

ETHICS AGREEMENT GUIDE

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



Preventing Conflicts of Interest
in the Executive Branch

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U.S. OFFICE OF GOVERNMENT ETHICS

GUIDE TO DRAFTING ETHICS AGREEMENTS FOR PAS NOMINEES

NOTICE: This guide does not contain legal advice. It is intended solely for educational purposes for ethics officials in the Federal executive branch.

INTRODUCTION

In DAEOgram DO-01-013 (Mar. 28, 2001), OGE first provided guidance to agency reviewers who draft ethics agreements for nominees to positions requiring Senate confirmation (“PAS nominees”). A model ethics agreement that accompanied that issuance served as a valuable starting point for the ethics agreements of countless PAS nominees. Over the years, OGE has had the benefit of working closely with agency reviewers to develop ethics agreement language addressing a variety of circumstances. The result has been a body of work that represents the joint product of OGE and the agencies to which PAS nominees are appointed.

That body of work is reflected in this guide, which OGE first issued in February 2008 and is reissuing in 2014 with updates based on the ethics community’s experience using this guide. This updated guide contains sample language and commentary designed to enhance the quality of PAS nominee ethics agreements. Our intention is to spread the benefit of individual experiences with such agreements evenly across the Federal executive branch. These samples have made the certification process considerably more efficient for PAS nominees in the time since the guide’s first issuance in 2008. These samples also have established consistency among the ethics agreements of different agencies.

This guide focuses primarily on sample language, but a number of considerations are relevant to the process of drafting ethics agreements for PAS nominees. The key consideration is that the agency and OGE both have active roles in the process, and this shared responsibility requires coordination at the earliest practicable stages. In addition, OGE’s approval of the language of an ethics agreement must be obtained before a PAS nominee’s financial disclosure report can be certified. As you use this guide, it also may help to keep in mind the following nonexclusive list of some of the characteristics of executive branch ethics agreements:

1. The agreement is a joint product.

The ethics agreement is a joint product of the agency, OGE and the Office of the Counsel to the President, with input from the PAS nominee. As a result, the process is collaborative. OGE’s approval of the language of the ethics agreement is a precondition for certification of the PAS nominee’s financial disclosure report.

2. The underlying conflicts analysis is comprehensive.

Before drafting the ethics agreement, the reviewer completes a comprehensive conflicts analysis. Under 18 U.S.C. § 208, for example, the reviewer evaluates all “particular matters” that will have a direct and predictable effect on the PAS nominee’s financial interests. The subset of “particular matters involving specific parties” often is the easiest to identify, but the reviewer also considers the subset of “particular matters of general applicability.” See OGE DAEOgram DO-06-029 (Oct. 4, 2006). In appropriate cases, the reviewer considers other applicable legal authorities, including the following: 18 U.S.C. §§ 203, 205, 209; 5 C.F.R. §§ 2635.502, 2635.503, 2635.807, 2636.305, 2636.306; Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990); and Executive Order 13490 (2009).

3. The agreement is a statement of relevant commitments.

The PAS nominee's ethics agreement is a statement of relevant commitments. It describes a specific course of action that the PAS nominee will undertake to achieve compliance with specific legal authorities. It typically does not include generic statements regarding compliance with a broad range of legal authorities. It also typically does not explain the reasons for the PAS nominee's commitments, inasmuch as the inclusion of explanations can create an incorrect impression that these commitments are conditional. Except in very rare circumstances, the only condition precedent in a PAS nominee's ethics agreement is confirmation by the Senate.

4. The agreement is factually accurate.

Although this guide contains a number of samples, each PAS nominee's circumstances are unique and the legal document addressing those circumstances is unique. The sample language serves only as the starting point for an individualized ethics agreement. Even before beginning to draft the agreement, the reviewer works with the PAS nominee to develop the details of the PAS nominee's ethics commitments. For example, the reviewer inquires about the details of items such as the following: the amount and timing of any payments; the existence of contingencies affecting payments; the planned disposition of all equity interests in an employer (e.g., a plan to accelerate the vesting of restricted stock, a plan to forfeit unvested stock options, etc.); the terms of a deferred compensation plan; the handling of accounts receivable; arrangements for future employment; arrangements with publishers; etc. Also, when analyzing a payment under 18 U.S.C. § 209, the reviewer acquires sufficient information to consider the factors identified in OGE's "Summary of the Restriction on Supplementation of Salary." DAEOgram DO-02-016, DO-02-016A (Jul. 1, 2002).

5. The agreement is complete.

When reviewing the financial disclosure reports of PAS nominees, who are the most senior leaders in the Federal executive branch, a reviewer does not rely on the same "review assumptions" that sometimes apply to other financial disclosure reports. A reviewer discusses the completeness of a financial disclosure report with a PAS nominee who is confused about disclosure requirements. Although the reviewer is not an investigator and is not expected to uncover all undisclosed financial interests, experience and judgment lead the reviewer to inquire about the existence of certain likely interests. See DAEOgram DO-08-002 (Jan. 25, 2008). For example, a reviewer might ask whether a PAS nominee holds a position with a family limited partnership if the PAS nominee has not disclosed any such position but has disclosed an equity interest in the partnership. Similarly, a reviewer might ask whether a PAS nominee has an equity interest in an employer if the PAS nominee has not disclosed any such interests but has disclosed a position as a highly-paid executive. The best time for such discussions is naturally before the reviewer drafts the ethics agreement.

6. The commitments are feasible.

The ethics agreement communicates commitments, not mere aspirations. For this reason, reviewers sometimes need assurances in advance that PAS nominees will be able to honor stated

commitments. For example, if a PAS nominee expects to receive a nonstandard severance payment from an employer before entering Federal service, the reviewer needs assurance that the employer is capable of making the payment at the planned time. This assurance is necessary because the applicability of either 5 C.F.R. § 2635.503 or 18 U.S.C. § 209 depends on whether the payment occurs before or after the PAS nominee enters Federal service. Similarly, if a PAS nominee agrees to divest a pooled investment fund within ninety days of confirmation, the reviewer needs assurance that the PAS nominee is not subject to a lock-in provision that prohibits divestiture for a longer period of time.

7. The language of the agreement is concise.

Ideally, the ethics agreement contains only a concise statement of relevant commitments by the PAS nominee. Extraneous information may distract from the statement of relevant commitments. At the same time, being concise does not always mean keeping the agreement short. The agreement should address every relevant commitment in sufficient detail to be clear about the specific actions that the PAS nominee will undertake.

8. The language of the agreement is precise.

As emphasized in DAEOgram DO-01-013 (Mar. 28, 2001), the ethics agreement makes clear what measures a PAS nominee will undertake. Reviewers strive to minimize the potential for inconsistent interpretations because the agreement's audience eventually could include the PAS nominee, the agency, the Inspector General, OGE, the White House, the Senate, the House of Representatives, and members of the general public. Ambiguity leaves a PAS nominee vulnerable if it leads to differing interpretations of the stated commitments among the members of this audience. The ethics agreement reduces ambiguity by being specific about such matters as the following: the scope of any recusal, both as to the types of matters from which the PAS nominee will recuse and the duration of the recusal; the timing of any divestiture or payment; arrangements for separating from an employer; arrangements for dissolving a business; the steps the PAS nominee will take to divest any privately held equity; any intention to seek a waiver or authorization; and the details of any other measure to resolve a conflict or the appearance of a conflict.

9. The language of the agreement is consistent.

The language of the agreement is consistent. Reviewers strive to eliminate inadvertent variations of language because readers might mistakenly attribute meaning to such variations. For example, omitting the phrase "personally and substantially" from a recusal could cause confusion when other recusals in the agreement contain this phrase. Similar confusion with regard to a recusal can stem from omitting the word "first" in the phrases "unless I first obtain a written waiver" and "unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d)." Also, varying the name by which an ethics agreement refers to an organization could cause confusion if another organization has a similar name. While there often is only a small risk of confusion as a result of such variations, it takes very little effort to eliminate that risk altogether.

10. The agreement is not a comprehensive counseling document.

Consistent with the admonition to be concise, most agencies do not attempt to use the ethics agreement as the PAS nominee's all-purpose introduction to ethics requirements in the Federal executive branch. The ethics agreement could not cover every applicable ethics requirement without sacrificing accuracy or obscuring relevant commitments. Any attempt to discuss general ethics requirements extensively may create a false impression that the agreement covers everything the PAS nominee needs to know about ethics. For this reason, the agency may choose to create a separate counseling document that introduces its PAS nominees to issues they are likely to encounter at the agency.

11. The PAS nominee signals a commitment to ethical leadership by signing the ethics agreement.

Throughout the Federal executive branch, the traditional practice of most agencies has been to prepare ethics agreements in the form of letters from PAS nominees to Designated Agency Ethics Officials. By signing such letters, the PAS nominees signal their commitment to ethical leadership. Their signatures also offer assurances that the PAS nominees are aware of the measures needed to achieve compliance with applicable ethics requirements.

12. Commitments in the agreement may not be rescinded without OGE's prior approval.

The ethics agreement is an agreement between the PAS nominee, the agency, and OGE. In addition, the United States Senate relies on the commitments reflected in the ethics agreement when making a decision to confirm the PAS nominee. For this reason, the agency and the PAS nominee may not rescind a commitment in an ethics agreement, such as an agreement to divest an asset, without first obtaining OGE's approval.

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CHAPTER 1: SAMPLE ETHICS AGREEMENT

1.0.0 – sample ethics agreement

Comment:

The following sample ethics agreement incorporates several of the individual sample paragraphs that appear in this guide. The purpose of this sample ethics agreement is to demonstrate the structure of an ethics agreement. For language addressing the specific circumstances of a particular PAS nominee, please refer to the individual sample paragraphs throughout this guide. The comments associated with those individual sample paragraphs explain the purpose of the language that they employ.

Sample Language:

May 15, 2017

Ms. Deborah McGonagall
Designated Agency Ethics Official
Department of Government Operations
1201 New York Avenue, NW, Suite 500
Washington, DC 20005

Dear Ms. McGonagall:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Deputy Secretary of the Department of Government Operations.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Within 90 days of my confirmation, I will divest my interests in the following entities: MacDonald Wilderness, Inc.; Nonluecha Power Saws, LLC; H. Jones Worldwide Investigations, Co.; and Syme Environmental Consulting, LP. With regard to each of these entities, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the entity until I have divested it, unless I first

obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

Upon confirmation, I will resign from my position with Mabry Shipping, Inc. I hold stock and vested stock options with Mabry Shipping, Inc. I do not hold unvested stock options or restricted stock. Following my appointment, I will divest my vested stock options and stock in Mabry Shipping, Inc., within 90 days of my confirmation. If I divest the stock options by exercising them, I will divest the resulting stock within 90 days of my confirmation. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of this entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know Mabry Shipping, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

Upon confirmation, I will resign from my position with Forest Enterprises, Inc. Before I assume the duties of the position of Deputy Secretary, I will receive a severance payment from Forest Enterprises, Inc. For a period of two years after my receipt of this payment, I will not participate personally and substantially in any particular matter in which I know Forest Enterprises, Inc., is a party or represents a party, unless I first receive a written waiver pursuant to 5 C.F.R. § 2635.503(c).

Upon confirmation, I will resign from my positions with the following entities: The Charity Foundation; Nationwide Labeledz, Inc.; and Newton Corp. For a period of one year after my resignation from each of these entities, I will not participate personally and substantially in any particular matter involving specific parties in which I know that entity is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

My spouse is employed by the law firm of Granahan & Khaner, PC, from which he receives a fixed salary and an annual bonus tied to his performance. For as long as my spouse continues to work for Granahan & Khaner, PC, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on my spouse's compensation or employment with the firm, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). I also will not participate personally and substantially in any particular matter involving specific parties in which I know my spouse's employer or any client of my spouse is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

I understand that I may be eligible to request a Certificate of Divestiture for qualifying assets and that a Certificate of Divestiture is effective only if obtained prior to divestiture. Regardless of whether I receive a Certificate of Divestiture, I will ensure that all divestitures discussed in this agreement occur within the agreed upon timeframes and that all proceeds are invested in non-conflicting assets.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,

John Doe

1.1.0 – introductory language

Comment:

This sample expresses the PAS nominee’s commitment to taking all actions specified in the agreement. This language is consistent with OGE’s guidance on ethics agreements in DAEOgram DO-01-013 (Mar. 28, 2001): “[T]he model agreement does not use any language suggesting that the PAS nominee’s commitments might be aspirational, rather than binding. Thus, for example, the various commitments do not use expressions such as ‘I will attempt,’ ‘I will try,’ ‘I will seek to avoid,’ etc., but rather state unequivocally, ‘I will,’ ‘I will not,’ or ‘I agree to.’ It is inconsistent with the very nature of an ethics agreement to suggest that its terms are not binding.”

Sample Language:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Deputy Administrator of the U.S. Metric Measurements Administration.

1.2.0 – language to include at the end of certain political PAS nominee agreements regarding public posting on OGE’s website

Comment:

This sample expresses the PAS nominee’s awareness of OGE’s policy of posting on its website the ethics agreements of PAS nominees, subject to certain exceptions. This language is not applicable to a special Government employee who is expected to serve 60 days or less in a calendar year or a career Foreign Service Officer who is being nominated to a position as an Ambassador.

Sample Language:

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

CHAPTER 2: RECUSALS PURSUANT TO 18 U.S.C. § 208

2.0.0 – 208 recusals: general discussion

Throughout this guide, the sample recusals under 18 U.S.C. § 208 generally include the following phrase: “any particular matter that to my knowledge has a direct and predictable effect.” Although the verb in this phrase is “has,” agencies may choose instead to write “will have” or “would have” for stylistic reasons. The key is to be consistent in the use of “has,” “will have” or “would have” because variations in language may be misconstrued by readers to have meaning. In contrast, the phrase “could have” would be an incorrect substitution for the word “has.” The scope of matters covered by the phrase “could have” is broader than the prohibition established in 18 U.S.C. § 208, which does not extend to every particular matter that “could have” a direct and predictable effect on a financial interest.

A number of agency ethics officials prefer to include language addressing the knowledge element. OGE traditionally considered the knowledge element to be implied in ethics agreements. For that reason, in the 2001 model ethics agreement and the original 2008 version of this guide, OGE did not include language addressing the knowledge element in the primary samples of recusals under 18 U.S.C. § 208, though OGE did provide some alternate samples that included such language. Based on feedback from ethics officials and a number of PAS nominees, OGE was persuaded to include language expressly addressing knowledge in the primary samples in the 2014 version of this guide. At the same time, when reading executive branch ethics agreements, readers should not misconstrue any omission of language addressing the knowledge element as signaling that the PAS nominee either has waived the knowledge element or has committed to recuse even when the PAS nominee lacks knowledge of a conflict of interest.

With regard to a conflict of interest arising from a financial interest in an entity (e.g., stock), another feature of these recusals is that they focus on the “financial interests” of the entity. For example, one sample below states that the PAS nominee will not participate in particular matters that have “a direct and predictable effect on the financial interests of Bortot Wilderness, Inc.” It does not state that the recusal applies to particular matters that have “a direct and predictable effect on Bortot Wilderness, Inc.,” or that have “a direct and predictable effect on my interest in Bortot Wilderness, Inc.”

