



March 20, 2017
LA-17-03

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires “appointees” to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President’s office OGE’s prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE’s issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE’s prior guidance on Executive Order 13490 is applicable to Executive Order 13770 to the extent that it addresses language common to both executive orders. Therefore, all substantive legal interpretations in the following Legal Advisories are applicable to Executive Order 13770: DO-09-005, DO-09-007, DO-09-010, DO-09-014, DO-09-020, DO-10-003, and LA-12-10. The following Legal Advisories remain valid in part, as specified in annotations that now appear in the versions posted on OGE’s website: DO-09-003, DO-09-011, DO-10-004, and LA-16-08. For the convenience of ethics officials and employees, an enclosed table highlights certain language common to both executive orders and references prior guidance that is applicable to Executive Order 13770.

II. Paragraph 7: “Specific Issue Area”

Executive Order 13770 prohibits an appointee from participating in any particular matter on which the appointee lobbied during the two-year period before being appointed or in the “specific issue area” in which that particular matter falls. *See* E.O. 13770, sec. 1, par. 7; E.O. 13490, sec. 1, par. 3. The Counsel to the President’s office has advised OGE that, as used in Executive Order 13770, the term “specific issue area” means a “particular matter of general applicability,” and OGE has accepted the Administration’s interpretation of this term. Although “specific issue” and “general issue area” are used in the context of the Lobbying Disclosure Act (LDA), the term “specific issue area” is not used in that context. *See* E.O. 13770, sec. 2; *see also*



2 U.S.C. §§ 1602, 1603(b)(5), 1604(b)(2). Although the term “specific issue area” appeared in Executive Order 13490, it was not defined in any guidance issued during the eight years in which that executive order remained in effect.

OGE has issued guidance distinguishing two types of particular matters: “particular matters involving specific parties” and “particular matters of general applicability.” *See* 5 C.F.R. § 2640.102(l)-(m); *see also* OGE Inf. Adv. Op. 06 x 9 (2006). The latter is broader than the former. *Id.* This difference in breadth is relevant in determining the scope of the recusal, as illustrated in the following example:

An appointee was a registered lobbyist during the two-year period before she entered government. In that capacity, she lobbied her agency against a proposed regulation focused on a specific industry. Her lobbying was limited to a specific section of the regulation affecting her client. Her recusal obligation as an appointee is not limited to the section of the regulation on which she lobbied, nor is it limited to the application of the regulation to her former client. Instead, she must recuse for two years from development and implementation of the entire regulation, subsequent interpretation of the regulation, and application of the regulation in individual cases.

III. Paragraphs 1 and 3: Post-Government Employment Lobbying Restrictions

The ethics pledge under Executive Order 13770 establishes two post-Government employment lobbying restrictions. The restriction in paragraph 1 of the ethics pledge prohibits a former appointee, for five years after terminating employment with an executive agency, from engaging in lobbying activities “with respect to” that agency. *See* E.O. 13770, sec. 1, par. 1. The restriction in paragraph 3 of the ethics pledge establishes the same restriction “with respect to” any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration. *See id.*; E.O. 13770 sec. 1, par. 3; sec. 2(c).

Executive Order 13770 relies partly on the definition of “lobbying activities” in the Lobbying Disclosure Act (LDA). *See* E.O. 13770, sec. 2(n). The LDA defines that term to include both “lobbying contacts” and behind-the-scenes efforts in support of such contacts. 2 U.S.C. § 1602(7). The LDA’s definition of “lobbying contacts” is limited to certain types of communications and excludes 19 types of communications. 2 U.S.C. § 1602(8). Executive Order 13770 specifically excludes additional types of communications. *See* E.O. 13770, sec. 2(n).

For purposes of paragraph 1, lobbying activities are deemed to be carried out “with respect to” an agency only to the extent that they involve the following:

- (a) Any oral or written communication to a covered executive branch official of that agency; or

(b) Efforts that are intended, at the time of performance, to support a covered lobbying contact to a covered executive branch official of that agency.

For purposes of paragraph 3, the prohibition on lobbying activities “with respect to” a covered executive branch official or non-career Senior Executive Service appointee extends to non-career Senior Executive Service appointees. Therefore, lobbying activities in paragraph 3 involve the following:

(a) Any oral or written communication to a covered executive branch official or non-career Senior Executive Service appointee;

or

(b) Efforts that are intended, at the time of performance, to support a covered lobbying contact to a covered executive branch official or non-career Senior Executive Service appointee of that agency.

For the convenience of ethics officials and employees, an enclosed table compares the post-Government employment lobbying restrictions in paragraphs 1 and 3.

