



OFFICE OF
INSPECTOR GENERAL

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

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MEMORANDUM FOR INSPECTOR GENERAL THORSON

FROM: *RD* Rich Delmar
Counsel

SUBJECT: Report of Inquiry Regarding Travel by Treasury Chief of Staff
Eli Miller

Introduction

Earlier this month, in response to media reports that Chief of Staff Eli Miller had accepted a flight on a privately-owned aircraft, you directed me to conduct an inquiry into the matter. I contacted Treasury OGC to obtain relevant records and conducted research into the rules governing government employees' acceptance of gifts, 5 C.F.R. Part 2635 Subpart B¹. I also interviewed Mr. Miller, as well as former Assistant General Counsel (General Law, Ethics, and Regulation) Rochelle Granat. My summary of their statements and other facts obtained, and my analysis of how the gift regulations apply to those facts, are set out below.

Interviews

I spoke with Mr. Miller on Thursday, October 19, 2017. Treasury Deputy General Counsel Brian Callanan observed the interview but did not participate. I asked Mr. Miller a series of questions regarding his acceptance of a flight on an aircraft owned or controlled by Mr. Nelson Peltz from Washington to Palm Beach.

Mr. Miller said that he met Mr. Peltz in the spring of 2016 in connection with the Trump for President Campaign. Mr. Miller stated that he served as CFO of the financing efforts for the campaign, and met Mr. Peltz through now-Treasury Secretary Mnuchin as well as now-President Trump. Messrs. Miller and Peltz worked together during the campaign.

Since the campaign they have kept in touch by phone, email/text, and occasional meetings. Mr. Miller estimated that they communicate on the order of twice a month. He stated that their relationship is strictly social, and "zero business." Mr. Miller advised that he sees Mr. Peltz as a mentor.

Mr. Miller denied knowing of any business that Mr. Peltz or entities associated with him would have with the Treasury Department or any of its offices and bureaus. He said

¹ The relevant provisions, contained within sections 2635.201 – 2635.205, are set out at the end of this memo.

that Mr. Peltz at one point observed to him that contacting the No Labels group in Congress might be a useful idea; this was not mentioned in the context of any particular bill or other initiative². He further stated that Mr. Peltz has never asked him about any matter involving his work at Treasury, nor asked him to intervene or provide information for any purpose.

Mr. Miller stated that on Thursday, March 23, 2017 Mr. Peltz was visiting with Secretary Mnuchin and Mr. Miller in the Secretary's office, on his way to visiting the White House to have lunch with the President³. Shortly before noon, the three left Treasury and in the course of the walk to the White House, a conversation ensued involving Mr. Miller's busy schedule, in the course of which Mr. Miller mentioned that he was going to Florida that evening to visit his in-laws. Mr. Miller stated that Mr. Peltz then mentioned that he was flying to Florida that evening on his own aircraft, and offered Mr. Miller a ride. Mr. Miller and Secretary Mnuchin both responded that they would "have to check with Rochelle," by which they meant then-Assistant General Counsel and Treasury's Designated Agency Ethics Official Rochelle Granat.

Mr. Miller said that he called Ms. Granat, and that she advised him of the rules regarding acceptance of gifts in Subpart B of 5 CFR Part 2635 (see excerpts below), similar to what she had advised when he had previously sought guidance on an issue involving acceptance of transportation.

Mr. Miller stated that he did in fact take the flight with Mr. Peltz that evening. They were the only passengers on the plane. The flight was from Dulles International Airport to an airport in Palm Beach. He did not recall the plane model, but did confirm that it was a smaller, business-type jet with a small number of seats. He said that Mr. Peltz slept for almost all of the flight, and that he spent the time working on emails and other documents. He stated that they did not talk after about the first ten minutes, and did not talk about anything related to Treasury.

He further stated that he recently contacted Mr. Peltz regarding the cost of the flight; on October 20 he sent an email, which advised:

I understood at the time that the flight was paid for personally by Nelson, not his business, and I called him again this month to confirm that. Nelson confirmed that the cost of my travel was a personal expense to him.

