



January 5, 2018

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Charles Schumer
Minority Leader
United States Senate
322 Hart Senate Office Building
Washington, DC 20510

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

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

Dear Senators:

I write regarding the President's nominee to be Administrator of the National Oceanographic and Atmospheric Administration (NOAA), Barry L. Myers, whose ethics agreement fails to resolve a significant conflict of interest. The ethics agreement establishes only a very narrow recusal for particular matters in which his family's weather company is a party, rather than particular matters affecting the company's financial interests. This letter recommends language for resolving his conflict of interest that the Senate should require him to incorporate in a supplemental ethics agreement as a condition for confirming him. This letter also flags an inconsistency between Mr. Myers' ethics agreement and his nomination hearing testimony that should be clarified prior to confirmation.

The company's name is AccuWeather.¹ Mr. Myers is its Chief Executive Officer, his brother Evan is its Chief Operating Officer, and his other brother Joel is its founder, Chairman and President.² A businessman and lawyer and not a scientist, Mr. Myers

¹ See Jason Samenow, *Barry Myers, Trump's Pick to Run NOAA, Declares Humans Are Main Cause of Climate Change*, WASH. POST (Nov. 29, 2017), <https://goo.gl/3QZUFi>.

² See Company Profile, *AccuWeather, Inc.*, BLOOMBERG (last visited Jan. 3, 2018), <https://goo.gl/CBkVJV>; see also Mark Hand, *Senators Question Whether Family of Trump's NOAA Nominee Would Profit Off His New Position*, THINKPROGRESS (Nov. 29, 2017), <https://goo.gl/8yyQKj>.

describes in his Senate questionnaire how he and his brothers built AccuWeather from scratch.³ During the confirmation hearing, Senator Brian Schatz noted that even if Mr. Myers sells his own shares, his brothers will continue to own more than 90 percent of the company.⁴ In many ways, Mr. Myers and his family *are* AccuWeather.

For this reason, the link between NOAA's work and AccuWeather presents a problem. NOAA can directly affect the interests of this closely held family company, which could compete with, or try to gain privileged access to, the agency Mr. Myers would run if confirmed.⁵ For example, AccuWeather has reportedly advocated that NOAA reduce the amount of publicly available weather information it releases:

AccuWeather officials have long complained that NOAA's work has hurt for-profit companies by offering forecast services that they contend belong in the private domain. Based on his past positions, experts worry that Myers may get rid of some functions of the National Weather Service, which could then give AccuWeather and other private weather companies an opportunity to generate additional revenue by filling the void. . . . The company has supported efforts to limit the extent to which the National Weather Service can release information to the public.⁶

Such a change would allow AccuWeather to profit by selling weather information critical to public safety after NOAA ceased making it available free of charge.

These circumstances create a significant unaddressed and largely unregulated conflict of interest for Mr. Myers. His family affiliation and personal hand in building the company would be enough to instill loyalty in anyone. Though not covered by the primary conflict of interest statute,⁷ this loyalty is the sort of revolving door problem that could call into question every weather-related decision he would make as NOAA's Administrator.

Even worse are his potential financial conflicts. Under the existing ethics agreement, Mr. Myers could personally profit at the public's expense. Nothing in his ethics agreement would prevent him from selling his shares of AccuWeather to his family and, upon leaving the government, offering to repurchase those interests for the same price—possibly even at a negligible price or, at least, without incurring any capital gains taxes.⁸ In the meantime, he could legally take countless official actions as Administrator to enrich himself or his family by advancing AccuWeather's financial interests. Absent an

³ See Barry L. Myers, *Questionnaire - Committee on Commerce, Science and Transportation*, 13-14 (Oct. 24, 2017), <https://goo.gl/dGAnxx>.

⁴ See Hand, *supra* note 2.

⁵ See Ari Natter, *Trump's Picks for Top Weather and Environment Jobs Draw Criticism*, BLOOMBERG (Oct. 13, 2017), <https://goo.gl/DqrEWf>.

