

# BLANKROME

1825 Eye Street NW | Washington, DC 20006  
blankrome.com

*Phone:* (202) 420-2601  
*Fax:* (202) 379-9258  
*Email:* sthomas@blankrome.com

March 19, 2018

Hon. John Thune, Chairman  
Committee on Commerce, Science, and  
Transportation  
United States Senate  
511 Dirksen Senate Office Building  
Washington, DC 20510

Hon. Bill Nelson, Ranking Member  
Committee on Commerce, Science, and  
Transportation  
United States Senate  
716 Hart Senate Office Building  
Washington, DC 20510

Re: Claims About Ethics Standards Regarding Barry Lee Myers, Nominee for  
Undersecretary of Commerce for Oceans and Atmosphere and Administrator  
of the National Oceanic and Atmospheric Administration (NOAA)

Dear Chairman Thune, Ranking Member Nelson, and Committee Members:

I have been requested to review the circumstances and provide my opinion on whether Barry Lee Myers has taken sufficient and appropriate steps to remove conflict of interest concerns in his signed agreement with the Office of Government Ethics, notwithstanding a claim to the contrary. My law firm serves as counsel to Mr. Myers in connection with the ethics law component of the nomination and confirmation process. I am the head of the Policy & Political Law Practice Group at the firm.<sup>1</sup>

The heart of the claim against Mr. Myers is that in his NOAA role (if confirmed), he somehow will find a way to improperly favor the business interests of AccuWeather, the company where he has been employed in various capacities over a number of years. Ignoring the fact that he and his spouse will have completely divested themselves of any interest in any AccuWeather companies and will have absolutely no management role with any such companies, the criticism is that because his brothers will retain ownership and management roles, he somehow will have an irresistible impulse to help AccuWeather at the expense of the

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<sup>1</sup> I served as a Commissioner at the Federal Election Commission (FEC) from 1986 to 2006, and was Chairman four times during that span. I was nominated for three separate terms by Presidents Reagan, Bush, and Clinton. I served as an Assistant General Counsel for Enforcement at the FEC and an Executive Assistant to former FEC Commissioner Tom Harris before serving as a Commissioner. I formed a political law practice at Dickstein Shapiro LLP which then joined Blank Rome LLP in 2016. I hold a B.A. in political science from Stanford University and an L.L.B. from Georgetown University Law Center.

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United States Government where he will be serving. The implication is that he needs to be more constrained by conflict of interest recusal rules than other persons who have left family businesses to serve the United States Government, like prior Secretary of Commerce under the Obama Administration, Penny Pritzker. This strained assertion appears to be coming from certain Hill offices, from one or more television talking head program guests, and from some non-management representatives at NOAA. The central source, though, seems to be Walter Shaub, former Director of the Office of Government Ethics who left that position after his outspoken criticism of President Trump.<sup>2</sup>

As Walter Shaub well knows, Myers has followed the precise ethical and legal guidance set forth in the ethics laws passed by Congress and the regulations passed by the very Office of Government Ethics where Mr. Shaub worked for many years. Many of those expressing concern may not realize that Myers has been in close consultation with the ethics lawyers at the Department of Commerce and with the ethics lawyers at the Office of Government Ethics to develop the binding Ethics Agreement he signed to protect against any improper conflict of interest concerns. There were several such conversations leading up to the sweeping agreement signed by Myers. He accepted the divestment and recusal constraints those ethics lawyers put forward in every detail (including extending the regulatory one-year period of recusal to the full length of his service at NOAA). Those constraints follow precisely the lines set forth in the statute and regulations (even going further, as just noted), and the protections thus applicable are *per se* adequate to deal with his situation. It is neither fair nor just to suggest that he should be regulated more severely than Congress and the Office of Government Ethics have clearly specified. To require more would be discriminatory.

The standard approved by Congress—set forth at 18 U.S.C. 208—is that Myers must recuse from participating personally and substantially in a particular Government matter that will affect his own financial interests or the interests of his spouse or minor child.<sup>3</sup> Congress has spoken, and it has deemed the financial interests of brothers to be outside the legitimate

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<sup>2</sup> Letter dated Jan. 5, 2018 from Walter Shaub to Senators McConnell, Schumer, Thune, and Nelson, *available at* <http://www.campaignlegalcenter.org/sites/default/files/Letter%20Regarding%20Barry%20Myers.pdf> (viewed Mar. 18, 2018).

<sup>3</sup> The relevant statutory language provides: [W]hoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be subject to the penalties set forth in section 216 of this title. [emphasis added]

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scope of concern. This makes sense in Myers' situation because he is making a total, clean break with AccuWeather interests and he has no arrangements or agreements whatsoever to return to AccuWeather. Though most probably do not realize it, Myers even has gone above and beyond what the statute requires by pledging to not improperly discuss NOAA business with his brothers, even informally on social occasions.<sup>4</sup>

The Office of Government Ethics has promulgated a regulation indicating an employee should not participate in a particular matter involving specific parties if the employee knows a business where he has served as an officer, director, or employee within the last year is a party and a reasonable person with knowledge of the relevant facts would question his impartiality.<sup>5</sup> The binding Ethics Agreement Myers has signed expressly incorporates this standard ("I will not participate personally and substantially in any particular matter involving specific parties in which I know any of [the AccuWeather entities] is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).").<sup>6</sup> The Ethics Agreement not only imposes the recusal obligation for one year; it imposes the recusal obligation permanently during the length of his service. Thus, once again, Myers has adhered to the letter and spirit of the ethics laws on the books, and has even gone further. The Office of Government Ethics essentially crafted the Ethics Agreement in place, and critics cannot rationally or fairly expect Myers to operate under tighter constraints than those imposed by the most impartial arbiter available under the law.