On October 18, I interviewed Ms. Granat by phone, regarding Mr. Miller's consultation with her. She stated that at some time earlier than March 23, Mr. Miller had contacted her for advice on the propriety of accepting a gift of transportation. She said that she referred to the Subpart B gift regulations and outlined the factors to be considered in determining whether a gift can be accepted; including the definition of prohibited source,

² Media accounts indicate that Mr. Peltz is a supporter of and contributor to this group. See, e.g. Group Launches Effort to Protect Moderate Candidates ... - No Labels (containing a December 2016 Wall Street Journal article.)

³ The White House website's link to the March 23 press briefing confirms that Messrs. Mnuchin and Peltz had lunch with the President that day. See <https://www.whitehouse.gov/the-press-office/2017/03/23/daily-press-briefing-press-secretary-27> (checked 10/20/2017)

offer based on official position, and pre-existing family relation or personal friendship. She advised that Mr. Miller told her that the offeror in this earlier inquiry was a personal friend from before his employment at Treasury, who was not in the status of a prohibited source⁴.

Ms. Granat said that on March 23, Mr. Miller called her about the current offer of transportation and asked her if the rules were "like before, right?" Ms. Granat affirmed that was the case. She did not ask Mr. Miller for details regarding the nature of the pre-existing friendship with the current offeror.

Ms. Granat stated that she did not prepare a memo to file, send an email, or prepare any other record of the advice provided to Mr. Miller regarding the March 23 offer. She said that the Office of General Counsel maintains a data base which records ethics-related information regarding Treasury employees, such as receipt of training, filings of financial disclosure forms, and requests for advice that are "significant," "unique," or that otherwise should be recorded. Many more minor instances of provision of advice are not recorded in this data base. She said she confirmed with Acting AGC Brian Sonfield that this matter is not in the data base.

I asked her if the Office of Government Ethics or any other authority prescribes a standard process for memorializing provisions of ethics advice. She said that with the exception of advisories relating to Widely Attended Gatherings, which must be recorded in writing, there is no requirement for written recordation.

Analysis

When asked, Mr. Miller indicated that he was not aware of any interest or relationship involving Mr. Peltz, or entities he controls, which would trigger any of the elements in the regulation's definition of prohibited source⁵. He further denied that Mr. Peltz provided the transportation because of Mr. Miller's position as a Treasury official, which would violate § 2635.203(e).⁶

And the facts he presented regarding how he knows Mr. Peltz do appear consistent with the regulation's definition of a personal relationship,⁷ in that while it arose from the

⁴ In the October 20 interview, Mr. Miller stated that ultimately he did not accept that earlier flight offer.

⁵ 2635.203(d) Prohibited source means any person who:

- (1) Is seeking official action by the employee's agency;
- (2) Does business or seeks to do business with the employee's agency;
- (3) Conducts activities regulated by the employee's agency;
- (4) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duties; or
- (5) Is an organization a majority of whose members are described in paragraphs (d)(1) through (4) of this section

⁶ (e) Given because of the employee's official position. A gift is given because of the employee's official position if the gift is from a person other than an employee and would not have been given had the employee not held the status, authority, or duties associated with the employee's Federal position.

⁷ 2635.204(b) Gifts based on a personal relationship. An employee may accept a gift given by an individual under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee. Relevant factors in making such a

political campaign and involved the current Secretary, it appears to have been conducted outside of official channels and topics. That said, the applicable regulations do stress that legal does not always equate to appropriate or wise. Subpart B starts out with a subsection entitled Considerations for declining otherwise permissible gifts which states:

(1) Every employee has a fundamental responsibility to the United States and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain. An employee's actions should promote the public's trust that this responsibility is being met. For this reason, employees should consider declining otherwise permissible gifts if they believe that a reasonable person with knowledge of the relevant facts would question the employee's integrity or impartiality as a result of accepting the gift.

(2) An employee who is considering whether acceptance of a gift would lead a reasonable person with knowledge of the relevant facts to question his or her integrity or impartiality may consider, among other relevant factors, whether:

(i) The gift has a high market value;

(ii) The timing of the gift creates the appearance that the donor is seeking to influence an official action;

(iii) The gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties; and

(iv) Acceptance of the gift would provide the donor with significantly disproportionate access.

In considering the market value of the gift, I sought information from the Acting Assistant General Counsel for General Law, Ethics and Regulation. He said that the Office of Government Ethics advised that the accepted method to value trips, when reporting them as gifts on financial disclosure forms, is to apply the federal election rule (11 C.F.R. §100.93(c)(3)) which uses the unrestricted, same-day first class fare for the routing at issue. Treasury determined that for a commercial flight from Dulles to West Palm Beach, that fare was \$1,527.