Some of these samples include multiple recusals. Sometimes multiple recusals are necessary because different recusal standards apply at different times. For examples of the use of multiple recusals, see 2.3.2, 3.2.3, 5.2.2, 6.1.0, 7.2.1, and 7.4.1 below. Although multiple recusals are necessary in some cases, they can be redundant in other cases. For example, if a PAS nominee will continue to hold a former employer’s stock for the duration of the PAS nominee’s appointment, the PAS nominee’s ethics agreement will need to include a full recusal under 18 U.S.C. § 208 for all particular matters directly and predictably affecting the financial interests of the former employer. In that case, there may be no need to include an additional “ability or willingness” recusal for any payment the former employer owes the PAS nominee or an additional one-year recusal under 5 C.F.R. § 2635.502.

Finally, note that a waiver under 18 U.S.C. § 208 may be inappropriate in many circumstances in which a particular matter will directly and predictably affect the “ability or willingness” of an entity to honor an obligation to make a payment to a PAS nominee. Whenever samples in this guide contain an “ability or willingness” recusal, the recusal contains language regarding the potential availability of such a waiver. However, agency ethics officials may want to counsel PAS nominees in advance that requests for such waivers may be denied.

2.1.0 – basic 208 recusal

Comment:

Every ethics agreement has a basic criminal conflict of interest recusal stating that the PAS nominee will not participate in any particular matter that has a direct and predictable effect on the PAS nominee’s personal and imputed financial interests, absent a waiver or a regulatory exemption. This sample language is flexible in that it applies both to the PAS nominee’s current financial interests and to financial interests that the PAS nominee will acquire in the future.

Sample Language:

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

2.2.0 – 208 recusal for specific stocks that pose only a remote risk of a conflict

Comment:

OGE’s earlier model ethics agreement supplied sample language for a criminal conflict of interest recusal that identified specific entities in which the PAS nominee has invested. DAEOgram DO-01-013 (Mar. 28, 2001). Sometimes such recusals are helpful because they draw attention to assets that are more likely than other assets to present conflicts of interests. However, a PAS nominee always must be vigilant for potential conflicts with regard to *all* of the PAS nominee’s assets. If certain specific assets warrant greater attention than other assets, it may be more prudent for the PAS nominee to divest those assets than for the PAS nominee to recuse.

In some cases, recusals that focus on certain specific assets of PAS nominees have caused confusion. In practice, the determination as to which assets require specific recusals is highly subjective. Moreover, all of a PAS nominee’s assets are already covered by the general recusal

under 18 U.S.C. § 208 that appears at the beginning of the ethics agreement. Drawing attention to only certain assets could cause the PAS nominee to neglect the obligation to recuse from particular matters directly and predictably affecting other assets. In addition, listing all of a PAS nominee's assets, or those that do not qualify for a *de minimis* exemption, could create an incorrect impression that the PAS nominee will have to recuse from so many matters that the PAS nominee will be unable to perform the essential functions of the position. Such comprehensive lists also have the disadvantage of establishing a recusal that is based on the present value of the PAS nominee's current assets, ignoring the fact that PAS nominee may buy or sell assets while in Federal service and the fact that the value of assets will fluctuate. For these reasons, ethics agreements usually do not contain recusals for specific assets.

When an ethics agreement does contain a recusal that focuses on a specific asset, there are specific reasons for drawing attention to that asset and for allowing the PAS nominee to continue holding the asset. For example, an agency may recently have concluded its handling of a particular matter affecting a company in which the PAS nominee holds stock. In this hypothetical situation, the following factors might weigh in favor of allowing the PAS nominee to keep the stock: (1) the PAS nominee would have difficulty divesting the stock because, for instance, it is held in a trust for which the PAS nominee is not the trustee; (2) the PAS nominee's recusal will not impede the work of the agency because other officials at the PAS nominee's level will be able to handle matters affecting the company; and (3) there is little likelihood that another particular matter affecting the company will arise during the PAS nominee's anticipated Federal service. In less compelling circumstances, an agency might require the PAS nominee to divest the stock, rather than including a specific recusal in the ethics agreement.

Please note that, in this sample and in 2.2.1, the language carefully states the reason that the agency is allowing the PAS nominee to retain potentially conflicting financial interests.

Sample Language:

I have been advised that the duties of the position of Under Secretary may involve particular matters affecting the financial interests of the following entities: Bennett Financial, LLC; Bortot Wilderness, Inc.; and Molinaro Power Saws, LLC. The agency has determined that it is not necessary at this time for me to divest my interests in these entities because the likelihood that my duties will involve any such matter is remote. Accordingly, with regard to each of these entities, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the entity for as long as I own it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

2.2.1 – 208 recusal for specific stocks that pose a likely conflict

Comment:

See the comment to 2.2.0. As is the case in 2.2.0, the language of this sample carefully states the reason that the agency is allowing the PAS nominee to retain potentially conflicting financial interests.

Sample Language:

I have been advised that the duties of the position of Under Secretary may involve particular matters affecting the financial interests of the following entities: Bortot Wilderness, Inc., and Molinaro Power Saws, LLC. The agency has determined that it is not necessary at this time for me to divest my interests in these entities because my recusal from particular matters in which these interests pose a conflict of interest will not substantially limit my ability to perform the essential duties of the position of Under Secretary. Accordingly, for as long as I own these interests, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of either of these entities, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

2.2.2 – 208 recusal for specific bonds that pose only a remote risk of a conflict

Comment:

See the comment to 2.2.0 for a discussion of the reason that specific 208 recusals are disfavored except in limited circumstances. In those limited circumstances in which a specific recusal for bonds is appropriate, a significant feature of the following sample language for bonds is the identification of the interest affected, as follows: “direct and predictable effect on the market value of any of these bonds or on the ability or willingness of the issuers to pay their debt obligations to me.”

Sample Language:

I have been advised that the duties of the position of Under Secretary may involve particular matters affecting the following bonds: Bennettsville general obligation bond (6/30/19); Bitlerton water bond (10/31/19); and Bitlerton general obligation bond (3/30/21). The agency has determined that it is not necessary at this time for me to divest these bonds because the likelihood that my duties will involve such a matter is remote. Accordingly, for as long as I own these interests, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the market value of any of these bonds or on the ability or willingness of the issuers to pay their debt obligations to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

2.2.3 – 208 recusal for specific bonds that pose a likely conflict

Comment:

See the comment to 2.2.2.

Sample Language:

I have been advised that the duties of the position of Under Secretary may involve particular matters affecting the following bonds: Bennettsville general obligation bond (6/30/19); Bitlerton water bond (10/31/19); and Bitlerton general obligation bond (3/30/21). The agency has determined that it is not necessary at this time for me to divest these bonds because my recusal from particular matters in which these bonds pose a conflict of interest will not substantially limit my ability to perform the essential duties of the position of Under Secretary. Accordingly, for as long as I own these interests, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the market value of any of these bonds or on the ability or willingness of the issuers to pay their debt obligations to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

2.2.4 – 208 recusal for a promissory note from a company

Comment:

In this sample, the PAS nominee is recused from personal and substantial participation in any particular matter that will directly and predictably affect the “ability or willingness” of the company to repay a promissory note.

Sample Language:

I hold a promissory note from LJ Francis, Inc. For as long as I hold this note, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of LJ Francis, Inc., to repay this note, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

2.3.0 – 208 recusal for a former employer when retaining employer stock

Comment:

The significant feature of this sample language is the inclusion of a recusal under 18 U.S.C. § 208. As demonstrated in 5.2.0 below, an ethics agreement normally contains a recusal under 5 C.F.R. § 2635.502 when a PAS nominee will have no financial interest in an employer after resignation. However, a recusal under 18 U.S.C. § 208 is necessary if the PAS nominee will retain stock in the employer after resignation. As demonstrated in 3.2.2 below, an ethics agreement should contain two different recusals when a PAS nominee will divest the employer’s stock within a year of resignation.

Sample Language:

Upon confirmation, I will resign from my position with Bortot Wilderness, Inc. Because I will continue to own stock in Bortot Wilderness, Inc., I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bortot Wilderness, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

2.3.1 – 208 recusal for a former employer when retaining employer stock options

Comment:

See the comment to 2.3.0. If the PAS nominee is divesting the stock options, see 3.2.3 below.

Sample Language:

Upon confirmation, I will resign from my position with Bortot Wilderness, Inc. Because I will continue to hold stock options in Bortot Wilderness, Inc., I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bortot Wilderness, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

2.3.2 – 208 recusal for a former employer when retaining a financial interest tied to the employer's profits

Comment:

One significant feature of this language is its specificity regarding the details of the payment of a share of profits to the PAS nominee. In this hypothetical situation, the agency was careful to collect these details in order to analyze the appropriateness of this payment under 18 U.S.C. § 209. In connection with this analysis, the agency specifically considered the factors described in OGE's "Summary of the Restriction on Supplementation of Salary," DAEOgram DO-02-016, DO-02-016A (Jul. 1, 2002).

Another significant feature of this language is the differing standards for the PAS nominee's recusal at different times. The highest level of recusal applies during the period in which the amount of the payment can be affected by the employer's earnings. Another level of recusal applies during the period after the amount of the payment has been fixed and before the PAS nominee has received the final installment.

If the PAS nominee had resigned within the past year, the agreement would have contained a third level of recusal. In that event, this sample would have ended with the following sentence: "In addition, for a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in

which I know BMBB, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).”

Note that the date of this agreement is August 1, 2014.

Sample Language:

I resigned from my position with BMBB, Inc., in January 2011. At the time of my resignation, I sold all of my stock in BMBB, Inc., back to the company, and I entered into a separation agreement that provided for BMBB, Inc., to pay me a portion of its profits for four years after my retirement. On April 1, 2012, I received 40 percent of the calendar year 2011 profits; on April 1, 2013, I received 30 percent of the calendar year 2012 profits; on April 1, 2014, I received 20 percent of the calendar year 2013 profits; on April 1, 2015, I will receive 10 percent of the calendar year 2014 profits. Through December 31, 2014, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of BMBB, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). Thereafter, until I receive the remaining payment due to me, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of BMBB, Inc., to honor its contractual obligation, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

2.3.3 – 208 recusal for a former employer when retaining a passive investment interest in a partnership

Comment:

A significant feature of this sample is that it contains language addressing the earned income ban in Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990), which bars full-time Senate-confirmed Presidential appointees from earning any outside income.

In this hypothetical situation, the PAS nominee is resigning from a position with a venture capital firm that holds 10 start-up companies. Although the PAS nominee is resigning from this position, she will continue to be an investor. This sample does not contain a separate recusal under 5 C.F.R. § 2635.502 for clients because the partnership does not represent clients. This sample does include a recusal under 18 U.S.C. § 208 because, as an investor, the PAS nominee will continue to have a financial interest in the partnership.

The agency’s ethics officials also will counsel this hypothetical PAS nominee that 18 U.S.C. § 208 imputes to her the interests of the partnership’s general partner. In this case, the hypothetical PAS nominee may qualify for the exemption at 5 C.F.R. § 2640.202(f) with regard to the general partner.

Sample Language:

Upon confirmation, I will resign from my position as managing partner of Bennett Venture Capital, LP, and I will become only a limited partner of this entity. During my appointment, I will not manage this entity or provide any other services to it. Instead, I will receive only passive investment income from it. As Under Secretary, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bennett Venture Capital, LP, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

2.3.4 – 208 recusal for a former employer when retaining a passive membership in a limited liability corporation

Comment:

See the comment to 2.3.3.

Sample Language:

Upon confirmation, I will resign from my position as managing member of Bennett Venture Capital, LLC, and I will become a non-managing member of this entity. During my appointment, I will not manage this entity or provide any other services to it. Instead, I will receive only passive investment income from it. As Under Secretary, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bennett Venture Capital, LLC, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

2.4.0 – limited 208 recusal related to contractual arrangements

Comment:

The key feature of this sample is its use of the “ability or willingness” standard. In this hypothetical, the agency has confirmed that the PAS nominee no longer holds any Bortot Wilderness, Inc., stock. The agency also has confirmed that the PAS nominee does not provide any services to Bortot Wilderness, Inc. Note that the date of this agreement is February 1, 2015.

Sample Language:

I resigned from my former position with Bortot Wilderness, Inc., in June 2011. At the time of my resignation, I entered into an exit agreement with Bortot Wilderness, Inc., that entitles me to tax preparation services through June 2017. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Bortot Wilderness, Inc., to provide this contractual benefit to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

2.4.1 – limited 208 recusal related to defined benefit plans

Comment:

As with recusals addressing other contractual arrangements, the key feature of this sample is that it limits the recusal requirement to particular matters affecting the “ability or willingness” to honor contractual obligations. Further guidance relevant to ethics agreements addressing defined benefit pension plans is available in OGE Informal Advisory Memorandum 99 x 6 (Apr. 14, 1999) (“OGE believes that, as a practical matter, most governmental matters in which an employee would participate are unlikely to have a direct and predictable effect on the plan sponsor’s ability or willingness to pay the employee’s pension.”), also published as OGE DAEOgram DO-99-15 (Apr. 14, 1999). Based on the guidance of that informal advisory memorandum, agencies often elect not to address defined benefit pension plans in ethics agreements for PAS nominees. Note that the language of this sample refers to “positions” rather than “position” because, in this hypothetical, the PAS nominee held positions as Vice President and a member of the Board of Directors.

Sample Language:

Upon confirmation, I will resign from my positions with Bortot Wilderness, Inc. Because I will continue to participate in this entity’s defined benefit pension plan, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Bortot Wilderness, Inc., to provide this contractual benefit, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). For a period of one year after my resignation, I also will not participate personally and substantially in any particular matter involving specific parties in which I know Bortot Wilderness, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

2.4.2 – limited 208 recusal related to state or local government defined benefit plans

Comment:

See the comment to 2.4.1 above and 5 C.F.R. § 2640.201(c)(2). For reasons similar to the reasons discussed in 2.4.1 above, agencies usually find it unnecessary to include recusals related to a state’s defined benefit pension plan.

Sample Language:

Upon confirmation, I will resign from my position with the Department of Motor Vehicles for the State of Maryland. Following my resignation, I will continue to participate in the State Employees Retirement System of Maryland, a defined benefit pension plan. Because I will continue to participate in this entity’s defined benefit plan, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of the State of Maryland to provide this contractual benefit to

me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2), such as 5 C.F.R. § 2640.201(c)(2).

2.4.3 – limited 208 recusal related to other continuing employee benefits

Comment:

The key feature to this sample is that it limits the recusal requirement to particular matters affecting the “ability or willingness” of the other party to the contract to honor the contractual arrangement. Another feature is a reference to the fact that this hypothetical contractual arrangement is “consistent with the corporation’s practice for departing executives,” which is relevant to the agency’s analysis under 18 U.S.C. § 209. Also, the recusal under 18 U.S.C. § 208 does not mention the availability of regulatory exemptions because there are no applicable exemptions. For reasons similar to those discussed in 2.4.1 above, agencies usually find it unnecessary to include recusals related to routine employee benefits. Note that the language of this sample refers to “positions” rather than “position” because, in this hypothetical, the PAS nominee held positions as Vice President and a member of the Board of Directors.

Sample Language:

Upon confirmation, I will resign from my positions with Bortot Wilderness, Inc. As a retiring executive of Bortot Wilderness, Inc., I am entitled to receive health coverage and life insurance for both me and my spouse for the rest of our lives, consistent with the corporation’s practice for departing executives. Therefore, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Bortot Wilderness, Inc., to provide these contractual benefits, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). For a period of one year after my resignation, I also will not participate personally and substantially in any particular matter involving specific parties in which I know Bortot Wilderness, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

CHAPTER 3: DIVESTITURES

3.0.0 – divestitures: general discussion

The deadline for divestiture can be stated in terms of days (e.g., “within 90 days of my confirmation”), or it can be tied to the applicable regulation (“within the time limits established in 5 C.F.R. § 2634.802(b)”). The advantage of tying the deadline to the number of days is that it provides clarity to the PAS nominee and interested parties. The advantage of tying the deadline to the regulation is that, in addition to establishing a deadline, it references the regulation that establishes a procedure for requesting extensions. The samples in this guide tie the deadline to the number of days, but either approach is acceptable.

