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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Legislative Activity of the 113th Congress Affecting the Executive Branch Ethics Program

This Legal Advisory updates relevant legislative activity from the recently ended 113th Congress. Three measures are of particular importance to the executive branch ethics community: 1) amendments to the Stop Trading on Congressional Knowledge Act of 2012 (“STOCK Act”); 2) a change in Senate rules pertaining to the confirmation process; and 3) conference spending restrictions and reporting requirements. The Office of Government Ethics (OGE) also monitored other ethics-related provisions of note discussed below.

In addition, OGE has compiled and published a newly updated “Compilation of Federal Ethics Laws” that includes all relevant provisions signed into law through January. The compilation includes not only the laws within the jurisdiction of the ethics program, but also related statutes of interest to the executive branch ethics programs, such as the Hatch Act. The Compilation may be found on OGE’s website at: <https://www.oge.gov/Web/OGE.nsf/Resources/Compilation+of+Federal+Ethics+Laws>.

Amendments to the Stop Trading on Congressional Knowledge Act of 2012

Of particular importance to the executive branch ethics community was a bill to modify the requirements under the STOCK Act. Specifically, the bill modified the STOCK Act’s requirements regarding online access to certain financial disclosure statements and related forms.¹ It amended the original requirement that all public financial disclosure reports be posted online and limited it to apply only to the President, the Vice President, and any officers occupying positions at Levels I and II of the Executive Schedule as set forth in 5 U.S.C. §§ 5312-5313. The bill also eliminated the requirement that an electronic filing system developed by OGE allow for the searching, sorting, and downloading of data contained in the reports, while leaving in place the overall requirement that OGE develop an electronic financial disclosure filing system for public filers.

¹ Pub. L. No. 113-7, 127 Stat. 438 (2013).

Changes in Senate Rules Pertaining to the Confirmation Process

The 113th Senate amended its rules to streamline the confirmation process for certain Presidential appointees. In January 2013, the Senate approved a resolution² to establish a standing order, applicable only in the 113th Congress, that accelerated the consideration of nominations when the Senate agreed to limit debate and proceed to a vote, a process called cloture.³ In particular, this standing order reduced the maximum number of hours of post-cloture consideration of all but the most senior executive branch nominations from 30 hours to eight hours. Although that standing order expired at the end of the 113th Congress, the Senate recently approved changes to its standing rules that similarly expedite the confirmation process. The changes provide for an expedited process to begin consideration of covered nominations and limit debate on the nomination to two or four hours, depending on the position at issue.⁴

Conference Spending Restrictions and Reporting

The 113th Congress passed recurring legislation that requires the head of any executive branch agency receiving appropriated funds to provide the agency's Inspector General (IG), or senior ethics officials if the agency has no IG, with annual reports regarding the costs and contracting procedures related to conferences that cost the government more than \$100,000.⁵ The head of the agency is also required to report the date, location, and number of employees attending any conference that costs more than \$20,000 to the IG or senior ethics officials within 15 days of the conference being held.

The 113th Congress also introduced two non-appropriations bills that aimed to impose new restrictions on executive branch conference spending. The proposed bills would have set limits on conference spending, expanded the definition of "conference," and required quarterly reporting, including a certification that no conflicts of interest resulted from conference expenses paid for by a private entity.⁶ Although these two bills did not become law, a similar bill was introduced in the 114th Congress,⁷ signaling continuing congressional concern about and interest in conference spending.

Notable Ethics-Related Provisions Considered by the 113th Congress

The 113th Congress considered several other notable ethics-related provisions. Although not passed into law, these provisions have been considered by Congress across multiple sessions.

² S. Res. 15, 113th Congress (2013).

³ Typically a three-fifths Senate majority (60 votes) is required to end debate on a matter. However, on November 21, 2013, the Senate reinterpreted Senate Rule XXII as it applies to floor consideration of Presidential nominees, lowering the number of votes needed to place a time limit on consideration of a Presidential nominee to a simple majority. 159 Cong. Rec. S8416-18 (2013). *See also* Valerie Heitshusen, Cong. Research Serv., R43331, Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings (2013).

⁴ S. Res. 118, 114th Congress (2015).

⁵ Pub. L. No. 113-235, 128 Stat. 2130 (2014); Pub. L. No. 113-76, 128 Stat. 5 (2014); Pub. L. No. 113-6, 127 Stat. 198 (2013). *See also* LA-13-07 (OGE's legal advisory discussing these conference provisions).

⁶ H.R. 313, 113th Congress (2013); S. 1347, 113th Congress (2013).

⁷ H.R. 2032, 114th Congress (2015).

Several of these provisions have been reintroduced in the first months of the 114th Congress, demonstrating continuing congressional interest in these ethics-related topics.