⁶ See Hand, *supra* note 2.

⁷ 18 U.S.C. § 208.

⁸ See letter from Barry L. Myers to David Maggi, Designated Agency Ethics Official, U.S. Dep't of Commerce (Oct. 5, 2017), <https://goo.gl/Q7bMfK>.

express agreement for the return of his shares in the company, none of this conduct would technically violate the criminal conflict of interest laws.⁹

Even if Mr. Myers were to sell his shares to a third party not related to him, nothing but tax consequences might deter his family from gifting him new shares in the company when he leaves government. While anyone might receive gifts from family members at some point, Mr. Myers' nomination presents unusual circumstances. He is the Chief Executive Officer of a tightly held family company with interests directly affected by the work of the agency he would lead if confirmed, and the company has expressly advocated for policy changes at the agency in order to boost company profits.

In connection with this conflict of interest, Mr. Myers' ethics agreement contains a very narrow recusal commitment. He promises only that he will recuse from *particular matters involving specific parties in which AccuWeather is a party or represents a party*.¹⁰ The narrowness of this recusal is a product of the difference between a "particular matter involving specific parties" and a "particular matter of general applicability":

- A *particular matter involving specific parties* is limited to matters in which the company itself is directly involved as a party or representative. This would be the case if, for instance, AccuWeather entered into a contract with NOAA or sued NOAA.¹¹
- In contrast, a *particular matter of general applicability* includes anything that is focused on the interests of a discrete and identifiable class of persons.¹² A discrete and identifiable class of persons can include an entire industry. Thus, one example of a particular matter of general applicability would be NOAA's consideration of a matter focused on the interests of the weather industry. Mr. Myers' ethics agreement would permit him to participate in a such a matter because he has not agreed to recuse from particular matters of general applicability affecting AccuWeather.

With this narrow recusal, Mr. Myers' ethics agreement has not adequately resolved his conflict of interest. After divesting his own holdings, he could use NOAA's authority and resources to benefit his family's company and ultimately even enrich himself. For example and unless other laws governing NOAA would bar him from doing so, he could establish a program to give data to select private companies before making it available to their competitors or to the public. He could even skew the playing field by formulating the precise criteria for deciding which companies should receive this special benefit, as long as he leaves it to others to apply his chosen criteria to applicants. More broadly, he could simply decide to stop releasing various weather-related information that is critical to public

⁹ See 18 U.S.C. §§ 208(a), 209; see also 5 C.F.R. pt. 2640.

¹⁰ See *supra* note 8 at 2 ("I will not participate personally and substantially in any particular matter involving specific parties in which I know any of these entities is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d)."), <https://goo.gl/Q7bMfK>.

¹¹ See 5 C.F.R. § 2641.201(h); see also Memorandum from Robert I. Cusick, Dir., U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, Regarding "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter," 06 x 9 (Oct. 4, 2006), <https://goo.gl/EyULvL>.

¹² See 5 C.F.R. § 2640.102(m).

safety in order to permit AccuWeather to sell the information for profit instead. He could also take other more subtle actions that, though harder to identify, could be of similar benefit to AccuWeather.

Whether or not an individual nominee would take advantage of a gap in the conflict of interest laws is beside the point. The objective of any ethics program is risk management. Mr. Myers' ethics agreement fails to manage the risks associated with the family business he currently runs because it neglects to establish adequate barriers to misuse of position for private gain. None of this discussion is a criticism of the U.S. Office of Government Ethics (OGE).¹³ The problem is that the existing ethics rules do not address the atypical case of Mr. Myers. While OGE can suggest that a nominee do more than the rules require, OGE lacks the authority to compel a nominee to go beyond the minimum legal requirements.