As noted above in the introduction to this guide, the agency’s determination regarding the assets to be divested should take into consideration particular matters of general applicability, not merely particular matters involving specific matters. See OGE DAEogram, DO-06-029 (Oct. 4, 2006). Thus, for example, a conflicts analysis that focuses only on agency contractors and grant applicants may be insufficient.

Note that these samples employ the word “divest” rather than the word “sell” because the PAS nominee must commit to the divestiture whether or not a “sale” is possible. Although a sale may be the most common means of divestiture, the PAS nominee will need to divest the conflicting asset through one means or another.

Finally, note that these samples use the phrase “my interests.” This phrase is intended to cover not only interests that the PAS nominee owns personally but also interests imputed to the PAS nominee because they are held by the PAS nominee’s spouse or dependent children. Divestiture by all of these individuals is usually necessary to resolve the PAS nominee’s potential conflicts of interest. Capturing both personal and imputed interests with the phrase “my interests” avoids a cumbersome formulation of divestiture language, and there is no need to distinguish between the PAS nominee’s interests, the spouse’s interests, the dependent child’s interests, and jointly held interests. Ethics officials are encouraged to make sure that the PAS nominee understands the scope of this divestiture commitment before the PAS nominee signs the ethics agreement, so that the PAS nominee is not surprised when divestiture of individually and jointly held interests of these family members is later required.

3.1.0 – language regarding Certificates of Divestiture

Comment:

Discussion of Certificates of Divestiture in ethics agreements alerts the PAS nominee of the option to request a Certificate of Divestiture. The PAS nominee must commit unconditionally to divest, whether or not OGE ultimately issues a Certificate of Divestiture. As OGE has explained, an ethics agreement may not make “the divestiture of prohibited or problematic holdings contingent upon receiving a Certificate of Divestiture.” DAEogram DO-01-013 (Mar. 28, 2001), DAEogram DO-98-013 (Apr. 8, 1998). Note that this sample language usually appears near the end of an ethics agreement, in order to make clear that it refers to all

divestitures discussed in the agreement. There is no need to repeat this language at the end of each separate paragraph in the agreement that discusses divestitures.

Sample Language:

I understand that I may be eligible to request a Certificate of Divestiture for qualifying assets and that a Certificate of Divestiture is effective only if obtained prior to divestiture. Regardless of whether I receive a Certificate of Divestiture, I will ensure that all divestitures discussed in this agreement occur within the agreed upon timeframes and that all proceeds are invested in non-conflicting assets.

3.2.0 – interim 208 recusal pending divestiture of a single asset

Comment:

This language includes the PAS nominee’s commitment to recuse from conflicting matters pending divestiture.

Sample Language:

I will divest my interests in Bortot Wilderness, Inc., within 90 days of my confirmation. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of this entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

3.2.1 – interim 208 recusal pending divestiture of multiple assets

Comment:

This language includes the PAS nominee’s commitment to recuse from conflicting matters pending divestiture. The recusal language has been drafted carefully to require recusal from matters affecting only those assets that the PAS nominee has not yet divested. One common drafting error is to require recusal from matters affecting “these entities” or “any of these entities” until the PAS nominee has completed *all* of the divestitures (e.g., “Until I have completed *these* divestitures, I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of *these entities*.”). The following sample avoids this drafting error by focusing on “each of these entities” that the PAS nominee has not yet divested. By focusing on the interests of “each of these entities,” the language makes clear that the PAS nominee will recuse from a particular matter even if it affects only one of the entities. By focusing on the interest of only those entities that the PAS nominee has *not yet divested*, the language makes clear that the PAS nominee will not need to recuse from a particular matter affecting an entity after the PAS nominee has divested the financial interest in that entity. This clarity is useful because the PAS nominee may complete the various required divestitures on different dates.

Sample Language:

I will divest my interests in the following entities within 90 days of my confirmation: Bortot Wilderness, Inc.; Molinaro Power Saws, LLC; Bennett Worldwide Investigations Co.; and Bitler Environmental Consulting, LP. With regard to each of these entities, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

3.2.2 – interim 208 recusal for a former employer when divesting the employer’s stock

Comment:

The significant feature of this sample is the inclusion of two recusals. The subject of multiple recusals is discussed in 2.0.0 above. As demonstrated in 2.3.0 above, an ethics agreement normally contains only the 18 U.S.C. § 208 recusal when a PAS nominee retains a financial interest in a former employer after resignation. As demonstrated in 5.2.0 below, an ethics agreement normally contains only a 5 C.F.R. § 2635.502 recusal for a former employer when a PAS nominee does not retain such a financial interest. This sample, however, contains both recusals because the 18 U.S.C. § 208 recusal will apply only until the PAS nominee divests the employer’s stock, while the 5 C.F.R. § 2635.502 recusal will apply for a full year after the PAS nominee’s resignation.

Sample Language:

Upon confirmation, I will resign from my position with Bortot Wilderness, Inc. I will divest my stock in Bortot Wilderness, Inc., within 90 days of my confirmation. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of this entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). For a period of one year after my resignation, I also will not participate personally and substantially in any particular matter involving specific parties in which I know Bortot Wilderness, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

3.2.3 – interim 208 recusal for a former employer when divesting the employer’s stock options

Comment:

See the comment to 3.2.2. This sample explicitly emphasizes that both steps of the divestiture will occur before the applicable deadline. It also states that divestiture will occur after the PAS nominee’s “appointment” because the PAS nominee will not be eligible for a Certificate of Divestiture until the PAS nominee has been appointed. In addition, the recusal language refers to both “stock options and stock,” inasmuch as the PAS nominee will acquire

stock by exercising the options. Finally, this sample indicates what will happen to unvested options.

Sample Language:

Upon confirmation, I will resign from my position with Bortot Wilderness, Inc. I will forfeit all Bortot Wilderness, Inc., stock options that are unvested at the time of my resignation. Following my appointment, I will divest my vested stock options and stock in Bortot Wilderness, Inc., within 90 days of my confirmation. If I divest the stock options by exercising them, I will divest the resulting stock within 90 days of my confirmation. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of this entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). For a period of one year after my resignation, I also will not participate personally and substantially in any particular matter involving specific parties in which I know Bortot Wilderness, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

3.2.4 – interim 208 recusal for an investment fund when the fund and a carried interest in the fund are being divested

Comment:

In this sample, the PAS nominee has a financial interest in an investment fund. In addition, he has a carried interest in the fund. The carried interest in this sample is tied to the future profits of the fund. The language of this sample is designed to ensure that there is no confusion on the part of the PAS nominee that the carried interest must be divested.

Sample Language

I am invested in two Conre Capital Partners funds: Conre Capital Fund II, LP and Conre Capital Fund III, LP. Within 90 days of my confirmation, I will divest my interests in Conre Capital Fund II, LP and Conre Capital Fund III, LP, including my carried interests in these funds. With regard to each of these funds, I will not participate personally and substantially in any particular matter in which to my knowledge I have a financial interest, if the particular matter has a direct and predictable effect on the financial interests of the fund or its underlying holdings until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

3.3.0 – divestiture of a prohibited holding

Comment:

This sample illustrates an approach to the divestiture of an asset that is prohibited by a specific statutory or regulatory prohibition, as opposed to a divestiture necessitated by 18 U.S.C. § 208.

Some statutory and regulatory provisions require divestiture of prohibited holdings before the PAS nominee actually assumes the duties of the position; other statutory and regulatory provisions require divestiture within a specified time period. In any case, the ethics agreement needs to be precise about the timing of divestitures of prohibited holdings. In addition, the agency needs to coordinate with OGE in advance to ensure that any request for a Certificate of Divestiture is processed promptly after the PAS nominee is appointed and before the PAS nominee becomes subject to the statutory prohibition. In the example below, the PAS nominee will divest after appointment but before commencing Federal service. However, the language of the agreement should be tailored specifically to address the requirements of any applicable legal authorities.

In some cases, compliance with statutory prohibitions also necessitates coordination with the Office of the Counsel to the President regarding the timing of an appointment, in order to ensure that the PAS nominee has adequate time to effect necessary divestitures before a prohibition becomes applicable to the PAS nominee. *See, e.g.*, 12 U.S.C. §§ 242 (“Each member of the Board shall within fifteen days after notice of appointment make and subscribe to the oath of office”), 244 (“No member . . . shall . . . hold stock in any bank . . . and before entering upon his duties as a member . . . he shall certify under oath that he has complied with this requirement”).

For purposes of this sample language, the date of “appointment” is the date on which the President signs the PAS nominee’s commission. This date likely will be distinct from the date on which the PAS nominee actually assumes the duties of the Federal position.

Sample Language:

I understand that the Board’s supplemental standards of conduct regulations prohibit Board members from holding financial interests in commercial providers of fissible material. 70 C.F.R. § 12901.101(a)(1). I currently hold financial interests in the following prohibited entities: Atomic Bortot, Inc., and Molinaro’s Fissible Isotopes, LLC. I will divest these assets after my appointment but before I assume the duties of the position of Board member.

3.4.0 – divestiture due to inability to disclose assets of a non-excepted investment fund that is the subject of a confidentiality agreement

Comment:

A PAS nominee needs to disclose the underlying assets of an investment fund that does not qualify as an excepted investment fund under 5 C.F.R. § 2634.310(c) or § 2634.907(i)(3). However, managers of some private funds do not disclose underlying assets to their investors. To address such cases, OGE has provided guidance regarding the circumstances under which it will certify a PAS nominee’s report when the PAS nominee lacks access to information about the holdings of an investment fund. OGE Legal Advisory LA-14-05 (2014). In other circumstances, a PAS nominee will need to include in the ethics agreement a discussion of the planned disposition of the investment fund. The following sample describes a situation in which a PAS nominee has access to information about the underlying holdings of two investment funds but is

unable to disclose that information as a result of having entered into confidentiality agreements prior to being considered for possible nomination to a PAS position. This language does not apply to a PAS nominee for a special Government employee position in which the PAS nominee is expected to serve for no more than 60 days in a calendar year.

Sample Language:

I have disclosed financial interests in Bortot Capital Partners, LP and the Mabry Fund, LP. However, preexisting confidentiality agreements barred me from identifying the underlying assets of these funds in my financial disclosure report. Therefore, I will divest my financial interests in these funds as soon as possible after confirmation and not later than 90 days after my confirmation. With regard to each of these funds, until I have divested the fund, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of that fund or its underlying assets, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

3.5.0 – sale of privately-traded employer stock back to the employer

Comment:

If a PAS nominee must divest the stock of an employer that is a private corporation, the PAS nominee may have to sell the stock back to the employer. If the sale will occur after the PAS nominee enters Federal service, the agency will evaluate the terms of the sale under 18 U.S.C. § 209. The agency will consider the factors discussed in OGE’s “Summary of the Restriction on Supplementation of Salary” in connection with 18 U.S.C. § 209. DAEOgram DO-02-016, DO-02-016A (July 1, 2002).

This sample addresses a hypothetical situation in which the sale will occur after the PAS nominee enters Federal service. In this context, the agency’s analysis under 18 U.S.C. § 209 noted the fact that the employer has established a price for its stock that is applicable to all of its employees.

If a PAS nominee will sell stock back to an employer before entering Federal service, the sale may constitute an extraordinary payment, depending partly on whether the employer has established a price that is applicable to all employees. In that event, the ethics agreement may need to include a recusal under 5 C.F.R. § 2635.503. Language for such a recusal can be extrapolated from the sample at 6.2.0 below.

Sample Language:

I will divest my shares of private stock in Bortot Wilderness, Inc., within 90 days of my confirmation. Consistent with the company’s policy for departing executives, Bortot Wilderness, Inc., will repurchase these shares upon my resignation. Bortot Wilderness, Inc., values its private stock quarterly, and the repurchase price will be based on the most recent quarterly valuation at the time of my resignation. I will not participate personally and substantially in

any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bortot Wilderness, Inc., until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

3.6.0 – interim 208 recusal pending divestiture of a sector mutual fund that does not qualify for the *de minimis* exemption at 5 C.F.R. § 2640.201(b)

Comment:

The PAS nominee in this sample will recuse from conflicting particular matters until he has divested an interest in a sector mutual fund that does not qualify for the *de minimis* exemption at 5 C.F.R. § 2640.201(b). The value of this hypothetical PAS nominee’s interest in the sector fund is greater than \$50,000.

When using this sample, agency ethics officials may need to caution the PAS nominee that this sample does not address particular matters affecting the fund itself as a legal entity. 5 C.F.R. § 2640.201(d) establishes a limited exemption for “particular matters of general applicability” affecting the fund as a legal entity. However, that exemption does not extend to “particular matters involving specific parties.” Pending divestiture of the fund, the PAS nominee may not participate in a particular matter involving specific parties that will have a direct and predictable effect on the fund as a legal entity. This sample does not address that issue because most PAS nominees are unlikely to participate in such party matters. If the PAS nominee’s duties will include such party matters, as may be the case for certain PAS nominees to the U.S. Internal Revenue Service or the U.S. Securities and Exchange Commission for example, agency ethics officials may need to incorporate a discussion of 5 C.F.R. § 2640.201(d) in the ethics agreement.

Sample Language:

I will divest my interest in the Marinec Healthcare Fund, within 90 days of my confirmation. Until I have completed this divestiture, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of any holding of the Marinec Healthcare Fund that is invested in the healthcare sector, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

CHAPTER 4: EXEMPTIONS, WAIVERS, AND AUTHORIZATIONS

4.0.0 – exemptions, waivers, and authorizations: general discussion

In certain circumstances, an ethics agreement may need to disclose a PAS nominee's intention to rely on a waiver or an authorization. Some agencies elect to include certain references to specific exemptions in ethics agreements. The following samples provide language for these purposes.

4.1.0 – reliance on *de minimis* exemptions for interests in securities

Comment:

This sample may be useful in an ethics agreement when a PAS nominee is relying on *de minimis* exemptions for specific investments in securities. However, this sample should not be a substitute for individualized training and counseling. Agencies should counsel PAS nominees thoroughly regarding the requirements of *de minimis* exemptions. In particular, agencies should ensure that PAS nominees understand that *de minimis* limits are based on aggregate values, not on the values of individual assets.

Note that this sample does not include a recusal under 18 U.S.C. § 208. This sample assumes that the ethics agreement also contains the standard 18 U.S.C. § 208 recusal in 2.1.0. This sample is intended only to elaborate on the general references to the exemptions that are contained in 2.1.0 (i.e., “unless I . . . qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2)”). This sample language is not necessary in every case, but some agencies prefer to use it when a PAS nominee is specifically relying on a *de minimis* exemption for assets that otherwise would present likely conflicts of interest.

Sample Language:

If I rely on a *de minimis* exemption under 5 C.F.R. § 2640.202 with regard to any of my financial interests in securities, I will monitor the value of those interests. If the aggregate value of interests affected by a particular matter increases and exceeds the *de minimis* threshold, I will not participate personally and substantially in the particular matter that to my knowledge has a direct and predictable effect on the interests, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

4.1.1 – reliance on *de minimis* exemptions for interests in sector mutual funds

Comment:

The sample language in 4.1.0 above addresses reliance on the exemption under 5 C.F.R. § 2640.202 for certain *de minimis* financial interests in securities. The following sample language addresses the exemption for *de minimis* interests in sector mutual funds under 5 C.F.R. § 2640.201(b).

