

DEPARTMENT OF JUSTICE

Washington

APR 02 2013

CERTIFICATION OF PUBLIC INTEREST WAIVER FOR WILLIAM BAER

FROM: Lee J. Lofthus
Designated Agency Ethics Official, Department of Justice

SUBJECT: Waiver from Restrictions Related to Arnold & Porter, LLP in the Antitrust Division's E-books Litigation, United States v. Apple, Inc., Civ. No. 1:12-cv-2826 (S.D.N.Y.) (DOJ File No. 60-511130-0007)

Pursuant to the authority delegated under Section 3 of Executive Order 13490 and for the reasons stated in the attached memorandum and after consultation with the Counsel to the President, I hereby certify that a limited waiver of the restrictions of paragraph 2 of the Ethics Pledge is in the public interest for appointee William J. Baer in the position of Assistant Attorney General in the Department of Justice. Mr. Baer shall not be restricted from participating in the Antitrust Division's E-books Litigation, United States v. Apple, Inc., Civ. No. 1:12-cv-2826 (S.D.N.Y.) (DOJ File No. 60-511130-0007), subject to the limitations set forth in the attached memorandum and without waiving the limitation on Mr. Baer's participation in regulations and contracts as provided in paragraph 2 of the Ethics Pledge. This waiver does not otherwise affect Mr. Baer's obligation to comply with other provisions of the Ethics Pledge or with all other pre-existing government ethics rules.

Signed _____


Lee J. Lofthus
Designated Agency Ethics Official
Department of Justice

Date _____

4-2-2013



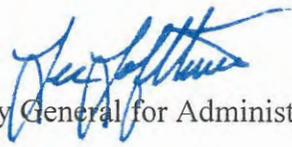
U.S. Department of Justice

Justice Management Division

APR - 2 2013

Washington, D.C. 20530

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION

From: Lee J. Lofthus 
Assistant Attorney General for Administration and Designated Agency Ethics
Official

Re: Request to Authorize Assistant Attorney General William J. Baer to Participate in the Antitrust Division's E-books Litigation, *United States v. Apple, Inc.*, Civ. No. 1:12-cv-2826 (S.D.N.Y.) (DOJ File No. 60-511130-0007)

The purpose of this memorandum is to waive the restriction in Executive Order 13490 of January 21, 2009, Ethics Commitments by Employees in the Executive Branch, and further to make a determination under the standards of conduct on impartiality, 5 C.F.R. Section 2635.502, that you may participate in a particular matter in which your former firm represents a party, relating to the Department's continuing e-books litigation, *United States v. Apple, Inc.*, Civ. No. 1:12-cv-2826 (S.D.N.Y.).

On April 11, 2012, the Department filed a civil antitrust lawsuit against Apple, Inc., Hachette Book Group, Inc., HarperCollins Publishers LLC, Simon & Schuster Inc., Holtzbrinck Publishers LLC (d/b/a/ Macmillan), and Penguin Group (USA), Inc. (and the parents of Macmillan and Penguin) for conspiring to raise retail e-book prices. At the same time the Complaint was filed, the Department filed a proposed settlement that resolved its concerns with Hachette, HarperCollins and Simon & Schuster. The Court approved these settlements on September 6, 2012. Since that time, Penguin and Holtzbrinck Publishers LLC (d/b/a/ Macmillan) have also settled; those consent decrees are pending court approval. The Division's case against Apple is set for trial on June 3, 2013.

You are generally recused from participation in particular matters with parties in which your former firm is or represents a party, under the standards of conduct for employees in the executive branch, 5 C.F.R. Section 2635.502, and under E.O. 13490. You left Arnold & Porter on January 2, 2013. Subsequent to your departure, Arnold & Porter appeared in this matter for HarperCollins – a publisher that settled with the Department nearly a year ago. This occurred under the somewhat unusual circumstance in which one of the attorneys for HarperCollins on this case left his old firm and began working as counsel for Arnold & Porter. This attorney continued to represent HarperCollins in this matter, along with attorneys at his old firm that also continue to represent HarperCollins in this matter. This attorney joined Arnold & Porter after you left. Thus, this matter was not pending at Arnold & Porter while you were there and you have had no involvement in it.

The Department has settled with HarperCollins, and any issues that arise in the future regarding its compliance under the court approved consent decree would be handled through separate proceedings and not through litigation on the substantive antitrust allegations in the Complaint. Nevertheless, HarperCollins is a party to the lawsuit. Thus, absent a waiver from the restriction in the Executive Order and the standards of conduct, you are recused from participating in the e-books litigation.

Executive Order 13490, Ethics Commitments by Employees in the Executive Branch

The Executive Order provides that a political appointee will not, for a period of two years from the date of appointment, participate in any particular matter involving specific parties that is directly and substantially related to the appointee's former employer or former clients, including regulations and contracts. Sec. 1, paragraph 2. The Executive Order further provides that "particular matter involving specific parties" shall have the same meaning as set forth in the ethics regulations at 5 C.F.R. Section 2641.201(h), except that it shall also include "any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties." E.O. 13490, Sec. 2(h).