There was no indication of an effort to influence an official action; Mr. Peltz's general endorsement of the No Labels group does not reach that level.

While Mr. Peltz has established a family foundation under I.R.C. § 501(c)(3) and presumably has other interests in the development and implementation of tax policy, no specific interests, actions, or disputes that are or could be affected are evident.

And there is no evidence that Mr. Peltz's access to Treasury officials would be enhanced by his offer, and Mr. Miller's acceptance, of the plane ride. Mr. Peltz knows Mr. Miller, and indeed the Secretary and the President, already.

In sum, while these factors could have led Mr. Miller to decide to decline the offer, I do not see his decision to accept it as improper.

determination include the history and nature of the relationship and whether the family member or friend personally pays for the gift.

Conclusion

Mr. Miller's acceptance of the aircraft ride does not appear to have violated applicable law and regulation. Nonetheless, in an environment of high attention to relationships affecting governmental actions, consideration might well be given to another provision in the gift regulation, which observes

Even though acceptance of a gift may be permitted by one of the exceptions contained in this section, it is never inappropriate and frequently prudent for an employee to decline a gift if acceptance would cause a reasonable person to question the employee's integrity or impartiality.

Consideration might also be given to making a written record of ethics advice given in situations that can trigger observations like the foregoing.

Excerpts From Subpart B - Gifts From Outside Sources

§ 2635.201 Overview and considerations for declining otherwise permissible gifts.

(a)Overview. This subpart contains standards that prohibit an employee from soliciting or accepting any gift from a prohibited source or any gift given because of the employee's official position, unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart.

(b)Considerations for declining otherwise permissible gifts.

(1) Every employee has a fundamental responsibility to the United States and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain. An employee's actions should promote the public's trust that this responsibility is being met. For this reason, employees should consider declining otherwise permissible gifts if they believe that a reasonable person with knowledge of the relevant facts would question the employee's integrity or impartiality as a result of accepting the gift.

(2) An employee who is considering whether acceptance of a gift would lead a reasonable person with knowledge of the relevant facts to question his or her integrity or impartiality may consider, among other relevant factors, whether:

(i) The gift has a high market value;

(ii) The timing of the gift creates the appearance that the donor is seeking to influence an official action;

(iii) The gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties; and
(iv) Acceptance of the gift would provide the donor with significantly disproportionate access.

(3) Notwithstanding paragraph (b)(1) of this section, an employee who accepts a gift that qualifies for an exception under § 2635.204 does not violate this subpart or the Principles of Ethical Conduct set forth in § 2635.101(b).

§ 2635.202 General prohibition on solicitation or acceptance of gifts.

(a)Prohibition on soliciting gifts. Except as provided in this subpart, an employee may not, directly or indirectly:

(1) Solicit a gift from a prohibited source; or

(2) Solicit a gift to be given because of the employee's official position.

(b)Prohibition on accepting gifts. Except as provided in this subpart, an employee may not, directly or indirectly:

(1) Accept a gift from a prohibited source; or

(2) Accept a gift given because of the employee's official position.

§ 2635.203 Definitions.

For purposes of this subpart, the following definitions apply:

(a) Agency has the meaning set forth in § 2635.102(a). However, for purposes of this subpart, an executive department, as defined in 5 U.S.C. 101, may, by supplemental agency regulation, designate as a separate agency any component of that department which the department determines exercises distinct and separate functions.

(b) Gift includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred

(9) Any gift accepted by the Government under specific statutory authority, including:

(i) Travel, subsistence, and related expenses accepted by an agency under the authority of 31 U.S.C. 1353 in connection with an employee's attendance at a meeting or similar function relating to the employee's official duties which take place away from the employee's duty station, provided that the agency's acceptance is in accordance with the implementing regulations at 41 CFR chapter 304; and

(ii) Other gifts provided in-kind which have been accepted by an agency under its agency gift acceptance statute; and

(10) Anything for which market value is paid by the employee.

(d) Prohibited source means any person who:

(1) Is seeking official action by the employee's agency;

(2) Does business or seeks to do business with the employee's agency;

(3) Conducts activities regulated by the employee's agency;

(4) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duties; or

(5) Is an organization a majority of whose members are described in paragraphs (d)(1) through (4) of this section.

