



August 7, 2017

The Honorable Claire McCaskill
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Ranking Member McCaskill:

This responds to your letter dated July 24, 2017, requesting information regarding the current Administration's oversight and implementation of Executive Order 13770, which establishes an ethics pledge for certain executive branch appointees, including White House personnel. In particular, your letter requests information regarding waivers of the ethics pledge issued by the White House.

As an overall matter, we note that your letter raises questions about the validity of waivers and authorizations and, more specifically, whether waivers can be issued retroactively. As you note, in 2010 OGE issued guidance stating that retroactive waivers are not valid.¹ While this guidance did not address waivers in the context of executive orders,² section 3 of Executive Order 13770 specifies that a waiver takes effect when signed.³ This language precludes a waiver issued pursuant to the Executive Order from having retroactive effect.

In light of this background, please find OGE's responses to each of the questions posed in your July 24, 2017, letter below.

¹ See Memo from Don W. Fox, General Counsel, U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, *Guidance of Waivers under 18 U.S.C. § 208(b), Authorizations under 5 C.F.R. § 2635.502(d), and Waivers of Requirements under Agency Supplemental Regulations*, DO-10-005 (2010) (guidance clarifying that waivers must be issued prospectively and that "OGE does not consider retroactive waivers to be valid."). Available at <https://goo.gl/1T4hbo>.

² *Id.* ("the term 'waiver' refers to waivers under 5 U.S.C. § 208(b) and 5 C.F.R. §§ 2635.402. [sic] 2635.605(a) and 2640.301 - .302 and agency supplemental regulations.").

³ See Section 3(b) of Exec. Order 13770 (Jan. 28, 2017) ("A waiver shall take effect when the certification is signed by the President or his designee.") at <https://goo.gl/PcbSd4>.

QUESTION 1:

1. *Has the White House provided OGE with a list of any individuals designated by President Trump to authorize waivers to the ethics pledge pursuant to Section 3 of Executive Order 13770? If so, please list those individuals, and any documents demonstrating how that designation is effectuated.*

The White House has not provided OGE with a list of individuals designated to authorize waivers to the ethics pledge. On May 31, 2017, the White House posted waivers issued to its employees on the White House website.⁴ Based on a review of the waivers posted by the White House, the waivers were either issued by the Counsel to the President (name not specified), or by Stefan C. Passantino, Deputy Counsel to the President, and James D. Schultz, Senior Associate Counsel to the President. Some waivers provided to OGE by other agencies were signed by Donald F. McGahn II, Counsel to the President.⁵

QUESTION 2:

2. *Has the White House provided OGE with any legal authority that allows it to grant retroactive waivers to any provision of President Trump's ethics pledge for executive branch appointees?*

The White House has not provided OGE with any legal authority allowing it to grant retroactive waivers of Executive Order 13770. However, as noted previously, section 3(b) of the Executive Order states that a "waiver shall take effect when the certification is signed by the President or his designee," which precludes the possibility of a waiver having retroactive effect.⁶

QUESTION 3:

3. *Has the White House provided OGE with the criteria that the White House used to determine whether a waiver to President Trump's ethics pledge is appropriate and in the public interest? If so, please explain those criteria and whether OGE agrees with them.*

⁴ The White House posted a chart listing the ethics waivers it had issued as of May 31, 2017. Available at <https://goo.gl/ZaUkC9>.

⁵ See pages 8, 69, and 108 of the compilation of agency records received in response to OGE's Data Call for Waivers and Authorizations, PA-17-02. Available at <https://goo.gl/1DLzHX>.

⁶ See Section 3(b) of Exec. Order 13770 (Jan. 28, 2017).



The White House has not provided OGE with such criteria. The White House posted waivers that contain a determination that “it is appropriate and in the public interest to provide a limited waiver,” but the documents do not provide the criteria used to make those determinations. Executive Order 13770 does not contain a waiver standard and section 3(a) of Executive Order 13770 states only that the “President or his designee may grant to any person a waiver of any restrictions contained in the pledge.”⁷

QUESTION 4:

4. *Please provide a list of any and all Trump Administration appointees that you are aware of who have requested or received a retroactive waiver to a provision of the ethics pledge.*

OGE is unaware of Administration appointees, if any, who may have requested a retroactive waiver to a provision of the ethics pledge. In addition, because the waivers posted by the White House are undated, OGE is unable to ascertain whether or not the waivers issued were intended to be retroactive or were given retroactive effect.