Highlights of Proposed Changes to the Ethics in Government Act and Financial Disclosure

Recent Congresses have sought to generally increase transparency through access to government information. During the 113th Congress, the Transparency in Government Act of 2014 was reintroduced. The bill would have replaced the current amount categories for assets, liabilities, and investment income in section 102 of the Ethics in Government Act of 1978 (EIGA) with a requirement to provide rounded estimates. In addition, the bill would have amended the definition of a lobbyist under the Lobbyist Disclosure Act of 1995.⁸ Although this bill was not enacted during the 113th Congress, a similar bill was reintroduced in the 114th Congress on March 16, 2015.⁹

During the 113th Congress, four bills were introduced concerning the application of ethics provisions to same-sex partners. The Domestic Partnership Benefits and Obligations Acts of 2013 would have amended several ethics provisions to extend to same-sex domestic partners of federal workers the same benefits and obligations as spouses in heterosexual marriages.¹⁰ Specifically, the bills would have amended the financial disclosure and outside earned income provisions in EIGA, the conflict of interest statutes in 18 U.S.C. §§ 202-209, the gift provisions at 5 U.S.C. §§ 7342, 7351, and 7353, and the acceptance of travel and related expenses from non-federal sources provision at 31 U.S.C. § 1353. Three additional bills were introduced that would have changed the definition of the terms “marriage” and “spouse” as used in federal laws and regulations but would not have directly amended the federal ethics and related laws.¹¹

Highlights of Proposed Bills to Address Executive Branch Conflicts of Interest

The 113th Congress introduced two bills limiting an agency’s discretion to withhold or “claw back” bonuses awarded to employees who have engaged in misconduct. The Stop Wasteful Federal Bonuses Act of 2014 and the VA Bonus Accountability Act would have prohibited an agency head from awarding an employee a bonus within five years after the agency Inspector General, another senior ethics official, or the Comptroller General made an adverse finding¹² relating to the employee and would have required such an employee to repay any

⁸ H.R. 4245, 113th Congress (2014). *See also* H.R. 2340, 112th Congress (2011).

⁹ H.R. 1381, 114th Congress (2015).

¹⁰ S. 1529, 113th Congress (2013); H.R. 3135, 113th Congress (2013).

¹¹ The State Marriage Defense Acts of 2014 would have defined the term “spouse,” as used in federal laws and regulations, to include only individuals in a relationship recognized as a marriage by the state or territory in which the individual is domiciled. S. 2024, 113th Congress (2014); H.R. 3829, 113th Congress (2014). The Federal Benefits Equality Act would have expanded the definition of “spouse,” as used in federal legislation, to include a member of a marriage, domestic partnership, civil union, or other similar legal union that is recognized by a state or territory of the United States. H.R. 2834, 113th Congress (2013). *See* LA-13-10 for OGE’s interpretation of the terms “marriage” and “spouse” where those terms appear in federal ethics provisions following the Supreme Court’s decision in *United States v. Windsor*, 133 S. Ct. 2675 (June 26, 2013).

¹² The bills defined “adverse finding” as a finding that the employee violated a policy or law for which the employee could have been removed or suspended or that the employee violated a law for which the employee could have been imprisoned for more than a year. S. 2263, 113th Congress (2014); H.R. 5254, 113th Congress (2014).

bonuses received during the year that the adverse finding was made.¹³ Although these bills were not enacted during the 113th Congress, a similar bill was reintroduced in the 114th Congress on March 16, 2015.¹⁴

Legislation aimed at promoting transparency and preventing conflicts of interest for advisory committee members was reintroduced during the 113th Congress. The Federal Advisory Committee Act Amendments of 2013 would have required that recusal agreements and waivers issued pursuant to 18 U.S.C. § 208(b)(3) for advisory committee members be made available to the public on the official website of the executive branch agency to which the advisory committee reports.¹⁵ The bill would have also required that agencies designate advisory committee members as special Government employees or representatives, explain to advisory committee members the difference between those designations, and summarize applicable ethics requirements. Although this bill was not enacted during the 113th Congress, the 114th Congress reintroduced a similar bill on May 15, 2015.¹⁶

Lastly, legislation aimed at promoting transparency in the grant review process was also reintroduced. The Grant Reform and New Transparency Act of 2013 would have, in certain circumstances, required agencies to make information pertaining to potential conflicts of interest in the grant review process publicly available. Specifically, agencies would have to provide a description of the process and standards used to determine that a grant reviewer does not have a prohibited conflict of interest with regard to the evaluation or review of a grant application or the decision to award a grant.¹⁷

Conclusion

OGE brings the above information to your attention as part of our initiative to keep the ethics community apprised of relevant legislative activity. OGE will continue to provide periodic updates on ethics-related legislative activity throughout the 114th Congress. OGE will also continue to monitor and keep agency ethics officials informed of agency-specific legislative proposals that may affect their agency's ethics program. If you would like to discuss this Legal Advisory or other legislative matters, please contact me at (202) 482-9314, or Branch Chief Diana Veilleux at (202) 482-9203.

¹³ S. 2263, 113th Congress (2014); H.R. 5254, 113th Congress (2014).

¹⁴ S. 742, 114th Congress (2015).

¹⁵ H.R. 1104, 113th Congress (2013). *See also* H.R. 3124, 112th Congress (2011).

¹⁶ H.R. 2347, 114th Congress (2015).

¹⁷ H.R. 3316, 113th Congress (2013). *See also* H.R. 3433, 112th Congress (2011).