Sample Language:

If I rely on a *de minimis* exemption under 5 C.F.R. § 2640.201(b) with regard to any of my financial interests in sector mutual funds, I will monitor the value of those interests. If the aggregate value of my interests in sector mutual funds that concentrate in any one sector exceeds \$50,000, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of any holdings of the funds that are in the specific sector in which the funds concentrate, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

4.2.0 – plan to request a waiver pursuant to 18 U.S.C. § 208(b)(1)

Comment:

Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990), requires agencies to consult with OGE when practicable before issuing a waiver pursuant to 18 U.S.C. § 208. With regard to PAS nominees, such consultation is practicable during the review of the PAS nominee's financial disclosure report. Such consultations often will be a necessary condition for OGE's certification of the financial disclosure report of a PAS nominee. Therefore, the agency works with OGE during the certification process to evaluate the appropriateness of issuing a waiver for the interests at issue. As illustrated in the following sample, language in the ethics agreement should place the Senate on notice that a PAS nominee intends to resolve a conflict of interest by seeking a waiver. For additional guidance on waivers, see OGE DAEOgram, DO-07-006 (Feb. 23, 2007).

Sample Language:

I will request a written waiver pursuant to 18 U.S.C. § 208(b)(1) regarding my financial interest in Bortot Wilderness, Inc. Until I have obtained such a waiver, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of this entity.

4.3.0 – plan to request authorization pursuant to 5 C.F.R. § 2635.502(d)

Comment:

As illustrated in the following sample, language in the ethics agreement should place the Senate on notice when a PAS nominee intends to resolve an appearance issue by seeking an authorization pursuant to 5 C.F.R. § 2635.502(d). In any such case, the agency works with OGE during the certification process to evaluate the appropriateness of issuing an authorization pursuant to 5 C.F.R. § 2635.502(d). Such consultation often will be a necessary condition for OGE's certification of the financial disclosure report of a PAS nominee.

Sample Language:

Upon confirmation, I will resign from my position with the Wyoming State Police. For a period of one year after my resignation, I will have a “covered relationship” under 5 C.F.R. § 2635.502 with the Wyoming State Police. Pursuant to 5 C.F.R. § 2635.502(d), I will seek written authorization to participate in particular matters involving specific parties in which the Wyoming State Police is a party or represents a party.

4.3.1 – plan to request authorization pursuant to 5 C.F.R. § 2635.502(d) subject to a limitation

Comment:

See the comment to 4.3.0. As a modification to 4.3.0, the following sample provides a limitation on a PAS nominee’s authorization to participate in certain matters in which the PAS nominee previously participated in another capacity outside the Federal Government.

Sample Language:

Upon confirmation, I will resign from my position as Director of the Wyoming State Police. For a period of one year after my resignation, I will have a “covered relationship” under 5 C.F.R. § 2635.502 with the Wyoming State Police. Pursuant to 5 C.F.R. § 2635.502(d), I will seek written authorization to participate in particular matters involving specific parties in which the Wyoming State Police is a party or represents a party. However, during my appointment to the position of Director of the Office of Emergency Coordination of State and Local Law Enforcement, I will not participate personally and substantially in any particular matter involving specific parties in which I previously participated as Director of the Wyoming State Police.

CHAPTER 5: RECUSALS PURSUANT TO 5 C.F.R. § 2635.502

5.0.0 – appearance recusals: general discussion

Most of these samples do not incorporate the “reasonable person” standard contained in 5 C.F.R. § 2635.502. That standard leaves an employee free to determine on a case-by-case basis whether a “reasonable person” with knowledge of the relevant facts would question the employee’s impartiality in certain matters. Under 5 C.F.R. § 2635.502(c)(1), the employee loses this discretion when the agency determines that a “reasonable person” with knowledge of the relevant facts would question the employee’s impartiality. In the context of a PAS nomination, an agency does not need to make a formal determination that a “reasonable person” actually would question the PAS nominee’s impartiality. An ethics agreement may require recusal when there is any concern about the potential for appearance issues to arise in connection with the PAS nominee’s participation in certain matters. Inasmuch as PAS nominees are the most senior leaders in the Federal executive branch, their ethics agreements often prospectively address the potential for appearance issues. This approach protects a PAS nominee from the types of questions that would arise if the PAS nominee were to self-regulate on a case-by-case basis.

Most of these samples employ the phrase “pursuant to 5 C.F.R. § 2635.502(d).” The specific reference to 5 C.F.R. § 2635.502(d) is consistent with the omission of any reference to the “reasonable person” standard. It signifies that the PAS nominee will obtain prior written authorization before participating in a covered matter and that the PAS nominee will not rely on an informal determination under 5 C.F.R. § 2635.502(c)(2). Exceptions to this approach are contained in 5.1.0 and 5.2.3 because those samples address circumstances in which there is no particular concern about the potential for appearance issues to arise in connection with the PAS nominee’s participation in certain matters.

Absent from these samples is generic language about the purpose of 5 C.F.R. § 2635.502 or about the significance of “covered relationships.” As suggested above, the agreement should be a concise statement of relevant commitments. Extraneous information can create ambiguity. Specifically with regard to a recusal under 5 C.F.R. § 2635.502, extraneous information tends to create confusion as to whether the PAS nominee is committing to recuse from certain matters or is committing merely to consider recusal on a case-by-case basis under the “reasonable person” standard. In order to eliminate the potential for such confusion, these samples do not restate or explain the regulatory prohibition.

Another notable feature of the recusals under 5 C.F.R. § 2635.502 in this guide is that they include the phrase “personally and substantially,” which does not appear in the regulation. As with recusals under 18 U.S.C. § 208, this language does not significantly limit the PAS nominee’s obligation to recuse. At the level of an official whose position requires Senate confirmation, nearly any level of participation would be deemed “personal and substantial” in light of the effect that the official’s participation would have on subordinates. Therefore, the primary reason for including the phrase “personally and substantially” in a recusal under 5 C.F.R. § 2635.502 is to avoid creating the misperception that a recusal under 18 U.S.C. § 208 is narrower than a recusal under 5 C.F.R. § 2635.502 with regard to the level of participation it permits. In the past, differences of language between recusals under 5 C.F.R. § 2635.502 that

omitted the phrase “personally and substantially” and recusals under 18 U.S.C. § 208 that included this phrase have led to questions based on such an impression.

The following samples employ the phrase “unless I am first authorized to participate,” rather than the phrase “unless I am authorized to participate.” The inclusion of the word “first” ensures consistency with the language of the sample recusals under 18 U.S.C. § 208 in this guide (i.e., “unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1)”). Omitting the word “first” may create confusion as to whether the timing of an authorization under 5 C.F.R. § 2635.502(d) is different than the timing of a waiver under 18 U.S.C. § 208(b)(1).

Finally, note that, as with recusals under 18 U.S.C. § 208, we have added language addressing the knowledge element. See the discussion of the knowledge element in 2.0.0 above.

5.1.0 – general 2635.502 recusal

Comment:

General recusals under 5 C.F.R. § 2635.502 are disfavored. A general recusal under 5 C.F.R. § 2635.502 effectively means only that the PAS nominee will recuse *if the PAS nominee decides to recuse*. Therefore, it adds little value to an ethics agreement because it does not reflect a specific commitment by the PAS nominee. However, if an agency does elect to include a general recusal under 5 C.F.R. § 2635.502, the agency should be careful to articulate the applicable legal standard correctly. In the following sample, the language correctly articulates this legal standard by requiring the PAS nominee to judge appearances from the perspective of “a reasonable person with knowledge of the relevant facts.”

Sample Language:

Finally, I will recuse myself from participation on a case-by-case basis in any particular matter involving specific parties in which I determine that a reasonable person with knowledge of the relevant facts would question my impartiality in that matter, unless I am first authorized to participate, pursuant to 5 C.F.R. part 2635, subpart E.

5.2.0 – one-year 2635.502 recusal for a former employer

Comment:

For party matters involving former employers, the ethics agreement does not, in most cases, leave the question of recusal under 5 C.F.R. § 2635.502 to a PAS nominee’s case-by-case determination. Instead, the Government determines prospectively that any such party matter will cause a reasonable person with knowledge of the relevant facts to question the PAS nominee’s participation in the matter. For this reason, the following sample states that the PAS nominee will recuse unless the PAS nominee first obtains authorization to participate, and it does not include any reference to “a reasonable person with knowledge of the relevant facts.”

Sample Language:

Upon confirmation, I will resign from my position with Bortot Wilderness, Inc. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know Bortot Wilderness, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

5.2.1 – one-year 2635.502 recusal for multiple former employers

Comment:

See the comment to 5.2.0.

Sample Language:

Upon confirmation, I will resign from my positions with the following entities: Bortot Wilderness, Inc.; Molinaro Power Saws, LLC; Bennett Worldwide Investigations Co.; and Bitler Environmental Consulting, LP. For a period of one year after my resignation from each of these entities, I will not participate personally and substantially in any particular matter involving specific parties in which I know that entity is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

5.2.2 – one-year recusal for a former employer in which the PAS nominee has a financial interest

Comment:

When a PAS nominee will retain a financial interest in a former employer, the ethics agreement often includes language addressing only the PAS nominee's obligation under 18 U.S.C. § 208. In most cases, there is no need to include an additional recusal under 5 C.F.R. § 2635.502 because a recusal under 18 U.S.C. § 208 is broader as to the scope of the matters covered than a recusal under 5 C.F.R. § 2635.502. Specifically, a recusal under 18 U.S.C. § 208 covers all particular matters, while a recusal under 5 C.F.R. § 2635.502 covers only a subset of particular matters (i.e., particular matters involving specific parties). Therefore, an agency often can use the language contained in any of the following samples: 2.3.0, 2.3.1, 2.3.2, 2.3.3, or 2.3.4.

In some circumstances, however, an ethics agreement may need to include both a recusal under 18 U.S.C. § 208 and a recusal under 5 C.F.R. § 2635.502. For example, the need for both recusals can arise if the obligation to recuse under 18 U.S.C. § 208 will expire before the obligation to recuse under 5 C.F.R. § 2635.502 will expire. Similarly, the PAS nominee may have an obligation to recuse from certain party matters involving former clients that is not addressed in the recusal under 18 U.S.C. § 208. Therefore, an agency may need to use the language contained in any of the following samples: 3.2.2, 3.2.3, 7.2.1, or 7.4.1.

Sample Language:

Upon confirmation, I will resign from my position with Bortot Wilderness, Inc. Because I will continue to own stock in Bortot Wilderness, Inc., I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bortot Wilderness, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

[or]

Upon confirmation, I will resign from my position with Bortot Wilderness, Inc. I will divest my stock in Bortot Wilderness, Inc., within 90 days of my confirmation. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of this entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). For a period of one year after my resignation, I also will not participate personally and substantially in any particular matter involving specific parties in which I know Bortot Wilderness, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

5.2.3 – one-year 2635.502 recusal for an organization with which the PAS nominee has had an unpaid position when the PAS nominee is not closely identified with the organization

Comment:

In most cases, 5.2.0 is the preferred language for recusals under 5 C.F.R. § 2635.502. 5.2.0 omits the “reasonable” person standard because the Government has determined prospectively that recusal is appropriate. The following sample, 5.2.3, differs from 5.2.0 because it includes the “reasonable person” standard. The language of 5.2.3 is not always advisable because including the “reasonable person” standard leaves the question of recusal to the PAS nominee’s own case-by-case determination about the appropriateness of participating in party matters involving an entity with which the PAS nominee has a “covered relationship.” In some situations, this approach may leave the PAS nominee vulnerable to questions that may arise if the PAS nominee self-authorizes his or her own participation in such matters. Therefore, the language of this sample, 5.2.3, is appropriate only when the totality of the circumstances weighs in favor of permitting the PAS nominee to self-authorize his or her own participation.

The following sample, 5.2.3, addresses a hypothetical situation in which the following circumstances weigh in favor of permitting the hypothetical PAS nominee to self-authorize her participation: (1) the organization was not the PAS nominee’s primary employer, (2) the PAS nominee was not in a senior leadership position with the organization and was not a spokesperson for the organization, (3) the PAS nominee is not closely identified with the organization in the minds of members of the public (e.g., as in the case of an organization’s founder or a person for whom the organization is named), and (4) the organization’s activities are

not closely linked with particular matters involving specific parties in which the PAS nominee is likely to be involved. Based on all of these hypothetical circumstances, this sample, 5.2.3, differs from 5.2.0 in that it leaves the question of recusal under 5 C.F.R. § 2635.502 to the PAS nominee’s case-by-case determination under the “reasonable person” standard.

Sample Language:

Upon confirmation, I will resign from my position with the Bitler Foundation. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know the Bitler Foundation is a party or represents a party if I determine that a reasonable person with knowledge of the relevant facts would question my impartiality in that matter, unless I am first authorized to participate, pursuant to 5 C.F.R. part 2635, subpart E.

5.3.0 – one-year 2635.502 recusal for former clients

Comment:

In the following sample, the PAS nominee will not retain a financial interest in the entity from which the PAS nominee is resigning.

Sample Language:

Upon confirmation, I will resign from my position with Bortot, Molinaro, Bennett and Bitler, LP. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know this firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party, for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

5.4.0 – recusal from particular matters involving specific parties in which the PAS nominee previously participated in connection with the PAS nominee’s prior non-Federal employment

Comment:

Sometimes PAS nominees are appointed to positions in which their responsibilities are likely to include matters in which they previously participated before entering Federal service. In such cases, the Government may have concerns about the potential for an appearance that the PAS nominee is “switching sides,” especially if the PAS nominee is an attorney, a lobbyist or an employee of an association. Although such concerns do not arise frequently, they do arise from time to time. This sample addresses a hypothetical situation in which such a concern has arisen.

One feature of this sample is that it relies on the process described in 5 C.F.R. § 2635.502(d) for any authorization of participation. This reliance on section 2635.502(d) is appropriate even though section 2635.502 does not explicitly address the appearance of “switching sides.” The notice of proposed rulemaking for the Standards of Ethical Conduct for Employees of the Executive Branch explained that section 2635.502 is flexible: “Proposed § 2635.502 . . . provides that an employee should use the process set forth in that section when circumstances other than those specifically described raise questions about his or her impartiality in the performance of official duties.” 56 Fed. Reg. 33778, 33786 (1991). Similarly, the notice of final rulemaking explained that section 2635.502(a)(2) is “intended to alert employees to the fact that the covered relationships described in § 2635.502(b)(1) are not the only relationships that can raise appearance issues and to encourage employees to use the process set forth in § 2635.502 to address any circumstances that would raise a question regarding their impartiality.” 57 Fed. Reg. 35006, 35026 (1992).

Sample Language:

Upon confirmation, I will resign from my position as General Counsel of the Consumer Defense Fund. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know the Consumer Defense Fund is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, for the duration of my appointment as General Counsel of the Manufactured Products Administration, I will not participate personally and substantially in any particular matter involving specific parties in which I know I previously participated in my capacity as General Counsel of the Consumer Defense Fund, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

5.4.1 – recusal from certain particular matters in which the PAS nominee previously participated in connection with the PAS nominee’s prior non-Federal employment

Comment:

The recusal in the previous sample, 5.4.0, required the PAS nominee to recuse from “particular matters involving specific parties.” The recusal in this sample, 5.4.1, is broader than the recusal in the previous sample, 5.4.0. The recusal in this sample, 5.4.1, requires the PAS nominee to recuse from “particular matters,” including both particular matters involving specific parties and particular matters of general applicability. The hypothetical agency officials in this sample elected to require the broad “particular matter” recusal because the activities of the PAS nominee’s previous employer are closely related to the mission of the agency.