The reality is that no law could address every nominee's circumstances, and it is partly for this reason that the United States Constitution establishes the Senate confirmation process as a pragmatic safety valve. The Senate can fashion remedies in atypical cases and, unlike OGE, is not limited by the cookie-cutter requirements of existing ethics rules. The advice and consent process provides the necessary leverage for resolving conflicts of interest not addressed in ethics rules, inasmuch as a nominee's confirmation can be conditioned upon the nominee making additional commonsense commitments before a final vote is held.¹⁴

The Senate should require Mr. Myers to recuse from *particular matters of general applicability* affecting AccuWeather and to report periodically on his compliance with that commitment. The language of a supplemental ethics agreement could read as follows:

For the duration of my appointment as Administrator, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of AccuWeather or any affiliated company identified in my ethics agreement, dated October 5, 2017. I will submit written confirmation of my compliance with this commitment as an attachment to each annual and termination public financial disclosure report that I file in connection with this appointment.

The term "particular matter" in this recommended language is understood by government ethics officials to encompass both particular matters involving specific parties and particular matters of general applicability.¹⁵

¹³ I can confirm based on my years of experience that Mr. Myers' Ethics Agreement is consistent with OGE's ethics agreement guide and applicable ethics rules. *See Guide to Drafting Ethics Agreements for PAS Nominees*, U.S. Office of Gov't Ethics (September 2014), <https://goo.gl/BPhYzW>.

¹⁴ *See, e.g.,* Scott Higham, Kimberly Kindy & Dan Keating, *Senate Panel Ban on Stock for Appointees but not Itself Seen as Double Standard*, WASH. POST (Dec. 18, 2010) (mentioning that the Senate Armed Services Committee requires nominees for Senate-confirmed positions at the U.S. Department of Defense to divest all defense contractor stock), <https://goo.gl/VFtzAv>; *see also* 5 U.S.C. app. § 110 (referencing an agreement with "a Senate confirmation committee").

¹⁵ *See* Guide, *supra* note 13 at 1.

As a related matter, the Senate should also seek clarification of Mr. Myers' confirmation hearing testimony regarding his spouse's employment with AccuWeather. In the hearing, Mr. Myers committed that his spouse would resign from AccuWeather if the Senate were to confirm his nomination to be NOAA's Administrator.¹⁶ However, his ethics agreement contains no such commitment.¹⁷ The Senate should require Mr. Myers to clarify in writing whether his spouse will resign from AccuWeather.

It is crucial that the Senate obtain a commitment from Mr. Myers that he will recuse from *particular matters of general applicability* affecting his family's company, as well as clarify his testimony as to how he will address his spouse's employment. To do otherwise would be to risk the nation's investment in NOAA and the vital public safety services it performs for the American people. As NOAA's website explains, "[f]rom daily weather forecasts, severe storm warnings, and climate monitoring to fisheries management, coastal restoration and supporting marine commerce, NOAA's products and services support economic vitality and affect more than one-third of America's gross domestic product."¹⁸ The consequences of confirming Mr. Myers without fully addressing his conflicts of interest could be severe.

Sincerely,

A handwritten signature in blue ink, reading "Walter M. Shaub, Jr.", with a stylized, cursive script.

Walter M. Shaub, Jr.
Senior Director, Ethics

¹⁶ See testimony of Barry L. Myers, *Hearing on Mr. Barry Lee Myers, of Pennsylvania, to be Under Secretary of Commerce for Oceans and Atmosphere*, S. Comm. on Commerce, Science, & Transp. (Nov. 29, 2017) (relevant portion starts at 00:34:35), <https://goo.gl/5LQizi>.

¹⁷ See *supra* note 10. Note, too, that OGE's ethics agreement compliance tracking process system tracks only those commitments that a nominee includes in an ethics agreement. See Mem. from Dale A. Christopher, Jr., Deputy Dir. for Compliance, U.S. Office of Gov't Ethics, Certification of Ethics Agreement Compliance by Senate-Confirmed Presidential Appointees, PA-17-03 (May 11, 2017), <https://goo.gl/sYjgA8>.

¹⁸ See website of the Nat'l Oceanic and Atmospheric Admin., *About Our Agency*, <http://www.noaa.gov/about-our-agency>.