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<sup>4</sup> Henry, Mike, "NOAA Nominee Barry Myers Embraces Science at Confirmation Hearing," Dec. 7, 2017, American Institute of Physics website, <https://www.aip.org/fyi/2017/noaa-nominee-barry-myers-embraces-science-confirmation-hearing> (viewed Mar. 18, 2018).

<sup>5</sup> 5 C.F.R. 2635.502(a): *Consideration of appearances by the employee*. 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.

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[(b)(1):] An employee has a *covered relationship* with:

# # # #

(iv) Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; # # # [emphasis added]

<sup>6</sup> The Office of Government Ethics regulations clarify at 5 C.F.R. 2635.502(b)(3) and 2640.102(l) that "particular matter involving specific parties" is a relatively broad term in itself ("includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties. The term typically involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties." [emphasis added]).

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The critique of Mr. Shaub is that Myers should be compelled by the Senate to agree not to participate in any NOAA “particular matter of general applicability” that has a direct and predictable effect on the financial interests of any AccuWeather entity. This approach should be rejected because (1) it is overbroad and (2) it clearly is beyond the precise conflict of interest standard created by Congress and the Office of Government Ethics described above. Essentially, it seems, Mr. Shaub does not want Myers to participate in any NOAA matter that might have an impact on the weather industry at large. This amorphous theory could be used to pressure Myers to recuse from virtually any policy matter at NOAA involving any aspect of the weather industry regardless of how generic in nature. That clearly would be overbroad and could render him unable to perform duly-authorized general policy functions related to the weather enterprise of the United States—a central part of the very job he was nominated to perform. And, again, it is not a restriction that is applied to others in his situation. As noted, Congress and the Office of Government Ethics have precise contours in place for addressing Myers’ potential conflict of interest situations. The Ethics Agreement Myers has signed covers and even goes beyond those concerns.<sup>7</sup>

Last, it is worth noting that Mr. Shaub seems to be taking a position with regard to Myers that is inconsistent with the very standard he said should be applicable to President-elect Trump regarding potential conflicts of interest. In remarks to the Brookings Institution on January 11, 2017, Mr. Shaub sharply criticized the President-elect for not divesting several family-owned assets, but he made clear that divestiture should be adequate (“OGE’s primary recommendation is that he divest his conflicting financial interests.”)<sup>8</sup> Mr. Shaub and those echoing his views seem to be taking the position that whatever the law requires is not enough. Having indicated in Mr. Trump’s situation that divestiture was enough, though, Shaub should not be heard to claim that Myers needs to be subjected not just to recusal constraints, but recusal constraints that plainly go beyond what Congress and the Office of Government Ethics have deliberately crafted. Mr. Shaub is welcome in his new role to urge that Congress and the Office of Government Ethics change the rules, but he and his supporters should not be allowed to facilitate the imposition of discriminatory constraints on Mr. Myers that do not

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<sup>7</sup> It must be noted that the Ethics Agreement signed in 2013 by Penny Pritzker (who was divesting her significant family business interests) only required that she recuse regarding “any particular matter involving specific parties in which [such an entity] is a party or represents a party . . .” (the standard used in the Myers Ethics Agreement); but, unlike the Myers situation, it only required such recusal for a year, not the full length of her term as Commerce Secretary. See May 8, 2013 letter from Penny Pritzker to Barbara Fredericks, *available at* <https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/56D8501C3C6375D285257FC20010E4A7/%24FILE/Penny-S-Pritzker-EA.pdf>. Mr. Shaub was Director of the Office of Government Ethics back then, and his office seems to have been willing to accept a less rigorous conflict of interest approach regarding Penny Pritzker.

<sup>8</sup> “Remarks of Walter M. Shaub, Jr., Director, U.S. Office of Government Ethics, as prepared for delivery at 4:00 p.m. on January 11, 2017, at the Brookings Institution,” available at [https://www.brookings.edu/wp-content/uploads/2017/01/20170111\\_oge\\_shaub\\_remarks.pdf](https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge_shaub_remarks.pdf) (viewed May 18, 2018). Mr. Shaub’s remarks note that the President technically is not subject to the recusal obligation set out in 18 U.S.C. 208. That point underscores that Myers not only will have divested all AccuWeather assets; he will be operating under a permanent Ethics Agreement bar on participating in any particular matters where any AccuWeather entity is a party.

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currently exist.

To summarize, in my view the claim that Barry Lee Myers should be subjected to some sort of additional, broader recusal requirement is unfounded, unwarranted, and inappropriate. Myers will be making a complete break with all AccuWeather interests and he will be bound to a comprehensive Ethics Agreement. The ethics rules are meant to impose reasonable constraints but not impose overbroad restrictions based on conjecture and an insinuation that someone cannot be trusted to operate in the interests of the United States Government. Myers has followed the rules, has a strong Ethics Agreement in place, and should not be held up with calls for additional recusal requirements not founded in law.

Sincerely,

A handwritten signature in blue ink, appearing to read "Scott E. Thomas". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Scott E. Thomas