As a practical matter, this “particular matter” recusal is limited to particular matters in which the PAS nominee previously “appeared before” or “directly communicated with” the agency. This limitation is intended to define the covered particular matters with sufficient clarity to enable agency staff to implement an effective screening arrangement.

Sample Language:

Upon confirmation, I will resign from my position as Director of Government Solutions with the Association of Metric Measurement Device Manufacturers (AMMDM). For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know AMMDM is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, for the duration of my appointment as Deputy Administrator, I will not participate personally and substantially in any particular matter in which I know I previously appeared before, or directly communicated with, the U.S. Metric Standards Administration on behalf of AMMDM, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

CHAPTER 6: SEVERANCE ARRANGEMENTS

6.0.0 – severance arrangements: general discussion

A reviewer necessarily works closely with a PAS nominee to develop a full factual understanding of the terms of a severance arrangement. In connection with such an arrangement, the PAS nominee's financial disclosure report may need to disclose both a continuing arrangement with an employer and any related financial interests. The ethics agreement carefully addresses the resolution of all conflicts of interest stemming from the severance package. In practice, the reviewer tailors the ethics agreement to the specific facts of the PAS nominee's individual circumstances.

If any severance payment will occur after the PAS nominee begins Federal service, the agency considers the factors discussed in OGE's "Summary of the Restriction on Supplementation of Salary" in connection with 18 U.S.C. § 209. DAEOgram DO-02-016, DO-02-016A (July 1, 2002). If the payment will occur before the PAS nominee begins Federal service, the agency considers the applicability of 5 C.F.R. § 2635.503.

Some of these samples include multiple recusals. They reflect the need for agency ethics officials to define carefully the scope of matters in which PAS nominees will participate after confirmation. Some financial interests require full recusal under 18 U.S.C. § 208 from any particular matter directly and predictably affecting the financial interests of former employers. However, other financial interests require only "ability or willingness" recusals under 18 U.S.C. § 208. In these instances, payments or benefits are not directly tied to earnings or to the value of stock (or other equity issuances). Instead, the commitment is dependent only on the employers' continuing "ability or willingness" to honor their commitments. In other cases, there may be no need for recusals under 18 U.S.C. § 208, but there may be reasons for including recusals under 5 C.F.R. § 2635.502 or 5 C.F.R. § 2635.503. For further discussion regarding the use of multiple recusals, see the comment to 2.0.0 above.

6.1.0 – sample of a complex executive severance and equity package

Comment:

This sample is very fact-specific. Note that the date of this hypothetical agreement is December 3, 2014. This sample is intended to demonstrate the level of specificity with which ethics agreements describe complex severance arrangements. However, the language of an ethics agreement is tailored to the circumstances of an individual PAS nominee. For additional discussion of the language of this sample generally, see the discussion in to 6.0.0 above and comments to 6.3.0 below. For a discussion regarding the use of multiple recusals, see 2.0.0 and 6.0.0 above.

Note that in a case, such as the one in this sample, where a filer is receiving an acceleration in order to resolve a conflict of interest that the government has identified, the PAS nominee or the PAS nominee's outside employer may need to consult a tax professional for advice regarding the acceleration. The U.S. Internal Revenue Service has published regulations

in connection with 26 U.S.C. § 409A regarding certain accelerations of payments under nonqualified deferred compensation plans that may be applicable to certain PAS nominees who have entered into ethics agreements. *See, e.g.,* 26 C.F.R. § 1.409A-3(j)(4)(iii). OGE takes no position with regard to the applicability of the IRS's regulations to an acceleration.

Sample Language:

Upon confirmation, I will resign from my position with Borlinaro, Inc. Following my resignation, I will receive from Borlinaro, Inc., a severance payment. Borlinaro, Inc., will make this payment to me before I assume the duties of the position of Under Secretary. For a period of two years from the date of this payment, I will not participate personally and substantially in any particular matter involving specific parties in which Borlinaro, Inc., is a party or represents a party, unless I first receive a written waiver pursuant to 5 C.F.R. § 2635.503(c).

Borlinaro, Inc., also will make a payment to me pursuant to a non-compete agreement that I signed when I began working for Borlinaro, Inc., in May 2000. The agreement provides that I will not work for a competitor of Borlinaro, Inc., for one year after a voluntary resignation from the company. Under the agreement, Borlinaro, Inc., has the right to enforce this non-compete clause for a second year, provided that it pays me an amount equivalent to an average of my annual base salary during my final three years of employment. Borlinaro, Inc., has advised me that it will exercise this right to enforce the non-compete clause for a period of two years in exchange for the required payment. Although the agreement provides for this payment to occur at the end of the first year following my resignation, Borlinaro, Inc., will accelerate this payment and will pay it to me before I assume the duties of the position of Under Secretary.

Consistent with the customary practice for departing executives of Borlinaro, Inc., I also am entitled to receive an annual bonus for fiscal year 2014 following my resignation. Borlinaro, Inc., will calculate this bonus using an objective formula that is based solely on the company's earnings for the period from October 1, 2013, through September 30, 2014. If I begin my service as Under Secretary prior to receiving this payment, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Borlinaro, Inc., to make this payment, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

If I resign on or before March 30, 2015, I will not receive a bonus for any portion of fiscal year 2015 that I work for Borlinaro, Inc. Consistent with the customary practice for departing executives of Borlinaro, Inc., if I resign after March 30, 2015, I will receive a *pro rata* bonus for 2015. Borlinaro, Inc., will calculate this bonus using an objective formula and will reduce the bonus proportionally to compensate me only for the portion of 2015 during which I will have worked for Borlinaro, Inc. If I begin my service as Under Secretary prior to receiving this payment, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Borlinaro, Inc., to make this payment, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

I own shares of Borlinaro, Inc., common stock. I also own vested nonqualified employee stock options and both vested and unvested incentive stock options for shares of Borlinaro, Inc.,

common stock. I do not own any unvested nonqualified employee stock options for shares of Borlinaro, Inc., common stock. Upon my resignation from Borlinaro, Inc., I will forfeit all unvested incentive stock options for shares of Borlinaro, Inc., common stock. Within 90 days of my confirmation, I will divest all of my common stock, all of my vested nonqualified employee stock options, and all of my vested incentive stock options in Borlinaro, Inc. If I divest the stock options by exercising them, I will divest the resulting stock within 90 days of my confirmation. Until I have divested all of these financial interests, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Borlinaro, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

Under the Borlinaro Executive Health Plan, my spouse and I will continue to receive free health coverage, consistent with the corporation's practice for departing executives. Borlinaro, Inc., will continue making all payments to the health provider under this plan for as long as either I or my spouse is living. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Borlinaro, Inc., to make these payments, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

6.2.0 – extraordinary payment recusal under 5 C.F.R. § 2635.503 that addresses a discretionary severance payment

Comment:

This sample specifies that the employer will make a discretionary severance payment before the PAS nominee begins Federal service. In this hypothetical situation, the reviewer has already confirmed that the employer is capable of making the payment before the PAS nominee's Federal service begins. Given the timing of this payment, the reviewer has analyzed it under 5 C.F.R. § 2635.503. If, instead, the employer were planning to make the payment after the beginning of the PAS nominee's Federal service, the reviewer would have analyzed the payment under 18 U.S.C. § 209. In that event, the reviewer would have considered the factors identified in OGE's "Summary of the Restriction on Supplementation of Salary." DAEOgram DO-02-016, DO-02-016A (Jul. 1, 2002).

Sample Language:

Following my resignation, I will receive a severance payment from Molinaro Power, Inc., before I assume the duties of the position of Under Secretary. For a period of two years after my receipt of this payment, I will not participate personally and substantially in any particular matter involving specific parties in which I know Molinaro Power, Inc., is a party or represents a party, unless I first receive a written waiver pursuant to 5 C.F.R. § 2635.503(c).

6.3.0 – severance payment pursuant to a standard employer policy

Comment:

This sample indicates that a particular payment is being made pursuant to a preexisting agreement and an employer’s standard policy. In this hypothetical situation, the agency has confirmed that the partnership makes such payments to all retiring partners. The consistency with which the partnership makes such payments is relevant to the agency’s analysis under 18 U.S.C. § 209.

Sample Language:

Upon confirmation, I will retire from my position with Bennett Venture Capital, LP. Pursuant to the Bennett Venture Capital, LP, 1998 Partnership Agreement for Participating Equity Partners, the partnership will pay me a severance payment, in three equal installments, totaling an amount equal to 75 percent of the average of my partnership share for my final three years. Until I have received these payments, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Bennett Venture Capital, LP, to make these payments to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

6.4.0 – outstanding bonus pursuant to a standard employer policy

Comment:

The date of this sample is January 15, 2015, and the sample addresses the nominee’s bonus for 2014. In connection with the agency’s evaluation of 18 U.S.C. § 209, the PAS nominee confirmed that the employer routinely pays bonuses to executives after their resignations. The PAS nominee also confirmed that the employer also uses an objective formula to calculate such bonuses. (Specifically, the hypothetical nominee explained to agency officials that the employer assigns differing quantities of “points” to individual executives at the beginning of the year and assigns a dollar-per-point value after calculating its profits following the end of the year. In this hypothetical, the employer eventually assigned a value of \$1,250 per point for calendar year 2014, and the nominee’s 200 points became worth \$250,000.)

If an employer does not use an objective formula, the agency will need to inquire about how the employer determined the amount of the bonus. The agency also will need to evaluate the payment under 18 U.S.C. § 209, using the factors identified in OGE’s “Summary of the Restriction on Supplementation of Salary.” DAEOgram DO-02-016, DO-02-016A (Jul. 1, 2002).

Finally, note that the recusal in this sample is not the full recusal under 18 U.S.C. § 208. This sample employs the limited “ability or willingness” recusal under 18 U.S.C. § 208 because the amount of the bonus does not depend on the firm’s future earnings. As noted above, the date of this agreement is January 15, 2015. The bonus is based on the application of an objective formula to the firm’s past earnings during the period between January 1, 2014, and

December 31, 2014. In that sense, the amount of the bonus is fixed, and the only variable is the firm's continued ability or willingness to pay a fixed bonus.

Sample Language:

Following my resignation, I will receive a bonus for calendar year 2014, as is the corporation's practice for departing executives. Borlinaro, Inc., will use an objective formula to calculate this bonus. Until I have received this payment, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Borlinaro, Inc., to make these payments to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

6.4.1 – outstanding bonus pursuant to a standard employer policy, when the employer will prorate the amount of the bonus

Comment:

The language of this sample is specific about the details of a bonus payment from the PAS nominee's employer. For example, although the date of this sample is hypothetically May 1, 2014, the sample addresses the bonuses for both fiscal year 2014 and fiscal year 2015. It also explains that the payment is consistent with the employer's standard practice, a fact that was relevant to the hypothetical agency's analysis under 18 U.S.C. § 209. In connection with the agency's evaluation of 18 U.S.C. § 209, the agency confirmed that the amount of the payment will be consistent with the amount paid to other executives, including executives who have resigned. See OGE's "Summary of the Restriction on Supplementation of Salary," DAEOgram DO-02-016, DO-02-016A (Jul. 1, 2002).

This sample includes a full recusal under 18 U.S.C. § 208 covering the period of time in which the PAS nominee's bonus is dependent on the company's profits. It includes an "ability or willingness" recusal covering the period of time after which the amount of the PAS nominee's bonus will be fixed and before the PAS nominee receives the bonus. Finally, it includes a one-year recusal for certain party matters under 5 C.F.R. § 2635.502, which may overlap the period in which the other recusals are applicable. When an agreement contains multiple recusals that are applicable at different times in this manner, the reviewer should explain them carefully to the PAS nominee. See 2.0.0 and 6.0.0 above for additional discussion about the use of multiple recusals.

In this hypothetical situation, the employer generates its income by selling power saws only to timber companies. Therefore, the employer's profits are not based on representational activities that may trigger concerns under 18 U.S.C. § 203 or the claims provision of 18 U.S.C. § 205. In some cases, the employer's earnings may trigger such concerns in connection with the PAS nominee's outstanding bonus. When such concerns arise, the agency will need to inquire about the method by which the employer will prorate the bonus. Depending on the factual circumstances, the PAS nominee may be unable to accept a prorated bonus that is based on a percentage of the employer's total earnings for the calendar or fiscal year. Such a bonus may be based partly on the employer's earnings at a time when the PAS nominee is a Federal employee.

In cases in which there are issues under 18 U.S.C. § 203 or 18 U.S.C. § 205, the employer may need to limit the bonus to a share of earnings during the specific period when the PAS nominee was not a Federal employee. For a sample of language addressing such issues, see 7.4.1 below.

Sample Language:

Following my resignation, I will receive a bonus for the work I performed during fiscal year 2014, as is the corporation's practice for departing executive members. Molinaro Power Saws, LLC, will use an objective formula to calculate this bonus. If I am confirmed before the end of the fiscal year on June 30, 2014, Molinaro Power Saws, LLC, will pay me a *pro rata* share of my bonus that covers only the period of fiscal year 2014 prior to my resignation. Through June 30, 2014, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Molinaro Power Saws, LLC, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). After June 30, 2014, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Molinaro Power Saws, LLC, to make this payment to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). In addition, for a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know Molinaro Power Saws, LLC, is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). I will not receive a bonus for fiscal year 2015.

6.4.2 – outstanding bonus is contingent on when the PAS nominee resigns from the employer

Comment

In this sample, the PAS nominee will receive her bonus only if she is still with her employer as of a certain date.

Sample Language

Upon confirmation, I will resign from my position with JB Chayya, Inc. I will receive any 2014 bonus to which I may be entitled only if I am still an employee of JB Chayya, Inc., on March 15, 2015, when such bonuses are paid. I will not receive a 2015 bonus. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know JB Chayya, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

6.4.3 – bonus is not pursuant to a standard policy and will be forfeited if not received prior to appointment

Comment

In the following sample, an employer might pay the PAS nominee a bonus, but payment of such a bonus either is not standard policy for the employer or is discretionary. The PAS nominee has agreed that she will either (1) receive the bonus from her former employer prior to assuming the duties of her Government position or (2) forfeit the bonus if it is not paid before she assumes the duties of her Government position. If the PAS nominee receives the bonus prior to assuming the duties of her Government position, the bonus may constitute an extraordinary payment from a former employer under 5 C.F.R. § 2635.503. In such a case, the PAS nominee would be required to recuse for two years from particular matters involving specific parties in which the former employer is a party or represents a party. On the other hand, if the PAS nominee forfeits the bonus, she will be required to recuse for one year under 5 C.F.R. § 2635.502.

Sample Language:

Upon confirmation, I will resign from my position with the XYZ Corporation. If the XYZ Corporation decides to pay me a bonus for work I performed during 2014, I will not accept the bonus and will forfeit it, unless I receive the bonus before I assume the duties of the position of Under Secretary. If I receive the bonus, I will not participate personally and substantially in any particular matter involving specific parties in which I know the XYZ Corporation is a party or represents a party for a period of two years from the date on which I receive the bonus, unless I first receive a written waiver pursuant to 5 C.F.R. § 2635.503(c). If I do not receive the bonus, I will not participate personally and substantially in any particular matter involving specific parties in which I know the XYZ Corporation is a party or represents a party for a period of one year from the date of my resignation, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

CHAPTER 7: ATTORNEYS

7.0.0 – attorneys: general discussion

Certain issues arise frequently in connection with the nominations of attorneys who are in private practice. The samples in this section address some of these issues, but they are not intended to be comprehensive.

