



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

JAN 16 2017

The Honorable Sheldon Whitehouse
United States Senate
530 Hart Senate Office Building
Washington, DC 20510

Dear Senator Whitehouse:

This letter responds to your inquiry of January 12, 2017, requesting specific information regarding the ethics review of E. Scott Pruitt, who has been nominated by President-elect Trump to be the Administrator of the United States Environmental Protection Agency (EPA).

Pursuant to the Ethics in Government Act of 1978 (amended by the Ethics Reform Act of 1989 and the Honest Leadership and Open Government Act of 2007), the EPA ethics team reviewed the public financial disclosure report submitted by Mr. Pruitt. We interacted with his surrogates to ensure that he reported all information necessary and required as set forth in the Ethics in Government Act. See "Contents of Report" at 5 U.S.C. app. §102 and in 5 C.F.R. Part 2634, Subpart C. Based on his submission, the EPA certified the public financial disclosure report on January 4, 2017, and forwarded it to the Office of Government Ethics (OGE), which certified it later that same day. Our certification of the report means that "the individual submitting [it] is in compliance with applicable laws and regulations." See 5 U.S.C. app. §106. In addition to certifying the report, the EPA and OGE also approved the language of Mr. Pruitt's ethics agreement, which conformed to the requirements of 5 C.F.R. Part 2634, Subpart H, Ethics Agreements, and the OGE-issued Nominee Ethics Agreement Guide (2014).

Federal ethics laws and regulations define the assets that are to be considered when assessing whether an employee or nominee has a financial conflict of interest. This assessment considers Mr. Pruitt's direct or imputed assets, which are defined to be his own interests, those of his spouse, minor child, general partner, any organization or entity for whom he serves as officer, director, trustee, general partner or employee, or any person with whom he is negotiating for or has an arrangement concerning prospective employment. See 5 C.F.R. § 2640.103(d). An employee's obligation to recuse himself from a particular matter or obtain a waiver pursuant to 18 U.S.C. §208(b) is based upon consideration of these defined interests. Interests or potential interests beyond those included in the definition are not considered and, therefore, cannot form the basis of an obligation *under federal ethics laws* to recuse oneself. For example, your letter asks whether the EPA considered potential "conflicts of interest arising from [Mr. Pruitt's] solicitation of funds for 527 and 501(c)(4) organizations." The assets of a 527 organization are

not owned directly by Mr. Pruitt or any of his imputed interests, so are, therefore, outside of the bounds of our review. Although Mr. Pruitt himself had a campaign committee for his own political campaigns for office, the EPA received confirmation from his surrogates that he is neither compensated by nor can he direct funds to himself. Further, he is not liable for the campaign's debt and is not owed any money. Mr. Pruitt's surrogates, in an email message from Mr. Adam Raviv, Special Counsel, WilmerHale, dated December 22, 2016, assured the EPA that if confirmed, the "committee will not raise additional money during his service and its only activity will be to settle any liabilities remaining from before his confirmation." We note that, as a federal employee, Mr. Pruitt would be prohibited under the Hatch Act, 5 U.S.C. § 7324, from soliciting any funds whatsoever for any partisan political campaign, group or election.

QUESTION #1: Could you provide us a complete list of matters that in your opinion will require your authorization?¹

ANSWER #1: Upon appointment, Mr. Pruitt will become an employee of the United States Environmental Protection Agency and subject to, among other things, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, and the conflict of interest statutes codified in Title 18 of the United States Code. The obligation to seek authorization to participate in a specific party matter to avoid a loss of impartiality of the employee originates from 5 C.F.R. § 2635.502(a), which states:

Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

The regulation, which includes a definitions section, specifies that an employee has a covered relationship with, among others, "[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee." 5 C.F.R. § 2635.502(b)(iv). As set forth in the ethics agreement, Mr. Pruitt has identified that for a period of one year after his resignation from his position as the Attorney General of the State of Oklahoma, he will have a covered relationship with the State of Oklahoma and has agreed to seek authorization prior to participating in any specific party matter in which the State of Oklahoma is a party or represents a party. Similarly, he has identified the Southern Baptist Theological Seminary, Windows Ministry Incorporated, and the Rule of Law

¹ This response differs from the long-standing agency practice of answering questions in a comprehensive narrative in light of the unique nature of the confirmation process and the importance of the federal ethics requirements to that process. In order to facilitate the approach taken, this response includes the wording of the questions contained in your letter verbatim.