E.O. 13490 references the following definition provided in the standards of conduct (however, the E.O. specifically includes regulations and contracts):

5 C.F.R. Section 2641.201(h)(1): *Particular matter involving specific party or parties -- (1) Basic Concept.* The prohibition applies only to communications or appearances made in connection with a "particular matter involving a specific party or parties." Although the statute defines "particular matter" broadly to include "any investigation, application, request for ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding," 18 U.S.C. 207(i)(3), only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product application, enforcement action, administrative adjudication, or court case.

The E.O. provides for waiver of the recusal provisions by the Director of the Office of Management and Budget (OMB) or his designee, in consultation with the Counsel to the President or his designee. E.O. 13490, Sec. 3(a). The Director, OMB, has designated the Designated Agency Ethics Official (DAEO) of each executive branch agency to exercise the Sec. 3 waiver authority, in writing, and in consultation with the Counsel to the President.

Specific Waiver Request

The e-books litigation is a high-profile matter that has raised important substantive antitrust issues, and the Department's efforts to litigate its remaining case against Apple would be significantly enhanced by your participation. The Division has infrequently gone to trial in cases involving civil conspiracy allegations, and, in this matter, Apple is contending that the antitrust laws do not prohibit the conduct alleged in the Department's Complaint. A trial on the merits against Apple will be resource intensive, hotly contested, and generate a significant amount of publicity. Also, the contours and terms of any relief – whether a consent decree or a court order following a successful trial – will have lasting policy implications as it will be used by the Division and opposing counsel as precedent for future matters.

Due to the importance of this matter to the Division's mission, we believe that it is necessary you be able to exercise your leadership role as the Assistant Attorney General in reviewing, shaping, and managing the Division's litigation (although this waiver would not extend to any proceedings against HarperCollins for failing to comply with its consent decree). Notably, Civil DAAGs Renata Hesse and Leslie Overton -- one of whom would normally step in as Acting Assistant Attorney General -- are also currently recused on this matter.

Although your former firm, Arnold & Porter, is now involved in representing a party to the Department's lawsuit, the Department settled the lawsuit with respect to HarperCollins nearly a year ago. Moreover, as noted above, Arnold & Porter has now appeared in this matter under the somewhat unusual circumstance in which one of the attorneys for HarperCollins began working as counsel for Arnold & Porter after your departure.

Based on consultations with the Antitrust Division, I conclude that it is not necessary at this time for you to meet or communicate with your former firm, should they make such a request. If direct contact with Department officials is necessary, other officials from the Department would be available to meet with your former firm.

The standard for waiving the restriction in the E.O. is that it be in the public interest. E.O. 13490, Sec. 3. Based on the above, I believe that it directly serves the public interest that the Department have the benefit of your participation in this case, given the institutional interest of the Department, and the important legal, policy, resource and strategic considerations involved in this matter. I certify that it is in the public interest that you be able to participate in *United States v. Apple, Inc.*, Civ. No. 1:12-cv-2826 (S.D.N.Y.).

5 C.F.R. Section 2635.502

The standard of conduct at 5 C.F.R. Section 2635.502 requires an employee to take appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under Section 502, where an employee knows that a person with whom he has a "covered relationship" is a party or represents a party to the matter, he should not participate in the matter

without informing an agency official and receiving authorization to participate. Included in the definition of a “covered relationship” is any person for whom the employee served, within the preceding year, as officer, director, trustee, general partner, agent attorney, consultant, contractor, or employee. 5 C.F.R. Section 2635.502(b)(1)(iv).

The Department has also been sensitive to appearances of partiality where the official’s former firm or former client is, or represents, a person or entity that is not a party but is otherwise significantly affected by a matter. In these situations, the Department applies the “catch-all” provision in Section 502, which states that if circumstances other than those specifically provided in the regulation may cause an official’s impartiality to be questioned, the Department should use the process provided in Section 502 to determine whether he should or should not participate in a particular matter.

You have a covered relationship with your former firm, Arnold & Porter. However, Arnold & Porter appeared in this matter on behalf of HarperCollins after you left the firm, and under the somewhat unusual circumstance in which one of the attorneys representing HarperCollins began working for Arnold & Porter after your departure. Thus, this matter was not pending at Arnold & Porter while you were there. Moreover, the Department has already settled the lawsuit with respect to HarperCollins.

Under the standard, I conclude that a reasonable person would not question the integrity of the Department’s programs and operations based on your participation in the e-books case, and that should such questions arise, the Department’s interest in your participation outweighs any possible concern.

WAIVER: I hereby certify that it is in the public interest for you as Assistant Attorney General to participate in *United States v. Apple, Inc.*, Civ. No. 1:12-cv-2826 (S.D.N.Y.), and pursuant to E.O. 13490 Sec. 3(a), I waive the restriction in Section 1 of E.O. 13490, on participation in a specific party matter that is directly and substantially related to your former employer, Arnold & Porter, except that you will not have any direct contact with Arnold & Porter and will not participate in decree compliance issues with respect to HarperCollins. We have consulted with the Office of the Counsel to the President concerning this waiver. Further, I hereby determine, under 5 C.F.R. Section 2635.502, that the interest of the Department in your participation in this case outweighs any possible concern that a reasonable person may question the Department’s programs and operations.