One key feature of these samples is that they include recusals from both the law firm and from the PAS nominees' own clients. With regard to clients, the recusals under 5 C.F.R. § 2635.502 normally focus on the former clients of the PAS nominee, not the current or former clients of the law firm.

Another feature is that the recusals under 5 C.F.R. § 2635.502 refer to the former clients of PAS nominees only generally (e.g., “any particular matter involving specific parties in which *a former client of mine* is a party or represents a party”). They do not restate the list of clients identified in Schedule D, Part II, of the PAS nominee's financial disclosure report. The generic reference to any “former client” is preferable because the clients identified in Schedule D, Part II, do not include clients who paid \$5,000 or less. In addition, Schedule D, Part II, may include clients whom the PAS nominee served more than one year ago.

For similar reasons, the recusals for former clients refer generically to a period of one year from the date on which the PAS nominee “last provided service” to each former client. Consistent with the regulation, the period of recusal is not measured from the date of confirmation or the date of appointment (e.g., “for a period of one year from the date of my confirmation”). Instead, these samples establish a rolling period of recusal that is specific to each client: “I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party *for a period of one year after I last provided service to that client.*”

When the PAS nominee will be a special Government employee and will continue to work as an equity partner in a law firm, the recusal under 18 U.S.C. § 208 must include all particular matters affecting the financial interests of the law firm. The firm's financial interests include the firm's financial interests in cases involving clients of the firm who are not clients of the PAS nominee. Language addressing this situation is provided in 11.1.1 below (e.g., “I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of the firm.”).

7.1.0 – resignation from a salaried position with a law firm in which the PAS nominee does not have a financial interest

Comment:

This sample, which involves a salaried attorney, does not contain a recusal under 18 U.S.C. § 208 because the law firm's financial interests will no longer be imputed to the PAS nominee after the PAS nominee's resignation.

Note that the language of this sample is not appropriate in certain circumstances in which 18 U.S.C. § 208 will continue to impute the law firm's financial interests to a PAS nominee following the PAS nominee's resignation, as in 7.6.0 below. In 7.6.0 below, the hypothetical PAS nominee will continue to have an investment in a separate investment partnership in which the law firm is the general partner. Before using the language of the following sample, a reviewer should confirm that the PAS nominee has not invested in a separate partnership in which the law firm is the general partner, which would necessitate the use of the language in 7.6.0 below. The reviewer should also confirm that the PAS nominee does not have a capital account with the firm, which would necessitate the use of the language in 7.2.0, 7.2.1, or 7.2.2 below.

Sample Language:

Upon confirmation, I will resign from my position with the law firm of Bortot, Molinaro, Bennett and Bitler, LP. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know this firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.2.0 – the refund of a capital account after resignation will occur before the PAS nominee begins Federal service

Comment:

This sample, which involves a law firm partner, does not contain an “ability or willingness” recusal under 18 U.S.C. § 208, even though the law firm owes the PAS nominee an outstanding payment. The reason that such a recusal is unnecessary is that the payment will occur before the PAS nominee's Federal service begins.

Sample Language:

Upon confirmation, I will resign from my position with the law firm of Bortot, Molinaro, Bennett and Bitler, LP. I currently have a capital account with the firm, and I will receive a refund of that account before I assume the duties of the position of Under Secretary. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know this firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.2.1 – the refund of a capital account after resignation may occur after the PAS nominee begins Federal service

Comment:

This sample, which involves a law firm partner, contains an “ability or willingness” recusal under 18 U.S.C. § 208 because the law firm will owe the PAS nominee an outstanding payment after the PAS nominee’s Federal service begins.

Sample Language:

Upon confirmation, I will resign from my position with the law firm of Bortot, Molinaro, Bennett and Bitler, LP. I currently have a capital account with the firm, and I will receive a refund of that account after my resignation. Until I have received this refund, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of the firm to pay this refund, unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1). For a period of one year after my resignation, I also will not participate personally and substantially in any particular matter involving specific parties in which I know the firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.2.2 – a portion of a capital account refund may be withheld by the law firm for account reconciliation and tax payments

Comment:

Similar to sample 7.2.0 above, in this sample, the PAS nominee, who is a law firm partner, will receive a refund of a capital account before the PAS nominee’s Federal service begins. However, a portion of the capital account may be withheld by the law firm for account reconciliation and tax payments, with the balance to be refunded after the PAS nominee’s Federal service begins. Therefore, the sample contains an “an ability or willingness” recusal under 18 U.S.C § 208 because the law firm will owe the PAS nominee an outstanding payment.

Note that the date of this agreement is July 1, 2014.

Sample Language:

Upon confirmation, I will resign from my position with the law firm of Smith and Jones. I currently have a capital account with the firm, and I will receive a refund of that account before I assume the duties of the position of Director. However, the firm may withhold a portion of my capital account as a reserve for account reconciliations and tax payments that the firm makes on behalf of its partners. I will receive the balance of my capital account no later than January

2015. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the firm's ability or willingness to pay this refund, unless I first obtain a written waiver, pursuant to 18 U.S.C. §208(b)(1). For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know the firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.3.0 – the PAS nominee is a sole practitioner who will place the law practice in an inactive status

Comment:

In this sample, the PAS nominee is a sole practitioner who is agreeing to place her practice in an inactive status. Agency ethics officials should counsel a PAS nominee in such a circumstance about the strict requirements of maintaining the practice in an inactive status. The PAS nominee must understand that the PAS nominee's law practice may not perform any business activities, including: taking on new clients, generating income, advertising, engaging in correspondence, and making telephone calls. The only permissible activities involve ministerial duties that do not generate income and are necessary to maintain the legal existence of the business while it is in an inactive status.

Sample Language:

I am the sole proprietor of my law firm, which does business as The Law Firm of Sandi L. Bennett. Upon confirmation, my law firm will cease engaging in any business, including the representation of clients. During my appointment to the position of Assistant Secretary, the law firm will remain dormant and will not advertise. I will not perform any services for the firm, except that I will comply with any requirements involving legal filings, taxes and fees that are necessary to maintain the law firm while it is in an inactive status. As Assistant Secretary, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of The Law Firm of Sandi L. Bennett. In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.3.1 – the PAS nominee is a sole practitioner who will place the law practice in an inactive status and who may receive a referral fee from another attorney

Comment:

See the comment to 7.3.0 for a discussion of placing the law practice in an inactive status. In this variation, the PAS nominee may receive certain referral fees for transferring cases to other attorneys.

Sample Language:

I am the sole proprietor of my law firm, which does business as The Law Firm of Sandi L. Bennett. Upon confirmation, I will cease providing services to my clients and I will refer them to other legal counsel for any ongoing legal matters. I will complete all such referrals before I assume the duties of the position of Assistant Secretary. If I agree to accept any payment for referrals, I will consult your office regarding the applicability of 18 U.S.C. § 209 before I receive any such payment. Upon confirmation, my law firm will cease engaging in any business, including the representation of clients. During my appointment to the position of Assistant Secretary, the law firm will remain dormant and will not advertise. I will not perform any services for the firm, except that I will comply with any requirements involving legal filings, taxes and fees that are necessary to maintain the law firm while it is in an inactive status. As Assistant Secretary, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of The Law Firm of Sandi L. Bennett. In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.4.0 – the PAS nominee will have outstanding accounts receivable after appointment

Comment:

This sample contains an “ability or willingness” recusal under 18 U.S.C. § 208 because the hypothetical PAS nominee’s clients will owe outstanding payments after the PAS nominee’s Federal service begins. This sample includes language indicating that the PAS nominee and the clients will “fix” any amounts owed before the PAS nominee begins Federal service. The purpose of this language is to prevent a situation in which the PAS nominee might have to negotiate during the PAS nominee’s Federal service with former clients over the amounts owed. By resolving potential billing disputes in advance, the PAS nominee eliminates any potential for appearing to misuse the Federal position during subsequent negotiations with a former client.

See the comment to 7.3.0 for a discussion of sole practitioners generally. In addition, see 2.0.0 and 6.0.0 above for a discussion of the use of multiple recusals.

Sample Language:

I am the sole proprietor of my law firm, which does business as The Law Firm of Sandi L. Bennett. Upon confirmation, the law firm will cease engaging in any business, including the representation of clients. During my appointment to the position of Under Secretary, the law firm will remain dormant and will not advertise. I will not perform any services for the firm, except that I will comply with any requirements involving legal filings, taxes and fees that are necessary to maintain the law firm while it is in an inactive status. As Under Secretary, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of The Law Firm of Sandi L. Bennett. All amounts owed to me by any of my clients will be fixed before I assume the duties of the position of Under Secretary, and I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of any of these clients to pay these amounts. In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party, for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.4.1 – a law firm will owe the PAS nominee an outstanding partnership share after appointment

Comment:

This sample indicates that the PAS nominee will receive a partnership share after withdrawing from a partnership. The language addressing details of this payment is necessarily fact-specific. A reviewer must tailor an agreement's language to the individual circumstances of a particular PAS nominee. When drafting such individualized language, it may be helpful to review 6.0.0 and 6.1.0 above.

Note that the hypothetical date of this agreement is February 1, 2015. The language of this sample specifies that the PAS nominee's prorated partnership share will be based only on the firm's earnings during the period of 2015 prior to the PAS nominee's withdrawal. This sample intentionally establishes that the partnership share will not be based on a portion of the firm's total earnings for the entire year, which could include a period of time when the PAS nominee was a Federal employee.

In this hypothetical situation, the law firm's fiscal year ends on September 30, 2015, but the PAS nominee is likely to be confirmed before that date. (For purposes of this hypothetical situation, one can imagine that the PAS nominee ultimately will be confirmed on June 30, 2015, and will resign from the law firm that same day.) If the PAS nominee were confirmed, for example, on June 30, 2015, the language of this sample would not allow the law firm to prorate the PAS nominee's partnership share by paying 75% of the partnership share that he would have earned if he had resigned after September 30, 2015. Instead, the language of this sample requires the law firm to calculate its actual earnings through June 30, 2015, and to pay the PAS nominee a share of those actual earnings.

If, instead, the ethics agreement allowed the law firm to base the PAS nominee's prorated partnership share on the firm's total earnings for the year, the agency would need to evaluate the payment carefully under 18 U.S.C. § 203 and 18 U.S.C. § 205. The agency might also need to consider the emoluments clause of the United States Constitution. The ethics agreement also would need to contain an appropriate recusal under 18 U.S.C. § 208, as in 6.4.1 above.

The language of this sample indicates that the payment of the partnership share is being made pursuant to a preexisting agreement and an employer's standard policy. It specifically cites the "Bortot, Molinaro, Bennett and Bitler, LP, 1998 Partnership Agreement for Participating Equity Partners." In this hypothetical situation, the agency has confirmed that the firm makes this payment to all retiring equity partners who have signed the 1998 agreement. The consistency with which the firm makes this payment is relevant to the agency's analysis under 18 U.S.C. § 209. See DAEOgram DO-02-016, DO-02-016A (Jul. 1, 2002) ("Summary of the Restriction on Supplementation of Salary").

Note that this sample contains three different recusals. For a discussion about the use of multiple recusals, see 2.0.0 and 6.0.0 above. In addition, note that this sample does not address the refund of a capital account. For language addressing the refund of capital accounts, see 7.2.0, 7.2.1, and 7.2.2 above.

Sample Language:

Upon confirmation, I will withdraw from the partnership of Bortot, Molinaro, Bennett and Bitler, LP. Pursuant to the Bortot, Molinaro, Bennett and Bitler, LP, 1998 Partnership Agreement for Participating Equity Partners, I will receive a *pro rata* partnership share based on the value of my partnership interests for services performed in 2015 through the date of my withdrawal. This payment will be based solely on the firm's earnings through the date of my withdrawal from the partnership. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of Bortot, Molinaro, Bennett and Bitler, LP, to pay this *pro rata* partnership share to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). For a period of one year after my resignation, I also will not participate personally and substantially in any particular matter involving specific parties in which I know this firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.5.0 – the PAS nominee’s name appears in the name of the firm

Comment:

The language of this sample indicates that the PAS nominee has complied with 5 C.F.R. § 2636.305 by having his law firm remove his name from the name of the firm. Note that in this sample the hypothetical PAS nominee is “Murray L. Bennett” and he is a named partner of the firm of “Bitler, Bennett, Molinaro & Bortot, LLP.”

Sample Language:

I am a partner of the law firm of Bitler, Bennett, Molinaro & Bortot, LLP. Upon confirmation, I will withdraw from the partnership, and the firm will change its name to “Bitler, Molinaro & Bortot, LLP.” I currently have a capital account with the firm, and I will receive a refund of that account before I assume the duties of the position of Under Secretary. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know this firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

7.6.0 – the PAS nominee has an equity interest in a partnership created by a law firm

Comment:

In this sample, the PAS nominee has disclosed in the financial disclosure report a financial interest in an investment partnership related to her law firm. The hypothetical investment partnership is named “BMBB Equity Strategies, LP.”

In the course of interviewing the PAS nominee about her financial disclosure report, the reviewer uncovered the fact that the law firm is the general partner of BMBB Equity Strategies, LP. Therefore, the law firm’s financial interests are imputed to the PAS nominee under 18 U.S.C. § 208, which imputes the interests of a “general partner” to a Federal employee. Although the PAS nominee in this hypothetical situation is resigning from her position as an associate attorney with the law firm, she will retain her interest in BMBB Equity Strategies, LP. Therefore, this sample contains a full recusal under 18 U.S.C. § 208 with regard to the law firm because the law firm’s financial interests will continue to be imputed to the PAS nominee following her resignation. Note, however, that a PAS nominee may be able to rely on the exemption for certain interests of general partners in 5 C.F.R. § 2640.202(f).

Sample Language:

Upon confirmation, I will withdraw from the law firm of Bortot, Molinaro, Bennett and Bitler, LP. I will retain my investment in BMBB Equity Strategies, LP, a partnership for which

the law firm is the general partner. For as long as I retain my interest in BMBB Equity Strategies, LP, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of either the law firm or BMBB Equity Strategies, LP, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party, for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

CHAPTER 8: OUTSIDE POSITIONS

8.0.0 – outside positions: general discussion

Ethics agreements typically address a PAS nominee's outside positions. The reviewer should be mindful that a PAS nominee may hold outside positions that the PAS nominee is not required to disclose in the financial disclosure report.

Most of these samples do not identify positions as paid or unpaid. The fact that a position is either paid or unpaid is not necessarily the determining factor with regard to the type of recusal needed. For full-time PAS positions, however, note that Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990), prohibits outside earned income. PAS nominees for full-time positions must terminate any paid outside positions upon confirmation. When drafting an ethics agreement that addresses such a termination, there is no need to provide an explanation that a PAS nominee is terminating a position in order to comply with the earned income ban.

If a PAS nominee is retaining a position for which the PAS nominee is presently receiving compensation, the PAS nominee will need to convert the position to an unpaid position, as illustrated in 8.6.0 below.

8.1.0 – retention of a position as a board member of an organization

Comment:

This sample includes a full recusal under 18 U.S.C. § 208 because the PAS nominee is a "director." This full recusal is necessary whether or not the PAS nominee receives compensation for this position.

Note that the agency has confirmed that this hypothetical PAS nominee is not involved in matters related to the organization's investments. For sample addressing the outside position of a PAS nominee who has been involved in such matters, see 8.1.1 below.