Attachments

Applicability of Prior Guidance to Executive Order 13770
Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
<p>Section 1. Ethics Pledge. Every appointee in every executive agency appointed on or after January 20, 2017, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee:</p> <p>As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:</p>	<p>Signing requirement (“appointee”): E.O. 13770, sec. 1 E.O. 13490, sec. 1</p> <p>Definition of appointee: E.O. 13770, sec. 2(b) E.O. 13490, sec. 2(b)</p>	<p>Whether the following categories of employees are considered “appointees” for the purpose of signing the ethics pledge:</p> <ul style="list-style-type: none"> • Acting officials and detailees: DO-09-010 • Appointees, generally: DO-09-003, DO-09-010 • Career officials appointed to confidential positions: DO-09-010 • Career Senior Executive Service (SES) members given Presidential appointments: DO-09-010 • Excepted service, generally: DO-09-010 • Foreign Service, similar positions: DO-09-010 • Holdover appointees: DO-09-010 • Individuals appointed to career positions: DO-09-003 • IPA detailees: DO-09-020 • Schedule C employees with no policymaking role: DO-09-010 • Special Government Employees (SGEs): DO-09-005, DO-09-010 • Temporary advisors/counselors pending confirmation to Presidentially appointed, Senate-confirmed (PAS) positions: DO-09-005 • Term appointees: DO-09-010
	<p>Signing requirement (“shall sign”): E.O. 13770, sec. 1 E.O. 13490, sec. 1</p>	<p>When the ethics pledge must be signed:</p> <ul style="list-style-type: none"> • Holdover appointees: DO-09-010, DO-09-014 • Nominees to PAS positions: DO-09-005 • Non-PAS who have already been appointed: DO-09-005 • Non-PAS who may be appointed in the future: DO-09-005 • Temporary advisors/counselors pending Senate confirmation to PAS positions: DO-09-005
<p><u>Sec. 1, par. 2:</u> If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.</p>	<p>Restriction on communicating with employees of former agency: E.O. 13770, sec. 1, par. 2 E.O. 13490, sec. 1, par. 4</p>	<p>Guidance on the restriction: DO-10-004, LA-16-08</p> <p><i>Note: Ethics officials and employees may continue to rely on DO-10-004 regarding the substance of the restriction. Note, however, that the duration of this restriction in E.O. 13770 is one year and commences when the individual ceases to be a senior employee, whereas the duration of the corresponding restriction in E.O.13490 was two years, commencing when the appointee moves to a position that is not subject to the Pledge.</i></p>
<p><u>Sec. 1, par. 5:</u> I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.</p>	<p>Prohibition on accepting gifts from registered lobbyists, lobbying orgs: E.O. 13770, sec. 1, par. 5 E.O. 13490, sec. 1, par. 1</p>	<p>Guidance on the lobbyist gift ban: DO-09-007, DO-10-003, LA-12-10</p> <p>Relationship to 5 C.F.R. 2635, subpart B (Gifts from Outside Sources): DO-09-007, DO-10-003</p>
	<p>Definition of “gift”: E.O. 13770, sec. 2(k) E.O. 13490, sec. 2(c)</p>	<p>Guidance on the following terms:</p> <ul style="list-style-type: none"> • “Gift”: DO-09-007 • “Solicited or accepted indirectly:” DO-09-007 <p>Treatment of official speeches, accompanying staff: DO-10-003</p>
	<p>Definition of “registered lobbyist or lobbying organization”: E.O. 13770, sec. 2(w) E.O. 13490, sec. 2(e)</p>	<p>Guidance on the term, “registered lobbyist or lobbying organization”: DO-09-007</p> <p>Treatment of the following:</p> <ul style="list-style-type: none"> • 501(c)(3) organizations: DO-09-007, LA-12-10 • Clients of lobbyists/lobbying firms: DO-09-007 • Institutions of higher education: LA-12-10 • Media organizations: DO-09-007, LA-12-10