DEPARTMENT OF JUSTICE

Washington

September 11, 2013

CERTIFICATION OF PUBLIC INTEREST WAIVER FOR WILLIAM BAER

FROM: Lee J. Lofthus
Designated Agency Ethics Official, Department of Justice

SUBJECT: Waiver from Restrictions Related to Arnold & Porter, LLP in the Antitrust Division's Criminal Investigations in [**Product A, Product B, Product C, Product D, Product E, and Product F**]

Pursuant to the authority delegated under Section 3 of Executive Order 13490 and for the reasons stated in the attached memorandum and after consultation with the Counsel to the President, I hereby certify that a limited waiver of the restrictions of paragraph 2 of the Ethics Pledge is in the public interest for appointee William J. Baer in the position of Assistant Attorney General in the Department of Justice. Mr. Baer shall not be restricted from participating in the Antitrust Division's Criminal Investigations in [**Product A, Product B, Product C, Product D, Product E, and Product F**], subject to the limitations set forth in the attached memorandum and without waiving the limitation on Mr. Baer's participation in regulations and contracts as provided in paragraph 2 of the Ethics Pledge. This waiver does not otherwise affect Mr. Baer's obligation to comply with other provisions of the Ethics Pledge or with all other pre-existing government ethics rules.

Signed _____



Lee J. Lofthus
Designated Agency Ethics Official
Department of Justice

Date _____

9-11-2013



U.S. Department of Justice

Justice Management Division

Washington, D.C. 20530

September 11, 2013

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL WILLIAM J. BAER

From: Lee J. Lofthus 
Assistant Attorney General for Administration and Designated Agency Ethics
Official

Re: Request to Authorize Assistant Attorney General William J. Baer to Participate in
the Antitrust Division's Criminal Investigations in the **[Products]**

The purpose of this memorandum is to waive the restriction in Executive Order 13490 of January 21, 2009, Ethics Commitments by Employees in the Executive Branch, and further to make a determination under the standards of conduct on impartiality, 5 C.F.R. Section 2635.502, that you may participate in the Department's criminal antitrust investigations in **[Product A, Product B, Product C, Product D, Product E, and Product F]** [collectively "Products"].

A recusal issue has arisen because your former firm appeared representing **[Company 4]** -- a corporate target believed to have been involved in a conspiracy involving **[Product B]**. It was not involved in the conspiracies related to **[Products A, C, D, E, and F]**, but those matters are related and thus a waiver was sought to permit your participation in all **[Products]**. I believe that it directly serves the public interest for the Department to have the benefit of your participation in each of these matters and that the Department's interest in your participation outweighs any possible concern that a reasonable person may question the Department's programs and operations. To find otherwise would deprive the Department of your leadership and expertise across multiple matters that do not even involve **[Company 4]**, thereby creating a hardship that is disproportionate to any potential appearance issue.

Background

On **[date]**, the Department opened a grand jury investigation in the **[district]** into price fixing and bid rigging on **[Product A]**. **[Description of Product A and volume of commerce estimate redacted.]** Once the investigation into this conspiracy started, the staff became aware of a second, separate conspiracy regarding **[Product B]**. On **[date]**, a separate grand jury investigation was opened in the **[district]** into **[Product B]**. **[Description of Product B and volume of commerce estimate redacted.]**

Four additional investigations are related to the **[Product A and Product B]** investigations: **[Product C]**, in which a grand jury was opened on **[date]** in **[district]**; **[Product D]**, in which a grand jury was opened on **[date]** in **[district]**; **Product E**, in which a grand jury opened on **[date]** in

the [district]; and [Product F], which is still at a preliminary stage. [Description of Products C, D, E, and F and volume of commerce estimates redacted].

You are generally recused from participation in particular matters with parties in which your former firm is or represents a party, under the standards of conduct for employees in the executive branch, 5 C.F.R. Section 2635.502, and under E.O. 13490. You left Arnold & Porter on January 2, 2013. Subsequent to your departure, Arnold & Porter appeared representing [Company 4], a potential target in the [Product B] conspiracy. We do not believe that these matters were pending at Arnold & Porter while you were there and, in any case, you had no involvement in them or knowledge about them. [Company 4] is not a former client of yours. Since Arnold & Porter represents a “party” as that term is defined for the purposes of E.O. 13490 and the standards of conduct, you are recused from participating in the [Product B] matter, absent a waiver.

It is important to highlight that [Company 4] is involved in [Product B] only; it is not involved in the suspected conspiracies involving [Products A, C, D, E, or F]. One of [Company 4’s] alleged co-conspirators, however, is believed to have been involved in conspiracies relating to [Product A and Product C], and the companies involved in [Product C] are also believed to have been involved in illegal conduct with respect to one or more of the following products: [Product D, Product E, and Product F]. Information leading to the opening of [Product B, Product C, and Product D] investigations came out of the [Product A] investigation. Information leading to the opening of the [Product E and Product F] investigations came out of the [Product C]. Thus, the [Product B] investigation is related to the Department’s investigations of these other products.