(e) Given because of the employee's official position. A gift is given because of the employee's official position if the gift is from a person other than an employee and would not have been given had the employee not held the status, authority, or duties associated with the employee's Federal position.

§ 2635.204 Exceptions to the prohibition for acceptance of certain gifts.

Subject to the limitations in § 2635.205, this section establishes exceptions to the prohibitions set forth in § 2635.202(a) and (b). Even though acceptance of a gift may be permitted by one of the exceptions contained in this section, it is never inappropriate and frequently prudent for an employee to decline a gift if acceptance would cause a reasonable person to question the employee's integrity or impartiality.

(b) Gifts based on a personal relationship. An employee may accept a gift given by an individual under circumstances which make it clear that the gift is motivated by a family

relationship or personal friendship rather than the position of the employee. Relevant factors in making such a determination include the history and nature of the relationship and whether the family member or friend personally pays for the gift.

Example 1 to paragraph (b):

An employee of the Federal Deposit Insurance Corporation (FDIC) has been dating an accountant employed by a member bank. As part of its "Work-Life Balance" program, the bank has given each employee in the accountant's division two tickets to a professional basketball game and has urged each to invite a family member or friend to share the evening of entertainment. Under the circumstances, the FDIC employee may accept the invitation to attend the game. Even though the tickets were initially purchased by the member bank, they were given without reservation to the accountant to use as she wished, and her invitation to the employee was motivated by their personal friendship.

Example 2 to paragraph (b):

Three partners in a law firm that handles corporate mergers have invited an employee of the Federal Trade Commission (FTC) to join them in a golf tournament at a private club at the firm's expense. The entry fee is \$500 per foursome. The employee cannot accept the gift of one-quarter of the entry fee even though he and the three partners have developed an amicable relationship as a result of the firm's dealings with the FTC. As evidenced in part by the fact that the fees are to be paid by the firm, it is not a personal friendship but a business relationship that is the motivation behind the partners' gift.

Example 3 to paragraph (b):

A Peace Corps employee enjoys using a social media site on the internet in his personal capacity outside of work. He has used the site to keep in touch with friends, neighbors, coworkers, professional contacts, and other individuals he has met over the years through both work and personal activities. One of these individuals works for a contractor that provides language services to the Peace Corps. The employee was acting in his official capacity when he met the individual at a meeting to discuss a matter related to the contract between their respective employers. Thereafter, the two communicated occasionally regarding contract matters. They later also granted one another access to join their social media networks through their respective social media accounts. However, they did not communicate further in their personal capacities, carry on extensive personal interactions, or meet socially outside of work. One day, the individual, whose employer continues to serve as a Peace Corps contractor, contacts the employee to offer him a pair of concert tickets worth \$30 apiece. Although the employee and the individual are connected through social media, the circumstances do not demonstrate that the gift was clearly motivated by a personal relationship, rather than the position of the employee, and therefore the employee may not accept the gift pursuant to paragraph (b) of this section.

§ 2635.205 Limitations on use of exceptions.

Notwithstanding any exception provided in this subpart, other than § 2635.204(j), an employee may not:

(a) Accept a gift in return for being influenced in the performance of an official act;

(b) Use, or permit the use of, the employee's Government position, or any authority associated with public office, to solicit or coerce the offering of a gift;

(c) Accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using the employee's public office for private gain;

(d) Accept a gift in violation of any statute; relevant statutes applicable to all employees include, but are not limited to:

(1) 18 U.S.C. 201(b), which prohibits a public official from, directly or indirectly, corruptly demanding, seeking, receiving, accepting, or agreeing to receive or accept anything of value personally or for any other person or entity in return for being influenced in the performance of an official act; being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or for being induced to do or omit to do any action in violation of his or her official duty. As used in 18 U.S.C. 201(b), the term "public official" is broadly construed and includes regular and special Government employees as well as all other Government officials; and

(2) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several specific exceptions to this general prohibition, including an exception for contributions made from the treasury of a State, county, or municipality;

(e) Accept a gift in violation of any Executive Order; or

(f) Accept any gift when acceptance of the gift is specifically prohibited by a supplemental agency regulation issued with the concurrence of the Office of Government Ethics, pursuant to § 2635.105.