Defense Fund as organizations with which he will have a covered relationship for one year from the date he resigns or resigned from his positions with those entities, and has agreed during the time he has a covered relationship with any organization to seek authorization prior to participating in any specific party matter in which any organization in which he has served as director or officer is a party or represents a party.

It is not possible to proactively identify a complete list of specific party matters that could exist across the entire agency that involve the State of Oklahoma or any of the three organizations, nor would it be possible to do so for many other employees who have covered relationships with a state or organization that the EPA interacts on a fairly regular basis. Instead, the employee ensures compliance with the ethics requirements by proactively identifying the persons with which the employee has a covered relationship and then seeking authorization each time the employee seeks to participate in a specific party matter where one of those persons is a party or represents a party.

QUESTION #2: What factors will you use to assess whether authorization will be granted? What factors will you use to determine how broadly any recusal, if required, must be drawn? For example, Mr. Pruitt has challenged EPA's carbon pollution standards for power plants. Assuming that a recusal would be required in that matter, would it be limited to decisions regarding the litigation, or to other matters considered by the Office and Air and Radiation?

ANSWER #2: For the purposes of the impartiality considerations under the Standards of Ethical Conduct, the factors the EPA's Designated Agency Ethics Official will take into consideration are set forth at 5 C.F.R. § 2635.502(d)(1) - (6):

Factors which may be taken into consideration include:

- (1) The nature of the relationship involved;
- (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
- (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) The sensitivity of the matter;
- (5) The difficulty of reassigning the matter to another employee; and
- (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Should a recusal be necessary, that would prohibit participation in that specific party matter in any way, but a recusal in one specific party matter would not itself prevent participating on other specific party matters in which the "covered relationship" is a party or represents a party, or extend to matters of general applicability. Pursuant to the impartiality rules, any court case is considered a specific party matter. Thus, if the State of Oklahoma is a party or represents a party in a particular piece of litigation, Mr. Pruitt's ethics agreement includes a commitment by him to seek authorization to participate personally and substantially in that litigation. Should Mr. Pruitt

seek authorization to participate in any litigation in which a person with whom he has a covered relationship is a party or represents a party, as stated above, the EPA Designated Agency Ethics Official would consider the factors set forth at 5 C.F.R. § 2635.502(d)(1) - (6) for purposes of compliance with the federal ethics rules. Beyond the federal ethics requirements, as an attorney, Mr. Pruitt would also be subject to the rules of any relevant state bar. Those rules, however, are in addition to, and beyond the scope of, the federal ethics review and requirements discussed in this letter.

QUESTION #3: Mr. Pruitt has agreed to not participate in any particular matter involving the RLDF without prior authorization. RLDF's activities and donors are largely secret. Without more extensive disclosures about RLDF and Mr. Pruitt's role in it, how will you determine whether a particular matter involves the RLDF?

ANSWER #3: Federal ethics requirements apply first to the employee himself, and so Mr. Pruitt has agreed that, for the period of time for which he has a covered relationship with the Rule of Law Defense Fund (RLDF), he will seek authorization prior to participating in any specific party matter in which RLDF is a party or represents a party. Once he becomes a federal employee, Mr. Pruitt will have a continuing obligation to comply with the commitments made in his ethics agreement and the federal ethics requirements. In order to have an obligation to seek authorization to participate personally and substantially in a matter, RLDF must be a party or represent a party in a specific party matter. If RLDF has an interest in a specific party matter but is not itself a party or representing a party in that matter, the federal ethics requirements would not obligate Mr. Pruitt to seek authorization prior to participating in that specific party matter.

QUESTION #4: The ethics agreement entered into by former EPA Administrator Carol Browner included a clear and permanent recusal of her participation in any EPA matter in which the State of Florida was involved as a party and she was involved personally and substantially as Secretary of the Florida Department of Environmental Regulation. Our understanding of Mr. Pruitt's ethics agreement is that he has made no such unequivocal pledge. Why has EPA concluded that a more lenient arrangement for Mr. Pruitt's conflicts is appropriate?

ANSWER #4: In assisting Mr. Pruitt with his ethics agreement, the EPA followed federal ethics requirements and the most recent Ethics Agreement Guide published by the Office of Government Ethics (OGE) in 2014. Both the EPA and OGE certified Mr. Pruitt's ethics agreement as complying with all federal ethics requirements and conforming to the template set forth in OGE's Guide. Each ethics agreement is specific to the individual who is signing the agreement, and so consistency with the agreement of a former EPA Administrator is not a requirement for the agreement to be in compliance with the federal ethics rules. While the question indicated Mr. Pruitt's ethics agreement differs from the ethics agreement entered into by former Administrator Carol Browner in 1997, Mr. Pruitt's ethics agreement is very similar to the agreement entered into by former Administrator Lisa Jackson in 2009. Those comparisons do not demonstrate compliance or non-compliance with the federal ethics requirements.