Due to these interrelationships, it was not workable to require your recusal in [Product B] but permit your participation in the others. Participation in any one of the matters requires access to confidential information and some degree of participation in the others. For that reason, a waiver was sought to permit your participation in each of the above-cited matters, even though your conflict is limited to [Product B].

Executive Order 13490, Ethics Commitments by Employees in the Executive Branch

The Executive Order provides that a political appointee will not, for a period of two years from the date of appointment, participate in any particular matter involving specific parties that is directly and substantially related to the appointee’s former employer or former clients, including regulations and contracts. Sec. 1, paragraph 2. The Executive Order further provides that “particular matter involving specific parties” shall have the same meaning as set forth in the ethics regulations at 5 C.F.R. Section 2641.201(h), except that it shall also include “any meeting or other communication relating to the performance of one’s official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties.” E.O. 13490, Sec. 2(h).

E.O. 13490 references the following definition provided in the standards of conduct (however, the E.O. specifically includes regulations and contracts):

5 C.F.R. Section 2641.201(h)(1): *Particular matter involving specific party or parties – (1) Basic Concept.* The prohibition applies only to communications or appearances made in connection with a “particular matter involving a specific party or parties.” Although the statute defines “particular matter” broadly to include “any investigation, application, request for ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding,” 18 U.S.C. 207(i)(3), only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product application, enforcement action, administrative adjudication, or court case.

The E.O. provides for waiver of the recusal provisions by the Director of the Office of Management and Budget (OMB) or his designee, in consultation with the Counsel to the President or his designee. E.O. 13490, Sec. 3(a). The Director, OMB, has designated the Designated Agency Ethics Official (DAEO) of each executive branch agency to exercise the Sec. 3 waiver authority, in writing, and in consultation with the Counsel to the President.

Specific Waiver Request

The matters that are the subject of this specific waiver request are significant to the Antitrust Division’s criminal program. The [Product A] investigation, in particular, will be high-profile in nature, and the conduct involved is believed to have inflicted considerable harm on U.S. businesses and consumers. Important decisions will need to be made in shaping these investigations, and in pursuing possible action to punish guilty parties and vindicate the public interest.

Moreover, these matters are expected to raise difficult evidentiary and charging issues, as well as important substantive issues on the proper methodology for calculating the volume of affected commerce for sentencing purposes. You have many years of experience on criminal antitrust investigations in the private sector. Accordingly, your participation in these matters going forward would be particularly valuable, not simply due to your position as the appointed and confirmed head of the Antitrust Division, but also due to your extensive expertise.

The Department’s efforts to successfully investigate and potentially to prosecute these matters would be significantly enhanced by your participation, and your participation would help to ensure consistency across the related matters. Depriving the Department of your leadership and valuable expertise in multiple important matters would create a hardship that is disproportionate to any potential appearance issue, particularly given that the suspected involvement of the entity that creates the conflict is limited to only one of the conspiracies under investigation – one believed to involve a relatively small amount of commerce. Due to the importance of these matters to the Division’s mission, and subject to the conditions outlined below, we believe it is necessary for you

to be able to exercise your leadership role as the Assistant Attorney General in reviewing, shaping, and managing the Division's investigations in **[the Products]**.

Based on consultations with the Antitrust Division, I conclude that it is not necessary at this time for you to meet or communicate with Arnold & Porter, should they make such a request. If direct contact with Department officials is necessary, other officials from the Department would be available to meet with your former firm. I have also concluded that, out of an abundance of caution, you should not be involved in charging decisions with respect to **[Company Z]** (or its employees), if they arise. **[Company Z]** may have been involved in the **[Product E]** conspiracy. **[Details redacted relating to Arnold & Porter representation in a separate Antitrust Division investigation involving Company Z]**. For several reasons, you have recused yourself from that separate matter.

The standard for waiving the restriction in the E.O. is that it be in the public interest. E.O. 13490, Sec. 3. Based on the above, I believe that it directly serves the public interest for the Department to have the benefit of your participation, given the institutional interests of the Department, and the important legal, policy, resource and strategic considerations that are involved. I certify that it is in the public interest that you be able to continue to participate in these matters.

5 C.F.R. Section 2635.502

The standard of conduct at 5 C.F.R. Section 2635.502 requires an employee to take appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under Section 502, where an employee knows that a person with whom he has a "covered relationship" is a party or represents a party to the matter, he should not participate in the matter without informing an agency official and receiving authorization to participate. Included in the definition of a "covered relationship" is any person for whom the employee served, within the preceding year, as officer, director, trustee, general partner, agent attorney, consultant, contractor, or employee. 5 C.F.R. Section 2635.502(b)(1)(iv).

