ELECTION LAW NEWS

Developments in All Aspects of Political Law | January 2017

OGE Amends the Executive Branch Gift Regulations

By: Robert L. Walker and Louisa Brooks

Effective January 1, 2017, there are some noteworthy changes to the portions of the Standards of Ethical Conduct for Executive Branch Employees that govern the solicitation and acceptance of gifts from outside sources. Of most interest are the changes to the Executive Branch gift regulations that:

- Prohibit Executive Branch employees from accepting alcoholic beverages under the exclusion for modest items of food and refreshment;
- Clarify the method of calculating the market value of a ticket to an event when that ticket lacks a face value;
- Require Executive Branch employees to obtain written authorization before accepting gifts of free attendance to widely-attended gatherings;
- Provide guidance on whether a social media contact may qualify as a personal friend for purposes of the exception for gifts based on a personal relationship; and
- Create a new exception permitting employees to accept gifts of informational materials.

Under a long-standing exclusion to the definition of what constitutes a "gift" under the Executive Branch Standards of Conduct, Executive Branch employees have been permitted to accept "modest items of food and refreshment, such as soft drinks, coffee, and donuts, offered other than as part of a meal." The Executive Branch Office of Government Ethics (OGE) has stated that it "has long treated alcoholic beverages as not being part of the class of modest refreshments covered by this exclusion." Reflecting this interpretation, the relevant provision has been amended to exclude from the definition of "gift" "modest items of food and *non-alcoholic* refreshments, such as soft drinks, coffee, and donuts, offered other than as part of a meal."

As part of an amended definition of "market value" as used in the gift regulations, OGE has now included a new example illustrating and clarifying how to determine the market value of a ticket to an event when the ticket lacks a face value. This approach requires including in the calculation the "face value of the most expensive publicly available ticket" to the event.

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New Example 4 to this provision reads:

> A company offers an employee of the Federal Communication Commission (FCC) free attendance for two to a private skybox at a ballpark to watch a major league baseball game. The skybox is leased annually by the company, which has business pending before the FCC. The skybox tickets provided to the employee do not have a face value. To determine the market value of the two tickets, the employee must add the face value of two of the most expensive publicly available tickets to the game and the market value of any food, parking, or other tangible benefits provided in connection with the gift of attendance that are not already included in the cost of the most expensive publicly available tickets.

Under the amended Executive Branch regulations, employees who wish to accept an offer of free attendance to an event under the "widely-attended gathering" exception must now – in all instances – obtain written authorization from their designated agency ethics official (DAEO) before attending the event. The amended provision on "widely-attended gatherings" – or "WAGs" – now also makes clear that a qualifying gathering must "include an opportunity to exchange ideas and views among invited persons."

In a leap into the 21st century, the amended gift regulations now provide an example to illustrate when, and whether, a social media "friend" may be considered for purposes of the exception for "gifts based on a personal relationship." The kernel of this very long example appears to be that, by itself, a virtual relationship is unlikely to be a "personal relationship" under the rule. As provided in the example, an agency employee – who uses a social media site to keep in touch with friends, coworkers, and professional contacts – is offered via the site a pair of $30 concert tickets by a government contractor whom the employee met at a business meeting. Although they have granted access to each other's social media networks, they do not otherwise "communicate further in their personal capacities, carry on extensive personal interactions, or meet socially outside work."

The example concludes: "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" the exception.

The new exception for "informational materials" permits an Executive Branch employee to accept "writings, recordings, documents, records, or other items" if the materials are "educational or instructive in nature" (they may not be primarily for entertainment, display, or decoration) and if the materials relate to the employee's official duties, to a general subject matter within the purview of the employee's agency, or to another topic of interest to the agency. The aggregate value of such informational materials received by an employee from any one person may not exceed $100 in a calendar year, unless the DAEO makes a written determination permitting acceptance of materials exceeding this $100 limit.