Sample Language:

I will retain my unpaid position as a member of the board of directors of Sister Bitler's Home for the Homeless. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Sister Bitler's Home for the Homeless, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

8.1.1 – retention of a position as a board member of an organization when the PAS nominee qualifies for the exemption at 5 C.F.R. § 2640.202(e)

Comment:

This sample specifically addresses the exemption at 5 C.F.R. § 2640.202(e). When incorporating language related to this exemption, agency ethics officials should explain the meaning of the concept of “categories” of investments carefully. A PAS nominee will cease to qualify for the exemption if the PAS nominee plays a role in the organization’s investments that is more specific than identifying such broad categories as “stocks” generally or “bonds” generally. The PAS nominee may not select specific investments, such as specific stocks or bonds.

In this hypothetical situation, the Office of the Counsel to the President has approved this hypothetical PAS nominee’s retention of an outside position. However, the hypothetical PAS nominee has been involved in deliberations related to the organization’s investments.

A variation on this sample appears in 8.1.2 below.

Sample Language:

I will retain my unpaid position as a member of the board of directors of Sister Bitler’s Home for the Homeless. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Sister Bitler’s Home for the Homeless, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). In order to qualify for the exemption at 5 C.F.R. § 2640.202(e) during my government service, I will not play any role in making investment decisions for Sister Bitler’s Home for the Homeless, except to the extent that I may participate in decisions to invest in broad categories of investments such as stocks, bonds, or mutual funds.

8.1.2 – retention of a position equivalent to a board member position with a university when the PAS nominee qualifies for the exemption at 5 C.F.R. § 2640.202(e)

Comment:

This sample addresses the same situation addressed in 8.1.1 above. The exemption at 5 C.F.R. § 2640.203(e) is sometimes used in connection with positions PAS nominees hold with universities that are qualifying tax-exempt organizations. In this sample, the hypothetical PAS nominee is on several committees in connection with her outside position, but only one of those committees, the Committee on Finance, is responsible for the university’s investments. The PAS nominee will resign from the Committee on Finance and will limit her other board activities in order to ensure that she continues to qualify for the exemption at 5 C.F.R. § 2640.202(e).

Sample Language:

If confirmed, I will retain my position as an unpaid member of the Board of Overseers of Borlinaro University. As part of my role as a member of that board, I serve on the following committees: the Standing Committee on Natural and Applied Sciences, the Visiting Committee on Athletics, and the Committee on Finance. Before assuming the duties of the position of Administrator, I will resign from my membership on the Committee on Finance. As Administrator, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Borlinaro University, unless I first obtain a written waiver, pursuant to section 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). In order to qualify for the exemption at 5 C.F.R. § 2640.202(e) during my government service, I will not play any role in making investment decisions for Borlinaro University, except to the extent that I may participate in decisions to invest in broad categories of investments such as stocks, bonds, or mutual funds.

8.2.0 – resignation from a position as a board member of an organization

Comment:

Unlike 8.1.0 and 8.1.1 above, this sample does not include a recusal under 18 U.S.C. § 208 because the interests of the organization will not be imputed to the PAS nominee, who is resigning from a board member position. Instead, this sample contains a recusal under 5 C.F.R. § 2635.502. See 5.0.0 and 5.2.0 above for discussion of the language of this type of recusal.

Sample Language:

Upon confirmation, I will resign from my position on the board of directors of Sister Bitler's Home for the Homeless. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know Sister Bitler's Home for the Homeless is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

8.3.0 – retention of a position as trustee of a trust for the benefit of family members

Comment:

The following sample addresses certain situations in which a PAS nominee is a trustee of a family trust. This language is appropriate if the beneficiaries of the trust are: (1) members of the PAS nominee's immediate family (i.e., the PAS nominee's spouse and the PAS nominee's minor or dependent children); (2) members of the PAS nominee's extended family (e.g., the PAS nominee's brother, the PAS nominee's niece, the PAS nominee's nephew, etc.); or (3) members of both the PAS nominee's immediate family and members of the PAS nominee's extended family.

Sample Language:

I will retain my position as a trustee of the Borlinaro Family Trust. I will not receive any fees for the services that I provide as a trustee during my appointment to the position of Under Secretary. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the Borlinaro Family Trust, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

8.4.0 – retention of a position as an “active participant” in an organization

Comment:

This sample contains a recusal under 5 C.F.R. § 2635.502(b)(1)(v) because the PAS nominee in this hypothetical situation will continue to serve in an unpaid capacity as an “active participant” in an organization. As demonstrated in 8.4.1 below, this recusal would not be necessary if the PAS nominee were terminating the role of “active participant.”

Note that an ethics agreement may contain the language of this sample only when the PAS nominee does not have an imputed financial interest in the organization under 18 U.S.C. § 208. If, for example, the PAS nominee is a “director” or a “trustee,” the ethics agreement will need to contain the language of 8.1.0 above.

Sample Language:

I will retain my unpaid position as Chair of the Admissions Committee of the Bennettsville Bar Association. For as long as I retain this position, I will not participate personally and substantially in any particular matter involving specific parties in which I know the Bennettsville Bar Association is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

8.4.1 – resignation from a position as an “active participant” in an organization

Comment:

As in 8.4.0 above, the PAS nominee is serving merely in an unpaid capacity as an “active participant” in an outside organization. In this variation of that hypothetical situation, the PAS nominee is terminating that service. After terminating that service, the PAS nominee will have no continuing recusal obligation. Unlike the recusal obligation under 5 C.F.R. § 2635.502(b)(1)(iv) related to former employers, the recusal obligation under 5 C.F.R. § 2635.502(b)(1)(v) for organizations in which an individual is an “active participant” does not continue for a period of one year after termination. Therefore, the language of this sample does not include a recusal.

As with 8.4.0, note that an ethics agreement may contain the language of this sample only when the PAS nominee does not have an imputed financial interest in the organization under

18 U.S.C. § 208. If, for example, the PAS nominee is a “director” or a “trustee,” the ethics agreement will need to contain the language of 8.1.0 above.

Sample Language:

Upon confirmation, I will resign from my position as Chair of the Admissions Committee of the Bennettsville Bar Association.

8.5.0 – leave of absence from an institution of higher learning

Comment:

This sample addresses the exemption related to leaves of absence at 5 C.F.R. § 2640.203(b). The reference to the specific exemption in this sample serves the purpose of defining the limits on the PAS nominee’s participation in matters affecting the employing institution.

Sample Language:

Upon confirmation, I will take an unpaid leave of absence from my position as Associate Professor at Borlinaro University. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Borlinaro University, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for either the exemption at 5 C.F.R. § 2640.203(b) or another regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

8.6.0 – changing the terms of a position: converting a paid outside position to a non-paid outside position when a PAS nominee is appointed to a full-time Federal position

Comment:

This sample addresses the earned income ban under Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990), which is applicable to full-time PAS positions. When a PAS nominee is allowed to retain a paid position, the PAS nominee must arrange to convert the position to an unpaid position upon confirmation. As this sample demonstrates, the steps that a PAS nominee must take to achieve such a conversion are fact-specific. A reviewer should ask the PAS nominee to confirm in advance that the outside organization will take all steps necessary to enable the PAS nominee to comply with the ethics agreement. Note that this sample language is not for PAS appointees who will be special Government employees.

For PAS nominees who work for institutions of higher learning, such as the hypothetical PAS nominee in this sample, the exemption at 5 C.F.R. § 2640.203(b) may apply. In that event, the agency can highlight the availability of the exemption by referring to it in the language in the 18 U.S.C. § 208 recusal. Such language appears in the sample below. For PAS nominees who

work for other types of institutions, however, the ethics agreement should omit the reference to 5 C.F.R. § 2640.203(b).

Sample Language:

If confirmed, I will resign from my position as Adjunct Professor with Borlino University on December 31, 2014. I am currently teaching one course in the 2014 fall semester at Borlino University, and I will continue teaching this course whether I am confirmed before or after the end of the semester. Borlino University is currently scheduled to pay me for teaching this course in two equal installments, in mid-October and in mid-December. If I begin my government service prior to receiving one or both of these payments, I will accept compensation only for services rendered before I assume the duties of the position of Assistant Secretary. If I begin my government service after having received one or both of these payments, I will promptly repay any portion that covers the period after I have assumed the duties of the position of Assistant Secretary. Until I resign from my position as Adjunct Professor, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the Borlino University, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for either the exemption at 5 C.F.R. § 2640.203(b) or another regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). Following my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know Borlino University is a party or represents a party for a period of one year after my resignation, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

8.6.1 – changing the terms of a position: retention of a paid executor position

Comment:

See the comment to 8.6.0 above.

Sample Language:

Following my confirmation, I will continue to serve as executor of a family estate. I will not at any time receive compensation for services that I perform during my government appointment. I am currently owed executor fees for services that I have provided to date, and this amount may increase prior to my confirmation. I will accept payment of executor fees earned prior to my confirmation, but the amount of any such fees will be fixed before I assume the duties of the position of Assistant Secretary. Until I have received this payment, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of the estate of a family member to provide this payment, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

CHAPTER 9: FAMILY FARMS AND FAMILY BUSINESSES

9.0.0 – family farms and family businesses: general discussion

Among other issues, family farms and family businesses often implicate the ban on outside earned income that is established in Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990). A PAS nominee for a full-time Federal position will not be able to continue receiving a salary from an outside entity. For the purposes of this ban, however, earned income is not limited to salaries. A potential issue involving earned income may arise when a PAS nominee provides services that are a material factor in the production of income for a family farm or family business. See 5 C.F.R. §§ 2636.303(b)(4), 2635.804.

Note that the earned income ban under Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990), is applicable only to full-time PAS positions. Therefore, to the extent that the samples in this section address the earned income ban, they are not intended for PAS appointees who will be special Government employees.

9.1.0 – the PAS nominee is retaining a passive ownership interest in a family farm or family business

Comment:

See the discussion in 9.0.0 above. This sample addresses the circumstances of a hypothetical PAS nominee who does not hold a position in the family farm or family business. For language addressing situations in which PAS nominees hold positions in family farms or businesses, see 9.1.1 below.

Sample Language:

My siblings and I own MacDonald Farms, Inc., a closely-held corporation run solely by my brother. I do not hold a position with this entity. I will continue to have a financial interest in this entity, but I will not provide services material to the production of income. Instead, I will receive only passive investment income from it. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of MacDonald Farms, Inc., unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

9.1.1 – the PAS nominee is resigning from a position with a family farm or family business but is retaining a passive financial interest

Comment:

See the discussion in 9.0.0 above.

Sample Language:

My siblings and I own Bitler Farms, Inc. Upon confirmation, I will resign from my position as Secretary of Bitler Farms, Inc. I will continue to have a financial interest in this entity, but I will not provide services material to the production of income. Instead, I will receive only passive investment income from it. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bitler Farms, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

9.1.2– the PAS nominee is resigning from a position with a family farm or family business and is divesting a financial interest in the entity

Comment:

See the discussion in 9.0.0 above. In this sample, the hypothetical PAS nominee has a position with a private family business that has no assets and no intrinsic value. Upon her resignation, the PAS nominee will transfer at no cost her financial interest in the entity to her siblings, who are the other owners.

If, instead, a PAS nominee will sell a financial interest to another person, the ethics agreement should substitute the term “sell” for the term “transfer.” If the entity is not publicly traded, the reviewer may need to evaluate the payment under 5 C.F.R. § 2635.503 or 18 U.S.C. § 209, depending on the terms of the sale. For a sample involving a hypothetical large, privately traded corporation, see 3.5.0 above.

Sample Language:

My siblings and I own Bitler Farms, Inc. Upon confirmation, I will resign from my position as Secretary of Bitler Farms, Inc. Upon resignation, I will transfer my financial interest in this entity to my siblings. I will not participate personally and substantially in any particular matter involving specific parties in which I know Bitler Farms, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

9.2.0 – entity formed to manage the assets of the PAS nominee’s family that pays the PAS nominee for services to the entity

Comment:

Issues may arise under the earned income ban when a full-time PAS appointee will be paid for providing services to an entity, even one created for his or her family. See Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990). For this reason, an ethics agreement may need to provide that the PAS nominee will resign from any such outside position. If the PAS nominee does not resign from the position, the agreement should state that the PAS nominee will not earn income for his or her services. In the sample below, the hypothetical PAS nominee earns fees for managing an investment partnership for her large extended family. Note that the earned income ban under Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990), is applicable only to full-time PAS positions. Therefore, the following sample language is not for PAS appointees who will be special Government employees.

Sample Language:

I will retain my position as general partner of The Molinaro Family Partnership, LP. I will receive payment of fees earned prior to my appointment, but I will not at any time receive compensation for services that I perform during my government appointment. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of The Molinaro Family Partnership, LP, or its underlying assets, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

9.2.1 – entity formed to manage the assets of the PAS nominee’s family that does not pay the PAS nominee for services to the entity

Comment:

The language of this sample is useful whenever the PAS nominee has an unpaid position with an entity (e.g., S-corporation, limited liability corporation, partnership, limited liability partnership, etc.) formed to manage only the assets of the PAS nominee’s family.

Sample Language:

I will retain my unpaid position as general partner of The Molinaro Family Partnership, LP. I will not at any time receive compensation for services that I perform during my government appointment. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of The Molinaro Family Partnership, LP, or its underlying assets, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

9.2.2 – the PAS nominee is resigning from a position with an S Corp, but the spouse will continue to be the owner of the business

Comment:

In this sample the PAS nominee will resign from an entity formed to manage the consulting work of the filer and her spouse. In this case, the entity is an S Corp. Because the spouse will retain ownership of the company, the sample language includes an 18 U.S.C. § 208 recusal for the company. The sample also addresses the PAS nominee's clients, as well as the spouse's clients. Finally, the sample includes an agreement that the spouse will not communicate with the PAS nominee's prospective agency on behalf of the business for the duration of the PAS nominee's appointment.

Sample Language:

My spouse and I formed an S Corp doing business as Great Consulting, Inc., to manage our consulting work. Upon confirmation, I will resign from my position with this entity but my spouse will continue to operate it. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Great Consulting, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). All amounts owed to me by my clients will be fixed before I assume the duties of the position of Under Secretary, and I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the ability or willingness of any client to pay the agreed upon amount. In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). I also will not participate personally and substantially in any particular matter involving specific parties in which I know a client of my spouse is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). Finally, for the duration of my appointment to the position of Under Secretary, my spouse has agreed not to communicate directly with the Department on behalf of Great Consulting, Inc., or any client.

CHAPTER 10: SPOUSES

10.0.0 – spouse: general discussion

Before drafting an ethics agreement, the reviewer ensures that the PAS nominee's financial disclosure report fully discloses all reportable income and assets of the PAS nominee's spouse. See DAEOgram DO-08-002 (Jan. 25, 2008). For example, the reviewer confirms that the PAS nominee has disclosed all forms of equity interests that a spouse may have in an employer (e.g., restricted stock, stock options, pensions, profit-sharing plans, etc.).

10.1.0 – the employer of the PAS nominee's spouse pays the spouse a fixed salary and bonus tied to the spouse's performance: 2635.502 recusal only

Comment:

In this sample, the hypothetical PAS nominee's spouse has neither an equity interest in, nor a profit-sharing arrangement with, the spouse's employer. Although the spouse receives an annual bonus, the bonus is based on the spouse's performance and not directly on the employer's profits. In this hypothetical situation, there is little likelihood that the hypothetical PAS nominee will be involved in any particular matter affecting the spouse's employer. In addition, there is little likelihood that a particular matter would affect this hypothetical spouse's compensation or employment because the spouse is a clerical employee of a major corporation. Before using the language of this sample, reviewers should also consider 10.1.1 and 10.1.2.

