LOOKING TO HIRE AN OBAMA APPOINTEE? WHAT YOU NEED TO KNOW ABOUT THE NEW OGE RULES ON THE RECRUITING OF FEDERAL EMPLOYEES

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The U.S. Office of Government Ethics ("OGE") has issued updated rules, which became effective August 25, 2016, on recruiting federal employees for private sector jobs. The revision comes at a time when many in the federal government will be seeking employment elsewhere due to the upcoming transition to a new administration. Prospective employers should be cognizant of some of the most important updates to the rules, including the addition of a disclosure requirement for "public filer" employees subject to section 17 of the Stop Trading on Congressional Knowledge Act of 2012 ("STOCK Act"), which may bring the prospective recruitment into the public arena.

The failure to understand these rules has potentially far-reaching implications for successful implementation of a company's political engagement compliance program. If you are thinking of approaching an executive branch employee regarding potential employment, feel free to contact one of K&L Gates' political ethics lawyers with any questions.

RECUSAL REQUIREMENTS

The general recusal requirement remains unchanged: Federal government employees[1] must recuse themselves from matters before them that have "direct and predictable" effects on the financial interests of a prospective employer with whom an employee is discussing possible employment. *However*, the revised rules clarify that such matters do not need to be particular to a specific prospective employer but may be of only *general applicability* instead. To illustrate, the rule envisions a scenario in which an employee of an agency is developing a regulation on research criteria used for approving drugs and begins discussions with a pharmaceutical company about possible employment. The employee must recuse herself from participation in the formation of the regulation, because the regulation is a particular matter of general applicability that could have a direct effect on the financial interests of the pharmaceutical company.

Prospective employers should be mindful of the recusal requirement and note that it can be triggered at any time during employment discussions. The recusal requirement applies to all federal government employees not just those covered under the STOCK Act.

STOCK ACT

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OGE's revisions to the rules implement the STOCK Act's requirement that a "public filer" employee of the federal government (i.e., an employee required to file public financial disclosure reports) notify the employee's agency within *three days* of commencing a negotiation or agreement with a prospective employer for employment or compensation. A public filer must also file a recusal notification if the negotiation or agreement could have such direct or predictable effects on the financial interests of the prospective employer. The new rule also provides an opportunity for public filers to file advance disclosure and recusal notifications before negotiations commence and conflicts of interest materialize.

Public filer employees include the president and vice president, presidential appointees in the executive office of the president, employees classified above pay grade GS-15, administrative law judges, and employees exempted from the competitive service because they hold a confidential or policy-making position.

WHAT CONSTITUTES NEGOTIATIONS

The new rule adds little to an understanding of what actions by a federal government employee constitute the commencement of negotiations with a prospective employer, outside of an affirmative communication by an employee that he or she is interested in a position. However, in cases where a prospective employer seeks to initiate discussions with a federal employee about potential employment, even if the discussion is only an attempt to gauge the employee's interest in considering the position, the federal government employee will be considered to be seeking employment and thus could be required to file disclosure and recusal notifications if the employee does not reject the "unsolicited employment overture" conclusively. The rule envisions an employee rejecting the overture unequivocally by stating, "I am not talking to anyone about employment until I leave the Government."

The message is clear that OGE's position is that when an employee responds to an unsolicited employment overture nothing short of a blunt refusal will keep the employee from triggering the disclosure and recusal rules. Prospective employers should keep this in mind as they consider whether and how best to reach out to federal government employees. They should also understand why they may be firmly rebuffed, lest their contact require disclosure and recusal.

The new rule includes, for the first time, examples intended to elucidate how social media recruitment of federal government employees fits within the regulatory framework. The rule clarifies that prospective employers do not trigger the recusal rules if they view an employee's profile on LinkedIn, nor would this be the case if the prospective employer sent an unsolicited message to an employee to which the employee does not respond. However, as with the more traditional method of recruitment discussed above, if the employee responds to a message on LinkedIn and the response is anything other than a rejection, that employee is considered to be seeking employment and the recusal rules could be triggered. Additionally, the rule clarifies that online résumé distribution services are similar to traditional search firms. Accordingly, the recusal rules may be triggered if an employee's résumé is sent electronically to a prospective employer, even if the employee has not had any communications with the prospective employer.

CONCLUSION

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As the current Administration winds down, prospective employers should not hesitate to engage with federal government employees about potential employment, as those employees are likely exploring post-government options in the wake of the administration change. However, prospective employers should be mindful of the disclosure and recusal obligations for public filer employees, and should be judicious in approaching employees whose recusal could be potentially detrimental to the company, the firm, or its clients. Additionally, prospective employers should remain vigilant in avoiding the perception, within the federal government or the public at large, of any impropriety in their potential recruitment of federal employees.

For more information on the OGE rules and their practical applications, consult with one of K&L Gates' political ethics lawyers.

NOTES:

[1] The OGE recusal rules apply to federal employees of the executive branch. Different rules apply to the employees of Congress and the federal judiciary.

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