The Department has also been sensitive to appearances of partiality where the official's former firm or former client is, or represents, a person or entity that is not a party but is otherwise significantly affected by a matter. In these situations, the Department applies the "catch-all" provision in Section 502, which states that if circumstances other than those specifically provided in the regulation may cause an official's impartiality to be questioned, the Department should use the process provided in Section 502 to determine whether he should or should not participate in a particular matter.

You have a covered relationship with your former firm, Arnold & Porter. However, Arnold & Porter appeared in the **[Product B]** matter after you left the firm. Thus, we do not believe the **[Product B]** matter was pending at Arnold & Porter while you were there, and, in any event, you did not participate in it or have knowledge of it. Arnold & Porter is not involved in **[Products A, C, D, E, or F]**.

Under the standard, and for the reasons described more fully above, I conclude that a reasonable person would not question the integrity of the Department's programs and operations based on your participation in the **[Products]** matters, and that should such questions arise, the Department's interest in your participation outweighs any possible concern. This is especially so given the adjustments the Department will make to reduce or eliminate the possibility that a reasonable person would question your impartiality. Namely, that you will not communicate with anyone from Arnold & Porter regarding these matters and will not be involved in the charging decisions with respect to **[Company Z]** (or its employees).

WAIVER: I hereby certify that it is in the public interest for you as Assistant Attorney General to participate in the **[Products]** matters, and pursuant to E.O. 13490 Sec. 3(a), I waive the restriction in Section 1 of E.O. 13490, on participation in a specific party matter that is directly and substantially related to your former employer, Arnold & Porter, except that you will not have any direct contact with Arnold & Porter and will not participate in charging decisions with respect to **[Company Z]** (or its employees). We have consulted with the Office of the Counsel to the President concerning this waiver. Further, I hereby determine, pursuant to 5 C.F.R. Section 2635.502, that the interest of the Department in your participation in these matters outweighs any possible concern that a reasonable person may question the Department's programs and operations.

DEPARTMENT OF JUSTICE

Washington

November 6, 2013

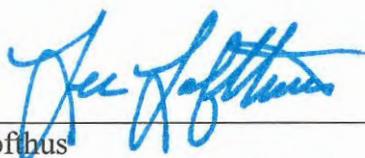
CERTIFICATION OF PUBLIC INTEREST WAIVER FOR WILLIAM BAER

FROM: Lee J. Lofthus
Designated Agency Ethics Official, Department of Justice

SUBJECT: Request to Authorize Assistant Attorney General William J. Baer to Participate in the Antitrust Division's investigation of AT&T Inc.'s proposed acquisition of Leap Wireless International

Pursuant to the authority delegated under Section 3 of Executive Order 13490 and for the reasons stated in the attached memorandum and after consultation with the Counsel to the President, I hereby certify that a limited waiver of the restrictions of paragraph 2 of the Ethics Pledge is in the public interest for appointee William J. Baer in the position of Assistant Attorney General in the Department of Justice. Mr. Baer shall not be restricted from participating in the Antitrust Division's Criminal Investigations in of AT&T Inc.'s proposed acquisition of Leap Wireless International, subject to the limitations set forth in the attached memorandum and without waiving the limitation on Mr. Baer's participation in regulations and contracts as provided in paragraph 2 of the Ethics Pledge. This waiver does not otherwise affect Mr. Baer's obligation to comply with other provisions of the Ethics Pledge or with all other pre-existing government ethics rules.

Signed _____


Lee J. Lofthus
Designated Agency Ethics Official
Department of Justice

Date _____

11-6-2013



U.S. Department of Justice
Justice Management Division

Washington, D.C. 20530

November 6, 2013

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL WILLIAM J. BAER

From: Lee J. Lofthus 
Assistant Attorney General for Administration and Designated Agency Ethics
Official

Re: Request to Authorize Assistant Attorney General William J. Baer to Participate in
the Antitrust Division's investigation of AT&T Inc.'s proposed acquisition of Leap
Wireless International

The purpose of this memorandum is to waive the restriction in Executive Order 13490 of January 21, 2009, Ethics Commitments by Employees in the Executive Branch, and further to make a determination under the standards of conduct on impartiality, 5 C.F.R. Section 2635.502, that you may participate in a particular matter in which your former firm represents a party, relating to the Department's investigation of AT&T's proposed acquisition of Leap Wireless International ("Leap"). The proposed transaction would combine the second- and fifth-largest wireless carriers in the nation. The Department's investigation will focus on whether the transaction may substantially lessen competition in mobile wireless telecommunications services in any area of the country.

You are generally recused from participation in particular matters with parties in which your former firm is or represents a party, under the standards of conduct for employees in the executive branch, 5 C.F.R. Section 2635.502, and under E.O. 13490. In this investigation, we recently learned that Arnold & Porter is assisting AT&T behind-the-scenes; a different large law firm is the Department's primary contact on this matter. We do not believe this matter was pending at Arnold & Porter while you were there. According to Leap's proxy statement filed with the SEC on July 30, 2013, the negotiations that culminated in the proposed transaction began on or around June 5, 2013. You left Arnold & Porter on January 2, 2013. AT&T is not a former client of yours, and you had no involvement in this matter while at Arnold & Porter.

