not to abuse drugs in the future, abuse of prescribed drugs occurring “after a severe or prolonged illness,” and the completion of a prescribed drug treatment program with a favorable prognosis from the appropriate medical professional.

#### **Authority**

U.S. Department of State. Adjudicative Guidelines for Determining Eligibility for Access to Classified Information. (February 3, 2006). Retrieved from <https://www.state.gov/m/ds/clearances/60321.htm> See also 32 C.F.R. § 147.9 “Guideline H—Drug Involvement,” (outlining similar guidelines for the Department of Defense).

### **9.3.5 Obama Administration**

#### **Precedent**

Legalization of Marijuana. The fact that a number of states have legalized, or at least de-criminalized the recreational use of marijuana has not limited the analysis of the drug use issue in connection with vetting.

### **9.3.6 Trump Administration**

#### **Precedent**

Legalization of marijuana in numerous states has not reduced the concerns regarding prior drug use for nominees in the Trump administration. Instructions that accompanied nomination and vetting materials sent to prospective appointees early in the Trump administration emphasized that questions concerning drug use should disregard legalization in states and should respond under federal drug laws. Background investigations regarding drug use in response to affirmative answers on Form SF 86 suggests that standards of review have not changed significantly, however, from the Obama administration, especially if prior drug use was moderate and not recent. Incorrect answers concerning prior drug use are, however, grounds for rejection of a nomination, and potentially 18 USC §1001 penalties.

## **9.4 Alcohol Use**

### **9.4.1 Bush II Administration**

#### **Precedent**

The 2008 version of the national security questionnaire added questions related to the effect of alcohol on an applicant’s employment within the past seven or ten years, depending on the applicable reporting period for the

particular nominee or appointee.

In 2006, the State Department posted adjudicative guidelines concerning alcohol on its website. Under the section titled “Guideline G: Alcohol Consumption,” the department outlined potentially disqualifying activities. These included: “alcohol-related incidents” of concern (e.g. DWI’s or domestic abuse), “alcohol-related incidents at work,” “habitual or binge consumption of alcohol to the point of impaired judgment,” a proper medical diagnosis of alcohol abuse/dependence, a proper evaluation of alcohol abuse/dependence as part of an alcohol treatment program, relapse after said diagnosis, or “failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.”

Mitigating factors included: infrequent behavior, a significant amount of time having passed since the behavior, the presence of unusual circumstances, acknowledgment of and proper steps to treat alcohol abuse, current participation and progress in a counseling/treatment program with no history of relapse, and the successful completion of counseling/rehabilitation along with a demonstrated “clear and established pattern of modified consumption or abstinence” and a favorable prognosis from a qualified medical professional or “a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.”

#### **Authority**

U.S. Department of State. Adjudicative Guidelines for Determining Eligibility for Access to Classified Information. (February 3, 2006). Retrieved from <https://www.state.gov/m/ds/clearances/60321.htm> See also 32 C.F.R. § 147.9 “Guideline G—Alcohol Consumption.” (Outlining similar guidelines for the Department of Defense).

## **9.5 Driving While Intoxicated (DWI)**

### **9.5.1 General Policy Issues**

In some cases, arrests for DWI are expunged if certain procedures are followed (remedial training, etc.). However, questions regarding arrests on the SF-86 still require disclosure of such arrest records, and therefore, regardless of whether DWI offenses are no longer contained in official police records, they must be fully disclosed and described in the SF-86.

## **X. MEDICAL ISSUES (INCLUDING MENTAL HEALTH)**

### **10.1 Bush II Administration**

#### **Precedent**

State Department Adjudicative Guidelines. The State Department’s website explains in a section titled “Guideline I: Psychological Conditions” that a negative inference should not “be raised solely on the basis of seeking



mental health counseling” and lists a number of causes for concern, which, among others, may include failure “to follow treatment advice related to a diagnosed emotional, mental, or personality condition, e.g. failure to take prescribed medication.” Mitigating factors may include demonstrated compliance with treatment, voluntary entry into counseling or treatment with a favorable prognosis, a mental health professional’s recent opinion that the individual’s condition is no longer a problem, the condition having been a temporary one, and the lack of indications of a current problem.