None of these amendments radically alters the circumstances of when an Executive Branch employee may accept a gift from a "prohibited source" – that is, from someone seeking official action by, doing (or seeking to do) business with, or regulated by the employee's agency, or who has interests that may be affected by the performance of the employee's official duties. But, as in all government ethics matters, the devil is in the detail of application of the gift regulations to particular cases and scenarios. When a question arises, attorneys in Wiley Rein's Election Law & Government Ethics Practice are ready to assist you and your organization in understanding and complying with these rules. ▪

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Major Changes to State Lobbying and Ethics Laws

By: Carol A. Laham and Stephen J. Kenny

Several changes to lobbying and ethics laws recently went into effect across the country. Below are highlights of some of the most significant changes.

Missouri

Recently-elected Governor Eric Greitens issued an executive order on his first day in office that prohibits Executive branch employees from accepting gifts from lobbyists. The new Attorney General, Josh Hawley, also announced strict new ethics requirements for his office. In addition to prohibiting Attorney General Office (AGO) employees from accepting gifts from lobbyists, the policy prohibits communications with any person about official business unless that person has registered as a lobbyist. The policy also prohibits campaign contributions from persons bidding on or applying for state contracts over which the AGO has authority and from persons under investigation by the AGO.

Oregon

Oregon reduced the time period that a lobbyist has to register after entering into a lobbying engagement from 10 business days to three. The legislation also requires a lobbyist employer to sign the lobbyist's registration statement within 10 calendar days and requires that lobbyists notify the Ethics Commission within three business days of ceasing to represent a client.

Rhode Island

Rhode Island adopted legislation that consolidated its previously separate Legislative and Executive branch lobbying regulations. Instead, all lobbyists and lobbyist employers file online statements with the Secretary of State within seven days of an engagement. The law also requires monthly reporting from February to July and additional reports due in October and January. The legislation simplified the required contents of these reports as well.

South Dakota

Last fall, South Dakota voters approved a major campaign finance referendum that also contained a strict gift limitation on lobbyists and lobbyist employers. Lobbyists and lobbyist employers are now prohibited from giving gifts to a state official or staff member (as well as their families) aggregating more than $100 in a calendar year. Opponents of the referendum have filed a lawsuit challenging the constitutionality of the measure. A state court recently issued a preliminary injunction stopping the entire law from taking effect until the merits of the case could be litigated.

Texas

The Texas Ethics Commission adopted a rule changing the lobbyist registration threshold. Previously, the rule exempted a person who spent 5% or less of his or her compensated time in a calendar quarter on lobbying activity from registering as a lobbyist. The new rule exempts persons from registration requirements if they spend 40 hours or less on lobbying activity in a calendar quarter (including preparatory activity).

Increased Lobbying/Gift Thresholds

Several states increased the thresholds applicable to lobbyist registration and reporting and gifts to government officials. Michigan increased its lobbyist registration and reporting thresholds, and Montana increased its lobbyist registration threshold. California adjusted its annual aggregate gift limit from $460 to $470. ▪

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Potential Federal Campaign Finance Legislation on the Horizon

[illegible]

all monetary limits

prohibitions

have given

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Citizens United

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At a high level of generality, there is broad support for making life easier for the party committees. Notably, even the Brennan Center for Justice, which typically favors stricter campaign finance laws, issued a report in 2015 expressing guarded support for easing several restrictions on parties.

Also in 2015, Federal Election Commission (FEC) Commissioner Lee E. Goodman introduced a proposal at the FEC to roll back some of the agency's rules restricting coordination between parties and candidates and "Federal Election Activities" conducted by state parties. U.S. Senate Majority Leader Mitch McConnell also pushed hard to attach a rider to the "omnibus" spending bill at the end of 2015 to facilitate coordination between parties and candidates. The FEC rulemaking has not proceeded very far due to disagreements between the agency's commissioners over the proposal's details and agency rulemaking priorities, while intraparty misgivings scuttled the omnibus rider.

Meanwhile, pressure continues to build against the funding straitjacket that BCRA imposed on the parties when it eliminated so-called soft-money contributions to them. Late last year, the U.S. Court of Appeals for the D.C. Circuit rejected a bid by the Louisiana state Republican Party committee to engage in so-called "Federal Election Activity" (FEA) free from federal regulation, so long as the activity is not coordinated with any federal candidates.

BCRA regulated many state party functions as FEA, such as conducting certain voter registration, voter identification, and get-out-the-vote drives and "generic campaign activity" that may coincide with federal elections. State parties are required to pay for FEA using funds raised within the federal contribution limits and source prohibitions, which are often much stricter than what is permitted under state law.