Arnold & Porter represented AT&T in its unsuccessful, high-profile attempt to acquire T-Mobile in 2011 while you were head of the firm's antitrust practice group in Washington, DC. The proposed AT&T/T-Mobile merger involved the same products as here: mobile wireless telecommunications services. The parties abandoned that merger after the Department filed a lawsuit seeking to block it. See Complaint, *United States v. AT&T Inc. et al.*, Civil Action No. 1:11-cv-01560-ESH (D.D.C. filed Aug. 31, 2011). You were not involved in AT&T/T-Mobile, nor do you have confidential information about that matter or AT&T as a result of your work at Arnold & Porter.

Executive Order 13490, Ethics Commitments by Employees in the Executive Branch

The Executive Order provides that a political appointee will not, for a period of two years from the date of appointment, participate in any particular matter involving specific parties that is directly and substantially related to the appointee's former employer or former clients, including regulations and contracts. Sec. 1, paragraph 2. The Executive Order further provides that "particular matter involving specific parties" shall have the same meaning as set forth in the ethics regulations at 5 C.F.R. Section 2641.201(h), except that it shall also include "any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties." E.O. 13490, Sec. 2(h).

E.O. 13490 references the following definition provided in the standards of conduct (however, the E.O. specifically includes regulations and contracts):

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The E.O. provides for waiver of the recusal provisions by the Director of the Office of Management and Budget (OMB) or his designee, in consultation with the Counsel to the President or his designee. E.O. 13490, Sec. 3(a). The Director, OMB, has designated the Designated Agency Ethics Official (DAEO) of each executive branch agency to exercise the Sec. 3 waiver authority, in writing, and in consultation with the Counsel to the President.

Specific Waiver Request

This investigation will be a high-profile, resource-intensive matter that will raise important substantive antitrust and competition policy issues, and the Department's efforts would be substantially enhanced by your participation on this matter. It will be an analytically complex merger review in an industry that is driving towards consolidation, and will likely involve extensive coordination with the Federal Communications Commission (FCC). Your input and significant expertise on merger analytics would be extremely valuable and your leadership in our

coordination with the FCC would contribute significantly to continuing our track record of working seamlessly with the Commission.

It is important to note that, although Arnold & Porter is involved in representing AT&T, they are not the lead antitrust counsel for AT&T in this matter and are not expected to be the Department's primary contact. This significantly reduces any appearance issues involved. Due to the importance of the matter to the Antitrust Division's mission, including the expected need for high-level coordination with the FCC, we believe that it is necessary for the Department to benefit from your substantial merger expertise and for you to be able to exercise your leadership role as the Assistant Attorney General in reviewing, shaping, and managing the Division's investigation and any potential litigation.

Based on consultations with the Antitrust Division, I conclude that it is not necessary at this time for you to meet or communicate with your former firm, should they make such a request. If direct contact with Department officials is necessary, other officials from the Department would be available to meet with your former firm.

The standard for waiving the restriction in the E.O. is that it be in the public interest. E.O. 13490, Sec. 3. Based on the above, I believe that it directly serves the public interest that the Department have the benefit of your participation in this case, given the institutional interest of the Department, and the important legal, policy, resource and strategic considerations involved in this matter. I certify that it is in the public interest that you be able to participate in the Department's investigation of AT&T's proposed acquisition of Leap (DOJ File No. 60-517212-0014).

5 C.F.R. Section 2635.502

The standard of conduct at 5 C.F.R. Section 2635.502 requires an employee to take appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under Section 502, where an employee knows that a person with whom he has a "covered relationship" is a party or represents a party to the matter, he should not participate in the matter without informing an agency official and receiving authorization to participate. Included in the definition of a "covered relationship" is any person for whom the employee served, within the preceding year, as officer, director, trustee, general partner, agent attorney, consultant, contractor, or employee. 5 C.F.R. Section 2635.502(b)(1)(iv).

The Department has also been sensitive to appearances of partiality where the official's former firm or former client is, or represents, a person or entity that is not a party but is otherwise significantly affected by a matter. In these situations, the Department applies the "catch-all" provision in Section 502, which states that if circumstances other than those specifically provided in the regulation may cause an official's impartiality to be questioned, the Department should use the process provided in Section 502 to determine whether he should or should not participate in a particular matter.

You have a covered relationship with your former firm, Arnold & Porter. However, as explained above, Arnold & Porter is not the Department's primary contact for this matter, and we do not believe the matter was pending at Arnold & Porter while you were there. AT&T is a long-time client of Arnold & Porter, and Arnold & Porter represented AT&T before the Department in its high-profile, unsuccessful attempt to acquire T-Mobile in 2011. However, AT&T was not your client, you did not work on AT&T/T-Mobile, and do not have confidential information about that matter or AT&T as a result of your work while at Arnold & Porter.

Under the standard, I conclude that a reasonable person would not question the integrity of the Department's programs and operations based on your participation in the Department's investigation of AT&T's proposed acquisition of Leap, and that should such questions arise, the Department's interest in your participation outweighs any possible concern.