Sample Language:

My spouse is employed by International Hotel Chains, Inc., in a position for which he receives a fixed annual salary and a bonus tied to his performance. For as long as my spouse continues to work for International Hotel Chains, Inc., I will not participate personally and substantially in any particular matter involving specific parties in which I know International Hotel Chains, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

10.1.1 – the employer of the PAS nominee's spouse pays the spouse a fixed salary and bonus tied to the spouse's performance: 208 recusal and 2635.502 recusal

Comment:

As with the preceding sample, 10.1.0 above, the hypothetical PAS nominee's spouse in this sample has neither an equity interest in, nor a profit-sharing arrangement with, the spouse's employer. Although the spouse receives an annual bonus, the bonus is based on the spouse's performance and not directly on the employer's profits. In this sample, however, the PAS nominee might participate in particular matters that will have a significant financial impact on the employer of the PAS nominee's spouse. The PAS nominee is being appointed to the U.S. Organ Donation Standards Agency, which has authority to take regulatory action that would restrict or terminate the import activities of the spouse's employer, Trans-Pacific Organ

Transplants, Inc. The restriction or termination of these activities would have such a significant effect on the employment of the PAS nominee's spouse that the spouse would likely lose her job. Therefore, the ethics agreement contains a recusal under 18 U.S.C. § 208.

The 18 U.S.C. § 208 recusal in this sample is narrower than the full recusal under 18 U.S.C. § 208. Rather than focusing on the "financial interests of Trans-Pacific Organ Transplants, Inc.," this language focuses on the "spouse's compensation or employment." Although the PAS nominee's agency, the U.S. Organ Donation Standards Agency, may be involved in particular matters that will affect the financial interests of the spouse's employer, the spouse has neither an equity interest in, nor a profit-sharing arrangement with, the employer. In addition, although this PAS nominee's spouse receives an annual bonus, the bonus is based on the spouse's performance and not directly on the employer's profits.

This sample includes both a recusal under 18 U.S.C. § 208 and a recusal under 5 C.F.R. § 2635.502. The reason for including both recusals is that the recusal under 18 U.S.C. § 208 in this sample is a *limited* recusal. Rather than focusing on the financial interests of the spouse's employer, it focuses only on the spouse's compensation and employment. However, the spouse's compensation and employment might not be affected by a particular matter involving specific parties in which the spouse's employer is a party. As a result, the limited recusal under 18 U.S.C. § 208 would not prevent the PAS nominee from participating in such a party matter. For this reason, the additional recusal under 5 C.F.R. § 2635.502 addresses the Government's concerns about the appearance of the PAS nominee participating in such a party matter.

Although this sample refers to the potential for a waiver under 18 U.S.C. § 208(b)(1) or an authorization under 5 C.F.R. § 2635.502(d), the agency may need to counsel the PAS nominees in advance that a waiver or an authorization likely would be inappropriate in connection with a particular matter that will affect a spouse's compensation or continued employment. In such situations, ethics agreements sometimes omit the language addressing waiver and authorization.

Before using the language of this sample, reviewers should also consider 10.1.0 and 10.1.2.

Sample Language:

My spouse is employed as the Human Resources Director for Trans-Pacific Organ Transplants, Inc., a position for which he receives a fixed annual salary and a bonus tied to his performance. For as long as my spouse works for Trans-Pacific Organ Transplants, Inc., I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on my spouse's compensation or employment with Trans-Pacific Organ Transplants, Inc. I also will not participate personally and substantially in any particular matter involving specific parties in which I know Trans-Pacific Organ Transplants, Inc. is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

10.1.2 – the employer of the PAS nominee’s spouse pays the spouse a fixed salary, but the ethics agreement addresses appearances regarding the PAS nominee’s impartiality: 208 recusal, 2635.502 recusal and additional commitment regarding communications

Comment:

In this sample, the hypothetical PAS nominee’s spouse has neither an equity interest in, nor a profit-sharing arrangement with, the employer. The PAS nominee’s spouse receives only a salary. Nevertheless, the agency is concerned about the appearance of the PAS nominee’s participation in certain matters that involve the PAS nominee’s spouse in a professional capacity. In this hypothetical situation, the PAS nominee’s agency occasionally receives communications from the spouse’s employer. For this reason, the ethics agreement has additional language regarding communications between the PAS nominee’s agency and the PAS nominee’s spouse. Before using the language of this sample, reviewers should also consider 10.1.0 and 10.1.1.

Sample Language:

My spouse is the President of the International Organ Donation Association (IODA), a position for which he receives a fixed annual salary. For as long as my spouse continues to work for IODA, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on my spouse’s compensation or employment with IODA, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). I also will not participate personally and substantially in any particular matter involving specific parties in which I know IODA is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, my spouse has agreed not to communicate directly with the U.S. Organ Donation Standards Agency on behalf of IODA during my appointment to the position of Deputy Director.

10.2.0 – the PAS nominee’s spouse has an equity interest in the employer or has a profit-sharing arrangement with the employer: 208 recusal

Comment:

This sample contains a full recusal under 18 U.S.C. § 208 because the PAS nominee has an imputed financial interest in the spouse’s employer as a result of the spouse’s equity or profit-based financial interests in the employer.

Sample Language:

My spouse is an employee of Molinaro Power Saws, LLC, and she participates in the employee stock ownership plan. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Molinaro Power Saws, LLC, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

10.3.0 – the PAS nominee’s spouse is an attorney whose compensation is not based on the profitability of the spouse’s law firm, and the spouse does not have an equity interest in the law firm

Comment:

As with 10.1.2 above, the recusal in this sample focuses on the spouse’s “compensation or employment,” as opposed to the financial interests of the employer. In this hypothetical situation, the PAS nominee’s spouse is an attorney who has neither an equity interest in, nor a profit-sharing arrangement with, the employing law firm. Although the PAS nominee’s spouse receives an annual bonus, the bonus is based on the spouse’s performance and not directly on the employer’s profits. As in the hypothetical situation addressed in 10.1.2, the agency is concerned about the appearance of the PAS nominee’s participation in certain matters that involve the PAS nominee’s spouse in a professional capacity. Therefore, this sample includes additional language in which the PAS nominee explains that the spouse has agreed not to communicate directly with the agency on behalf of the firm or any client.

Sample Language:

My spouse is employed as an associate by the law firm of Bortot, Molinaro, Bennett and Bitler, LP, from which she receives a fixed salary and an annual bonus tied to her performance. For as long as my spouse continues to work for Bortot, Molinaro, Bennett and Bitler, LP, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on my spouse’s compensation or employment with the firm, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). I also will not participate personally and substantially in any particular matter involving specific parties in which I know my spouse’s employer or any client of my spouse is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, for the duration of my appointment to the position of Deputy Director, my spouse has agreed not to communicate directly with the Interstate Waterways Adjudication Agency on behalf of her employer or any client.

10.3.1 – the PAS nominee’s spouse is an equity partner with a law firm

Comment:

As a variation on 10.3.0 above, this sample addresses the circumstance in which the spouse has a financial interest in the employer. In this sample, the recusal under 18 U.S.C. § 208 is broader than the two recusals related to the employer in 10.3.0 above.

Sample Language:

My spouse is currently a partner with the law firm of Bortot, Molinaro, Bennett and Bitler, LP. For as long as my spouse continues to work for Bortot, Molinaro, Bennett and Bitler, LP, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the firm, unless I first

obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). I also will not participate personally and substantially in any particular matter involving specific parties in which I know a client of my spouse is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, for the duration of my appointment to the position of Deputy Director, my spouse has agreed not to communicate directly with the Interstate Waterways Adjudication Agency on behalf of her employer or any client.

10.4.0 – the PAS nominee’s spouse is a salaried employee of an agency contractor

Comment:

In this sample, the PAS nominee’s spouse has no financial interest in the employer beyond a salary and a performance-based bonus. Nevertheless, the agency is concerned about the appearance of the PAS nominee’s participation in certain matters that involve the PAS nominee’s spouse in a professional capacity.

Sample Language:

My spouse is employed by Bennett & Bitler, LLC, from which he receives a fixed salary and an annual bonus tied to his performance. For as long as my spouse continues to work for Bennett & Bitler, LLC, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on my spouse’s compensation or employment with his employer, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). I also will not participate personally and substantially in any particular matter involving specific parties in which I know my spouse’s employer is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). For the duration of my appointment as Assistant Administrator, my spouse has agreed not to communicate directly with the U.S. Spatial Relationships Research Administration on behalf of his employer.

CHAPTER 11: SPECIAL GOVERNMENT EMPLOYEES

11.0.0 – special Government employees: general discussion

Agencies should counsel special Government employees thoroughly about the requirements of applicable laws and regulations. These samples are not intended to serve as a substitute for thorough counseling, but they provide useful language for the ethics agreements of special Government employees. Note that the language of 11.1.1 regarding a special Government employee who is an attorney also may be useful for lobbyists and consultants.

11.1.0 – a special Government employee’s outside employment

Comment:

A special Government employee has an imputed financial interest in an employer under 18 U.S.C. § 208. This language addresses the availability of waivers only pursuant to 18 U.S.C. § 208(b)(1) because the hypothetical PAS nominee will not be a member of a Federal Advisory Committee Act (FACA) committee. (Note that a special Government employee who is a FACA committee member could also seek a waiver under 18 U.S.C. § 208(b)(3)). In addition, this language addresses the availability of regulatory exemptions under 18 U.S.C. § 208(b)(2). In appropriate circumstances, special Government employees who are employees of institutions of higher learning may be able to rely on 5 C.F.R. § 2640.203(b).

Sample Language:

I am an employee of Bitler-Bennett Overland Transport, Inc. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Bitler-Bennett Overland Transport, Inc., unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

11.1.1 – a special Government employee will continue to practice as an attorney

Comment:

A special Government employee has an imputed financial interest in an employer under 18 U.S.C. § 208. Therefore, this sample includes a full recusal under 18 U.S.C. § 208 because the hypothetical PAS nominee will retain her position with a law firm. This recusal extends to all financial interests of the firm, including the firm’s financial interests in cases involving current clients of the firm even if they are not clients of the PAS nominee. However, this sample also includes a recusal under 5 C.F.R. § 2635.502 for clients of the PAS nominee.

The language of this sample addresses the availability of waivers under 18 U.S.C. § 208(b)(1) because the hypothetical PAS nominee will not be a member of a Federal Advisory Committee Act (FACA) committee. (Note that a special Government employee who is a FACA committee member could also seek a waiver under 18 U.S.C. § 208(b)(3)). This language does

not address the availability of regulatory exemptions under 18 U.S.C. § 208(b)(2) because the hypothetical PAS nominee is not an employee of an institution of higher learning and is not able to rely on 5 C.F.R. § 2640.203(b).

Sample Language:

I am an attorney with the law firm of Bitler, Bennett, Molinaro & Bortot, LLP. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the firm, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a client of mine is a party or represents a party, for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

11.2.0 – 18 U.S.C. § 203 and 18 U.S.C. § 205: seeking advice in the event that a special Government employee unexpectedly serves more than 60 days in a 365-day period

Comment:

Language in an ethics agreement addressing 18 U.S.C. § 203 and 18 U.S.C. § 205 is generally disfavored. Such language rarely contains a specific commitment by the PAS nominee, and it may not capture all specific requirements of the applicable statutory provisions.

If an agency elects to include language related to these statutory provisions in an ethics agreement, the agency may use the language of the following sample. This sample contains a specific commitment by a hypothetical PAS nominee to keep track of her days of service and to seek advice regarding the additional legal requirements that will apply if her service exceeds 60 days in any period of 365 consecutive days.

Sample Language:

I have been advised that I will likely serve on the board for no more than 60 days in any period of 365 consecutive days. Accordingly, I understand that I may not, under 18 U.S.C. §§ 203(c)(1) and 205(c)(1), provide any representational services or act as agent or attorney for another in any particular matter involving specific parties in which I have participated personally and substantially as a government official. I also understand that I may not receive a share of any payment made for such representational services performed by another. I understand that additional requirements of 18 U.S.C. §§ 203(c)(2) and 205(c)(2) will apply to me if I serve for more than 60 days in any period of 365 consecutive days. In that event, I will comply with all applicable requirements, and I will consult your office if I have any questions about those requirements.

CHAPTER 12: MISCELLANEOUS PROVISIONS

12.0.0 – miscellaneous provisions: general discussion

This guide is not intended to provide an exhaustive list of provisions for ethics agreements of PAS nominees. The samples in this miscellaneous section are provided only as additional illustrations of useful language.

12.1.0 – correcting a PAS nominee’s submission to the Senate: correction of the financial disclosure report and submission of a supplemental ethics agreement

Comment:

A PAS nominee’s financial disclosure report and ethics agreement should be complete at the time the PAS nominee submits it to the Senate. In the rare case in which a PAS nominee has omitted information inadvertently, the agency needs to coordinate with OGE to supplement the original submission. In addition, the agency’s DAEO needs to submit a new opinion letter certifying that there is no unresolved conflict of interest under applicable laws and regulations.

Sample Language:

I am writing to amend the financial disclosure report that I signed on August 1, 2014, and to supplement the ethics agreement that I signed on August 15, 2014.

Enclosed is a new page that I have identified as Page 23a. This new page discloses two financial interests that I inadvertently omitted from Schedule A of my financial disclosure report.

If I am confirmed for the position of Under Secretary, I will divest my interests in Bortot Wilderness, Inc., and Molinaro Power Saws, LLC, within 90 days of my confirmation. With regard to each of these entities, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

12.2.0 – arrangement to write a book in the future

Comment:

This sample provides language for a situation in which a PAS nominee has an arrangement with a publisher, but the PAS nominee has agreed not to work on the textbook during her appointment.

Sample Language:

Before learning of my consideration for a possible nomination to a position at the U.S. Banking Administration, I received an advance from Molinaro Publishers, Inc., for a

textbook on economics that I have agreed to write. I understand that I may not work on this textbook or perform any other services for compensation during my appointment to the position of Deputy Administrator if the Senate confirms my nomination. I will not participate personally and substantially in any particular matter involving specific parties in which I know Molinaro Publishers, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

12.2.1 – arrangement with a publisher regarding royalties

Comment:

The following sample applies the “ability or willingness” standard to a publisher’s payment of royalties under the terms of a publishing contract with the PAS nominee.

Sample Language:

I receive royalties from Molinaro Publishers, Inc., for sales of my book, *Bortot’s Field Guide to Wilderness Survival Techniques*. I will not participate personally and substantially in any particular matter involving specific parties in which I know Molinaro Publishers, Inc., is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

APPENDIX A: LANGUAGE ADDRESSING EXECUTIVE ORDER 13490 (Ethics Pledge)

The following language is used to incorporate the terms of the Ethics Pledge for those PAS nominees required to sign the pledge. This language is not applicable to special Government employees. This language is not applicable to career Foreign Service Officers who are being nominated to Ambassador positions.

A.1.0 – language regarding E.O. 13490 for a new PAS nominee

Comment:

This sample is for use, where applicable, by an individual who is not currently subject to the terms of an Ethics Pledge.

Sample Language:

I understand that as an appointee I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

A.1.1 – language regarding E.O. 13490 for a current Presidential appointee who has already signed the Ethics Pledge

Comment:

This sample is for use, where applicable, by an individual who is currently subject to the terms of an Ethics Pledge that the individual previously signed in connection with a Presidential appointment.

Sample Language:

I understand that as an appointee I must continue to abide by the Ethics Pledge (Exec. Order No. 13490) that I previously signed and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

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