### **Authority**

U.S. Department of State. Adjudicative Guidelines for Determining Eligibility for Access to Classified Information. (February 3, 2006). Retrieved from <https://www.state.gov/m/ds/clearances/60321.htm> See also 32 C.F.R. § 147.11 “Guideline I—Emotional, mental, and personality disorders.” (Outlining similar guidelines for the Department of Defense).

## **10.2**

### **Current Practice**

#### **Precedent**

Attention to mental health issues has been reflected in evolution of national security questionnaire. Question 21 and extensive sub-questions in the SF-86 reflects the historic view that mental health treatment might be a disqualifying condition for a security clearance. However, in order to avoid automatic disqualification for mental health treatment, the national security questionnaire has added various exemptions, which essentially disregard psychiatric and other mental health treatment in selected categories, presumably because these are deemed not to be indicative of security risks. Thus, for example, the mental health portion of the 2008 form SF-86 provides an additional exemption for any counseling or treatment “strictly related to adjustments from service in a military combat environment.” The mental health section of the 2010 version of SF-86 included an exemption for anyone who sought or received treatment as a victim of sexual assault. Since the 2010 version of the SF-86 has been issued, various defense and intelligence officials have stressed the mental health exemptions available to returning servicemen and survivors of sexual assault, noting the importance of seeking treatment to the long-term health and well-being of both categories of people.

#### **Precedent**

In light of the above discussion concerning military survivors of sexual assault, the applicable provisions of SF-86 now includes the following instruction: “Victims of sexual assault who have consulted with the health care professional regarding an emotional or mental health condition during this period strictly in relation to the sexual assault are instructed to answer No.”

### **Authority**

Memorandum from Secretary of Defense Leon Panetta for Secretaries of



the Military Departments et al. (Sept. 4, 2012); Memorandum from Undersecretary of Defense James Clapper for Secretaries of the Military Departments et al. (Nov. 20, 2009); Memorandum from National Intelligence Director James Clapper for Distribution (Apr. 12, 2013).

Media Release, “Director of National Intelligence Issues New Security Clearance Guidance.” Director of National Intelligence. (April 5, 2013). Retrieved from <https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/828-director-of-national-intelligence-issues-new-security-clearance-guidance>

## **XI. IMMIGRATION STATUS**

### **11.1 General policy issues**

Along with failure to pay payroll taxes for domestic service providers, forms and interviews for security clearance and personal data statements have long focused on the immigration status of such workers. See also discussion above, section 6.1.9.

In the Obama administration, questions were often raised as to whether such workers had provided the filer with “I-9” forms, indicating the legal status of the worker and providing backup documentation. Given the fact that obtaining such forms for domestic workers is highly unusual, the absence of such forms was not automatically disqualifying (in contrast to failure to pay nanny taxes, see above). In addition, it was widely accepted that, if the domestic service provider could be classified as an independent contractor, no such forms or backup documentation would be required.

In the Trump administration, greater emphasis has been placed on immigration status. In addition to questions concerning whether the employer has received and maintained I-9 forms and related documentation for employees, the personal data statement issued by the administration has emphasized this issue, requiring lists of domestic employees and independent contractors, and inquiring as to their immigration status.

#### **Case study**

Andrew Puzder. In connection with his nomination in 2016 for secretary of labor disclosed that his family hired an undocumented immigrant as a maid and initially failed to pay taxes related to her employment.

#### **Authority**

Berman, More Trouble for Andrew Puzder, The Atlantic, Feb. 7, 2017 <https://www.theatlantic.com/politics/archive/2017/02/trump-labor-nominee-puzder-hired-undocumented-immigrant/515865/>



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