WAIVER: I hereby certify that it is in the public interest for you as Assistant Attorney General to participate in the Department's investigation of AT&T's proposed acquisition of Leap Wireless International, and pursuant to E.O. 13490 Sec. 3(a), I waive the restriction in Section 1 of E.O. 13490, on participation in a specific party matter that is directly and substantially related to your former employer, Arnold & Porter, except that you will not have any direct contact with Arnold & Porter. We have consulted with the Office of the Counsel to the President concerning this waiver. Further, I hereby determine, under 5 C.F.R. Section 2635.502, that the interest of the Department in your participation in this case outweighs any possible concern that a reasonable person may question the Department's programs and operations.

DEPARTMENT OF JUSTICE

Washington

June 9, 2014

CERTIFICATION OF PUBLIC INTEREST WAIVER FOR WILLIAM BAER

FROM: Lee J. Lofthus
Designated Agency Ethics Official, Department of Justice

SUBJECT: Request to Authorize Assistant Attorney General William J. Baer to Participate in the Antitrust Division's investigation of AT&T Inc.'s proposed acquisition of DirecTV

Pursuant to the authority delegated under Section 3 of Executive Order 13490 and for the reasons stated in the attached memorandum and after consultation with the Counsel to the President, I hereby certify that a limited waiver of the restrictions of paragraph 2 of the Ethics Pledge is in the public interest for appointee William J. Baer in the position of Assistant Attorney General in the Department of Justice. Mr. Baer shall not be restricted from participating in the Antitrust Division's investigation of AT&T Inc.'s proposed acquisition of DirecTV, subject to the limitations set forth in the attached memorandum and without waiving the limitation on Mr. Baer's participation in regulations and contracts as provided in paragraph 2 of the Ethics Pledge. This waiver does not otherwise affect Mr. Baer's obligation to comply with other provisions of the Ethics Pledge or with all other pre-existing government ethics rules.

Signed _____


Lee J. Lofthus
Designated Agency Ethics Official
Department of Justice

Date _____

6-9-2014



U.S. Department of Justice

Justice Management Division

Washington, D.C. 20530

June 9, 2014

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL WILLIAM J. BAER

From: Lee J. Lofthus 
Assistant Attorney General for Administration and Designated Agency Ethics
Official

Re: Request to Authorize Assistant Attorney General William J. Baer to Participate in
the Antitrust Division's investigation of AT&T Inc.'s proposed acquisition of
DirecTV

The purpose of this memorandum is to waive the restriction in Executive Order 13490 of January 21, 2009, Ethics Commitments by Employees in the Executive Branch, and further to make a determination under the Standards of Conduct on Impartiality, 5 C.F.R. Section 2635.502, that you may participate in a particular matter in which your former firm represents a party, relating to the Department's investigation of AT&T's proposed acquisition of DirecTV. The proposed \$67.1 billion transaction will combine the nation's second and sixth largest providers of multi-channel video programming distribution services (MVPD).

You are generally recused from participation in particular matters with parties in which your former firm is or represents a party, under the standards of conduct for employees in the executive branch, 5 C.F.R. Section 2635.502, and under E.O. 13490. In this investigation, Arnold & Porter is representing AT&T before the Federal Communications Commission (FCC), which is also reviewing the deal. A different large law firm is representing AT&T in the Department's investigation. You left Arnold & Porter on January 2, 2013. Arnold & Porter represented AT&T in several antitrust matters before the Department while you were head of the firm's antitrust practice group in Washington, DC. However, AT&T was not at any point your client, and you do not believe you have confidential information about the company as a result of your work at Arnold & Porter. You are not aware of this matter having been pending while you were at Arnold & Porter while you were there, as you did not do work for AT&T.

Executive Order 13490, Ethics Commitments by Employees in the Executive Branch

The Executive Order provides that a political appointee will not, for a period of two years from the date of appointment, participate in any particular matter involving specific parties that is directly and substantially related to the appointee's former employer or former clients, including regulations and contracts. Sec. 1, paragraph 2. The Executive Order further provides that "particular matter involving specific parties" shall have the same meaning as set forth in the ethics regulations at 5 C.F.R. Section 2641.201(h), except that it shall also include "any meeting or other communication relating to the performance of one's official duties with a former employer or

former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties.” E.O. 13490, Sec. 2(h).

E.O. 13490 references the following definition provided in the standards of conduct (however, the E.O. specifically includes regulations and contracts):

5 C.F.R. Section 2641.201(h)(1): *Particular matter involving specific party or parties – (1) Basic Concept.* The prohibition applies only to communications or appearances made in connection with a “particular matter involving a specific party or parties.” Although the statute defines “particular matter” broadly to include “any investigation, application, request for ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding,” 18 U.S.C. 207(i)(3), only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product application, enforcement action, administrative adjudication, or court case.

The E.O. provides for waiver of the recusal provisions by the Director of the Office of Management and Budget (OMB) or his designee, in consultation with the Counsel to the President or his designee. E.O. 13490, Sec. 3(a). The Director, OMB, has designated the Designated Agency Ethics Official (DAEO) of each executive branch agency to exercise the Sec. 3 waiver authority, in writing, and in consultation with the Counsel to the President.