QUESTION 5:

5. *Has the White House indicated to OGE that going forward, it will continue to make waivers granted to White House personnel from provisions of President Trump’s ethics pledge publicly available on a regular basis?*

The White House has not indicated to OGE whether waivers granted to White House personnel will continue to be made publicly available on a regular basis in the future. However, as part of OGE’s statutorily authorized⁸ annual data collection survey covering calendar year 2017 (2017 Agency Ethics Program Questionnaire), OGE will request that all agencies, including the White House, provide the number and names of individuals who received waivers to the ethics pledge in 2017. An advance copy of the survey was provided to all agency ethics officials, including the White House, on May 17, 2017. Agency responses covering calendar year 2017 will be due to OGE on February 1, 2018.

⁷ See Section 3(a) of Exec. Order 13770 (Jan. 28, 2017).

⁸ See 5 U.S.C. App. § 402(e)(1).



QUESTION 6:

6. *Has OGE received signed and dated copies of all ethics pledge waivers granted to White House personnel since January 20, 2017? If so, are you aware of whether the date on these documents accurately reflects when the document was signed by the President's designee, and not when the electronic document was drafted or finalized?*

The White House has not provided OGE with copies of the ethics pledge waivers granted to White House personnel in response to OGE's data call. Rather, the White House posted electronic copies of such waivers on the White House website.⁹ Most of the waivers posted on the White House website are undated and unsigned.

QUESTION 7:

7. *Is OGE aware of any referrals made to the Department of Justice regarding a potential violation of President Trump's ethics pledge? If so, please provide a list of those referrals.*

OGE is not aware of any referrals made to the Department of Justice regarding violations of the ethics pledge in Executive Order 13770.¹⁰

I hope the information provided above is responsive to your inquiry. I also bring to your attention OGE's ongoing review and upcoming report on the waivers and authorizations issued collected in response to its data call,¹¹ including waivers to Executive Order 13770. After receiving responses from all 136 executive branch agencies, OGE followed up with those agencies whose responses required further information or raised compliance concerns, including the White House.

⁹ The White House chart linking to the ethics waivers issued by the White House as of May 31, 2017, is available at <https://goo.gl/ZaUkC9>.

¹⁰ 5 U.S.C. App. § 402(e)(2) requires agencies to inform the Director of OGE upon referral of any alleged violation of the federal conflict of interest laws to the Attorney General. Upon any referral made to the Department of Justice of potential violations of the criminal conflict of interest statutes (18 U.S.C. §§ 203 – 209), the referring agency must notify OGE of the referral by filing an OGE Form 202 (<https://goo.gl/zQ5ZX1>). See 5 C.F.R. § 2638.206 at <https://goo.gl/oRSmZE>. This requirement does not include referrals made to the Department of Justice regarding potential violations of the ethics pledge in Executive Order 13770. However, OGE's annual Agency Ethics Program Questionnaire covering calendar year 2017 will request data from all agencies, including the White House, on referrals to DOJ of potential violations of the criminal conflict of interest statutes, as well as disciplinary actions taken for ethics violations, and potential violations of the ethics pledge.

¹¹ See Memo from Walter M. Shaub, Jr., Director, U.S. Office of Gov't Ethics, to Chief of Staff to the President, Agency Heads, Designated Agency Ethics Officials, Inspectors General, and Appointees, *Data Call for Certain Waivers and Authorizations*, PA-17-02 (2017) at <https://goo.gl/XVU8vF>.



The Honorable Claire McCaskill
Page 5

OGE is in the process of reviewing the follow-up responses received and drafting a report analyzing the results of the data call. The report will be issued in mid-September and made publicly available on OGE's website.

If your staff has any questions or would like to discuss these responses, they may contact OGE's Chief of Staff, Shelley K. Finlayson, at (202) 482-9292.

Sincerely,

David J. Apol
Acting Director and General Counsel

cc: The Honorable Ron Johnson
Chairman