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
<p><u>Sec. 1, par. 6</u>: I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.</p>	Revolving door ban (incoming appointees): E.O. 13770, sec. 1, par. 6 E.O. 13490, sec. 1, par. 2	Guidance on the revolving door ban (incoming appointees): DO-09-011, DO-09-020 Relationship to impartiality regulations: DO-09-011
	Definition of “directly and substantially related to my former employer or former clients”: E.O. 13770, sec. 2(d) E.O. 13490, sec. 2(k)	Guidance on the term, “directly and substantially related to”: DO-09-011
	Definition of “former client”: E.O. 13770, sec. 2(i) E.O. 13490, sec. 2(j)	Guidance on the term, “former client”: DO-09-011 Treatment of the following: <ul style="list-style-type: none"> • Discrete, short-term engagements/<i>de minimis</i>: DO-09-011 • Federally funded research and development centers: DO-09-011 • Government entities: DO-09-011 • Nonprofit organizations: DO-09-011 • Service as a consultant: DO-09-011 • State or local colleges and universities: DO-09-011
	Definition of “former employer”: E.O. 13770, sec. 2(j) E.O. 13490, sec. 2(i)	Guidance on the term, “former employer”: DO-09-011 Treatment of the following: <ul style="list-style-type: none"> • Federally funded research and development centers: DO-09-011 • Government entities: DO-09-011 • State or local colleges and universities: DO-09-011 • Nonprofit organizations: DO-09-011
	Definition of “particular matter involving specific parties”: E.O. 13770, sec. 2(s) E.O. 13490, sec. 2(h)	Guidance on the term, “particular matter involving specific parties”: DO-09-011, DO-09-020 Treatment of the following: <ul style="list-style-type: none"> • Consultation with experts: DO-09-011 • Meetings, other communications: DO-09-011 • Official speeches: DO-09-020 • Open to all interested parties/multiplicity of parties: DO-09-011 • Rulemakings/regulations: DO-09-011

Paragraphs 1 and 3 in Executive Order 13770
Attachment to LA-17-03

	Paragraph 1	Paragraph 3
Basic Prohibition	I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency. E.O. 13770, sec. 1, par. 1.	In addition to abiding by the limitations of paragraphs 1 and 2, I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration. E.O. 13770, sec. 1, par. 3.
Length of Restriction	5 years. E.O. 13770, sec. 1, par. 1.	Remainder of the Administration. E.O. 13770, sec. 1, par. 3
Commencement of Restriction	Termination of employment as an appointee. E.O. 13770, sec. 1, par. 1.	Termination of government service. E.O. 13770, sec. 1, par. 3
Restricted Activity	<p>Lobbying activities, as defined in the Lobbying Disclosure Act, but excluding certain types of communications. E.O. 13770, sec. 2(n). The term “lobbying activities” includes “lobbying contacts” and behind-the-scenes efforts in support of such contacts. 2 U.S.C. § 1602(7).</p> <ul style="list-style-type: none"> • “Lobbying contacts” are limited to written or oral communications with covered officials that are made on behalf of a client. 2 U.S.C. § 1602(8)(A). <ul style="list-style-type: none"> ○ The term “lobbying activities” as defined in E.O. 13770 does not include communications and appearances with regard to: a judicial proceeding; a criminal or civil law enforcement inquiry, investigation, or proceeding; or any agency process for rulemaking, adjudication, or licensing, as defined in and governed by the Administrative Procedure Act, as amended, 5 U.S.C. 551 et seq. ○ The definition of “lobbying contact” includes 19 exceptions listed at 2 U.S.C. § 1602(8)(B). 2 U.S.C. § 1602(8)(B)(i)-(xix) <ul style="list-style-type: none"> ▪ For example, the definition excludes “a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official.” 2 U.S.C. § 1602(8)(B)(v). • The term “client” means any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity. 2 U.S.C. § 1602(2). • An activity is considered a “lobbying activity” whether or not a former appointee is required to register as a lobbyist. Therefore, there is no minimum requirement to engage in lobbying activities before the restrictions apply (<i>i.e.</i>, no 20% service threshold). <i>See</i> E.O. 13770, sec. 2(n). 	
With Whom Appointees are Restricted From Engaging in Lobbying Activities	<p>Covered executive branch officials <u>at the former appointee’s former agency</u>. E.O. 13770, sec. 1, par. 1 (“with respect to that agency”).</p> <ul style="list-style-type: none"> • A communication to or appearance solely before a covered legislative branch official is not a lobbying activity “with respect to” the former appointee’s former agency. <i>Id.</i> • With respect to those appointees to whom component designations are applicable, “agency” means the separate and distinct component agencies designated in accordance with 18 U.S.C. § 207(h). E.O. 13770, sec. 2(e). 	<p>Covered executive branch officials <u>throughout the executive branch</u>. E.O. 13770, sec. 1, par. 3.</p> <p>Non-career senior executive service appointees <u>throughout the executive branch</u>. E.O. 13770, sec. 1, par. 3.</p>
	<p>Covered executive branch officials are:</p> <ul style="list-style-type: none"> • The President; • The Vice President; • Any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President; • Any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order; • Any member of the uniformed services whose pay grade is at or above O–7 under section 201 of title 37; and • Any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5. <i>See</i> E.O. 13770, sec. 2(c); 2 U.S.C. § 1602(3). 	