Specific Waiver Request

This investigation will be a high-profile, resource-intensive matter that will raise important substantive antitrust and competition policy issues involving evolving markets moving toward consolidation, and the Department’s efforts would be substantially enhanced by your participation on this matter. It will also involve extensive coordination with the Federal Communications Commission (FCC). Your input and significant merger expertise would be extremely valuable here, and your leadership in our coordination with the FCC and in our communications with industry, consumer, and public policy groups is similarly essential.

It is important to note that, although Arnold & Porter is involved in representing AT&T, they are representing the company before the FCC, not before the Department. This significantly reduces any appearance issues involved. Due to the importance of the matter to the Antitrust Division’s mission, including the expected need for high-level coordination with the FCC, we believe that it is necessary for the Department to benefit from your substantial merger expertise and for you to be able to exercise your leadership role as the Assistant Attorney General in reviewing, shaping, and managing the Division’s investigation and any potential litigation.

Based on consultations with the Antitrust Division, I conclude that it is not necessary at this time for you to meet or communicate with your former firm, should they make such a request. If direct

contact with Department officials is necessary, other officials from the Department would be available to meet with your former firm.

The standard for waiving the restriction in the E.O. is that it be in the public interest. E.O. 13490, Sec. 3. Based on the above, I believe that it directly serves the public interest that the Department have the benefit of your participation in this case, given the institutional interest of the Department, and the important legal, policy, resource and strategic considerations involved in this matter. I certify that it is in the public interest that you be able to participate in the Department's investigation of AT&T's proposed acquisition of DirecTV.

5 C.F.R. Section 2635.502

The standard of conduct at 5 C.F.R. Section 2635.502 requires an employee to take appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under the Standards of Conduct, an official is presumptively recused for one year from participating in matters in which his former firm is or represents a party because this is a "covered relationship" under 5 C.F.R. Section 2635.502. Although you have been separated from your firm for more than a year, and thus no longer have a "covered relationship" with Arnold & Porter, the Department has been sensitive to appearances of partiality, even after one year, if its senior officials participate in matters involving either (1) their former firms or (2) clients for which they performed a significant amount of legal work. In these circumstances, the Department has used the process described in 5 C.F.R. Section 2635.502 (d) to determine whether an official should participate in a matter. Thus, authorization for you to participate is based on a determination that the importance of your participation outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations. 5 C.F.R. Section 2635.502(d).

I have considered the factors set forth in 5 C.F.R. Section 2635.502(d), and I believe they weigh in favor of your participation. The nature of the relationship involved is a former law firm from which you have been separated for 16 months, and the law firm's involvement is in a parallel FCC proceeding, not the Department's investigation. Further, Arnold & Porter is a large firm with hundreds of lawyers, and it appears unlikely that your work on the antitrust review could have a material impact on the firm's finances simply because the firm is handling the FCC aspects of the transaction. Although this is a high-profile matter in which you would be a decision-maker if authorized to participate, these factors are, again, mitigated by the role your former firm plays (*i.e.*, as counsel for the FCC proceedings, not the Department's review). Moreover, although there are qualified officials to whom this matter can be reassigned, it is preferable that a matter of this magnitude – which will involve extensive coordination with FCC leadership, coordination with industry, consumer, and public policy groups, and attention from Congress – be decided by the individual who has been appointed by the President and confirmed by the Senate to head the Antitrust Division. Of course, your extensive merger expertise will be especially valuable in analyzing the important and substantive antitrust and competition policy issues raised by this transaction involving evolving markets moving toward consolidation.

Finally, adjustments will be made to your duties that will reduce or eliminate any appearance concern. As discussed above, I have concluded that it is not necessary for you to meet or communicate with your former firm.

We have also considered whether your recusal on *Comcast/Time Warner* would restrict your ability to participate in this matter or create an appearance issue of its own. The two matters are separate transactions, involving two different companies albeit in the same industry. After careful review of the circumstances presented by each matter, and based on confidential information, we have concluded that it is possible to participate in *AT&T/DirecTV* without participating in *Comcast/Time Warner*.

Under the standard, I conclude that a reasonable person would not question the integrity of the Department's programs and operations based on your participation in the Department's investigation of AT&T's proposed acquisition of DirecTV, and that should such questions arise, the Department's interest in your participation outweighs any possible concern.

WAIVER: I hereby certify that it is in the public interest for you as Assistant Attorney General to participate in the Department's investigation of AT&T's proposed acquisition of DirecTV, and pursuant to E.O. 13490 Sec. 3(a), I waive the restriction in Section 1 of E.O. 13490, on participation in a specific party matter that is directly and substantially related to your former employer, Arnold & Porter, except that you will not have any direct contact with Arnold & Porter. We have consulted with the Office of the Counsel to the President concerning this waiver. Further, I hereby determine, pursuant to 5 C.F.R. Section 2635.502, that the interest of the Department in your participation in this case outweighs any possible concern that a reasonable person may question the Department's programs and operations.