QUESTION #5: Mr. Pruitt has agreed to seek your authorization for a one-year period of time. Is it your understanding that any recusal you may require of Mr. Pruitt would be limited to this one-year period? If so, how will you account for his participation in matters after that one-year period where the conflict still exists, like litigation that he has brought against the agency that has not settled or been decided by that time?

ANSWER #5: As explained above, the regulations define a person with whom an employee has a covered relationship to include “[a]ny person for whom the employee has, *within the last year*, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee.” 5 C.F.R. § 2635.502(b)(iv) (italics added). After one year, the covered relationship with the former employer under the federal ethics rules no longer exists. At that point in time and into the future, there is no obligation under the federal ethics rules to seek authorization to participate in the relevant specific party matters, and any disqualification on participating in those specific party matters is no longer in effect. An employee may voluntarily continue to recuse himself from such specific party matters after that point, but is not obligated to do so by the federal ethics requirements. Again, this letter discusses only Mr. Pruitt’s obligations under the federal ethics laws and does not address other possible obligations such as compliance with state bar rules.

QUESTION #6: Mr. Pruitt has sued EPA on behalf of the State of Oklahoma. Before authorizing him to participate in EPA decisions involving Oklahoma, how will you determine whether Mr. Pruitt has obtained consent from his client to be released from ethical obligations he may have to it?

ANSWER #6: The federal ethics requirements ensure employees meet certain obligations on behalf of the interests of the federal government, as those interests are articulated in federal laws and regulations. Likewise, the EPA’s ethics program is focused on ensuring compliance with those laws and regulations. To the extent Mr. Pruitt has ethical obligations to the State of Oklahoma or any other organization, ensuring compliance with those non-federal obligations is beyond the scope of the federal ethics requirements and the EPA’s ethics program.

QUESTION #7: Many of Mr. Pruitt's lawsuits have involved multi-state coalitions. Presumably he has entered into joint prosecution agreements with his co-plaintiffs. Have you reviewed, or will you review, these agreements to assess whether Mr. Pruitt has a "covered relationship" with other states or parties in those lawsuits? Is it your opinion that he would also have to obtain consent from his co-plaintiffs to participate in matters in which EPA's position is adverse to those states?

ANSWER #7: As described above, the federal ethics regulations define persons with whom an employee has a covered relationship, and the impartiality standards do not consider that joint prosecution agreements give rise to any covered relationship with co-plaintiffs. Joint prosecution agreements would not be relevant to evaluating compliance with federal ethics requirements and the EPA has not reviewed any such possible agreements.

QUESTION #8: It is a general principle of legal ethics that an attorney may not disclose privileged information without the client's consent. Furthermore, in multi-party litigation when two or more clients with a common interest in litigation agree to exchange otherwise privileged information concerning the matter, the communication is privileged as against third persons. Have any provisions been put in place to prevent the unauthorized disclosure by Mr. Pruitt of confidential client information, either from the State of Oklahoma or other state plaintiffs in Mr. Pruitt's litigation?

ANSWER #8: The federal ethics requirements ensure employees meet certain obligations on behalf of the interests of the federal government, as those interests are articulated in federal laws and regulations. Likewise, the EPA's ethics program is focused on ensuring compliance with those laws and regulations. To the extent Mr. Pruitt has ethical obligations to the State of Oklahoma or any other state or organization, knowledge of such provisions and ensuring compliance with those non-federal obligations is beyond the scope of the federal ethics requirements and the EPA's ethics program.

QUESTION #9: Pursuant to 42 U.S.C. § 7601(d) (sic), the authority of the Administrator to issue rules related to topics listed in 42 U.S.C. § 7607(d) is not delegable. How will you address a situation where you determine Mr. Pruitt has a conflict of interest with respect to a rule covering one of these topics?

ANSWER #9: Should the federal ethics requirements preclude an Administrator from participating in a matter where the authority to take certain actions is defined by a statute or a regulation to rest with the Administrator, and where the statute or regulation specifically states that the authority may not be delegated, the Federal Vacancies Reform Act and other federal law provide a mechanism for another official of the EPA to perform such functions in an acting capacity. For example, if an Administrator is determined to have a conflict of interest and must be recused with respect to any such non-delegable statutory function or duty, he would be deemed unable to perform the function or duty and the Administrator position would be deemed "vacant" with respect to that function or duty. The Federal Vacancies Reform Act identifies the officials who would serve as the acting Administrator to perform the function or duty, and under Executive Reorganization #3 of 1970, the EPA Deputy Administrator acts as Administrator in the event of a vacancy in the office of Administrator.

QUESTION #10: If a recusal is determined appropriate in any matter, has the nominee agreed to forgo any briefings during the period of the recusal?

ANSWER #10: An employee who is recused from participation cannot be briefed on the same particular matter from which he is recused. In its advisory entitled "Effective Screening Arrangements for Recusal Obligations, DO-04-012 (June 1, 2004), the Office of Government Ethics wrote that:

Ethics officials should also counsel employees regarding the scope of their recusals, including the kinds of actions that may constitute personal and substantial participation.

For example, employees with recusal obligations should not assign covered matters on an ad hoc basis. Participating in a decision concerning who should work on a matter, how a matter should be handled, or whether a matter should be acted upon, is a form of participation in the matter. Involvement in preliminary discussions, in interim evaluations, in review or approval at intermediate levels, or in supervision of subordinates working on a matter also amounts to personal and substantial participation. Recusal means no participation in any way, including briefings.

QUESTION #11: Under what obligation is Mr. Pruitt to follow determinations made by you concerning his recusals and waivers? If he chooses not to follow your determinations, what recourse is available for EPA?

ANSWER #11: Pursuant to the Ethics in Government Act at 5 U.S.C. app. §110, Mr. Pruitt is required to comply with his ethics agreement. Pursuant to 5 C.F.R. § 2634.802(b), he is required to comply with his ethics agreement within ninety days from the date of Senate confirmation. As an employee of the EPA, Mr. Pruitt will be subject to the Standards of Ethical Conduct set forth at 5 C.F.R. Part 2635, as well as the conflict of interest statutes codified in Title 18 of the United States Code, which include specific prohibitions against financial and representational conflict of interest.

As a Presidential nominee for a Senate-confirmed position, Mr. Pruitt is required to have one hour of initial ethics training which he may complete before or after his appointment, but not later than two months after his appointment. 5 C.F.R. § 2638.304(b)(1). In addition, he is required to have an ethics briefing to discuss his immediate ethics obligations. This new training requirement, which became effective on January 1, 2017, may be combined with the initial ethics training, but must occur no later than fifteen days after appointment. See 5 C.F.R. § 2638.305(b)(1). As an employee of the EPA, Mr. Pruitt will be subject to the Standards of Ethical Conduct for Employees of the Executive Branch, which includes the basic obligations of public service set forth at 5 C.F.R. § 2635.101(b)(1) – (12).

As the head of this agency, Mr. Pruitt will be “responsible for, and will exercise personal leadership in, establishing and maintaining an effective agency ethics program and fostering an ethical culture in the agency.” 5 C.F.R. § 2638.107. In the event that an employee fails to meet the obligations of his or her ethics agreement, then the EPA may notify the Office of the Inspector General and/or the Office of Government Ethics. See 5 C.F.R. § 2635.101(b)(11), which requires employees to disclose waste, fraud, abuse and corruption to the proper authorities, and 5 C.F.R. § 2638.401, which gives the Office of Government Ethics the authority to take action with respect to deficiencies in an agency’s ethics program.

In closing, thank you for your January 12, 2017, letter requesting specific information regarding the ethics review performed by the EPA with regard to the nomination of E. Scott Pruitt for the position of Administrator. The EPA recognizes the importance of the federal ethics requirements to the confirmation process, and is committed to working with the Congress, Mr. Pruitt, and future nominees to explain those requirements and how they apply to a particular situation.

Consistent with that commitment, Mr. Pruitt's representative requested a copy of the signed version of this response after it has been transmitted to you, and one will be provided to him.

If you have further questions, you may contact me at minoli.kevin@epa.gov or (202) 564-8064, or your staff may contact Justina Fugh, Senior Counsel for Ethics, at fugh.justina@epa.gov or (202) 564-1786 and copy Christina Moody of the EPA's Office of Congressional and Intergovernmental Relations, moody.christina@epa.gov or (202) 564-0260.

Sincerely,



Kevin S. Minoli
Designated Agency Ethics Official
Principal Deputy General Counsel