In addition, to prevent non-federal funds from being used to subsidize FEA, BCRA (and FEC regulations implementing) imposed complex accounting and recordkeeping requirements on state party committees' use of federal and non-federal funds to pay their staff. These accounting and recordkeeping requirements have proven to be very difficult to understand and comply with not only by the state parties, but also by the FEC commissioners who have deadlocked several times on when and how to apply them.

Given the plethora of other major issues that are poised to be at the top of the policy agenda, campaign finance legislation may not see action during the first 100 days of the Trump Administration. But the prospects for a significant federal campaign finance bill to be enacted may now be at their highest since the last major legislative changes were made in 2002. ▪

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SEC Fines Investment Advisers for Pay-to-Play Violations

By: D. Mark Renaud

On January 17, 2017, the U.S. Securities and Exchange Commission (SEC) announced settlements with 10 investment advisory firms for violations of the SEC's pay-to-play rule (Rule). The penalties ranged from $35,000 to $100,000 and totaled over $660,000.

The penalties generally resulted from contributions made by individuals at the investment firms who are covered by the pay-to-play rule (called "covered associates") to state or local government officials state agency or local agency.

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One case specifically addressed prohibited fundraising, as well. The contributions ranged from $400 to $10,000, and all were in excess of the *de minimis* amounts permitted under the Rule ($350 per election if one can vote for the candidate; $150 per election if not).

All of the respondents were doing work for affected state or local agencies within two years after the prohibited contributions, which put the respondents in violation of the "time-out" under the Rule.

Wiley Rein regularly advises financial services companies and other entities on the federal pay-to-play rules, as well as the patchwork of state and local pay-to-play rules all over the country.

More information on the penalties can be found here. ▪

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Former FEC Commissioner's Counsel Brandi Zehr Rejoins Wiley Rein

Brandis L. Zehr, former counsel to Federal Election Commission (FEC) Commissioner Lee E. Goodman and former deputy general counsel of Jeb Bush's 2016 presidential campaign, has rejoined the firm's highly regarded Election Law & Government Ethics Practice as an associate.

Brandi will advise clients in complying with federal and state campaign finance, ethics, lobbying, and pay-to-play laws; counsel tax-exempt charitable and social welfare organizations in the areas of corporate and tax compliance and obtaining and retaining tax exemption; and represent clients before the FEC in enforcement proceedings, advisory opinion requests, and rulemaking comments.

During her time at the FEC, Brandi advised Commissioner Goodman on both policy and enforcement matters. While serving as in-house counsel of Governor Bush's presidential campaign, Brandi advised the campaign on a range of legal compliance issues including campaign finance, ballot access, election administration, corporate governance, intellectual property, insurance, contracts, and employment law matters.

Brandi began her career at the FEC as a campaign finance analyst. While in law school, Brandi joined the Republican National Committee (RNC) as a law clerk and, upon graduation, as associate counsel. Following the RNC, Brandi worked as an associate in the election law practice of another law firm before joining Wiley Rein in 2011. She received her J.D. and her undergraduate degree from The College of William and Mary.

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FEC, IRS, and Lobbying Disclosure Filing Dates for 2017

Monthly FEC Filing Dates for PACs

Date	Report
01/31/17	2016 Year-End Report
02/20/17	February Report
03/20/17	March Report
04/20/17	April Report
05/20/17	May Report
06/20/17	June Report
07/20/17	July Report
08/20/17	August Report
09/20/17	September Report
10/20/17	October Report
11/20/17	November Report
12/20/17	December Report
01/31/18	2017 Year-End Report

Note: Filing dates that fall on a weekend or holiday are not extended to the next business day. Paper filers must submit their reports on the previous business day. In addition, reports must be received by these filing dates. Only reports sent by registered or certified mail may be postmarked by the filing date, and reports sent by overnight mail must be received by the delivery service by the filing date.

Additional information on FEC reporting is available at www.fec.gov/info/report_dates.shtml.

Semiannual FEC Filing Dates for PACs

Date	Report
01/31/17	2016 Year-End Report
06/30/17	Mid-Year Report
01/31/18	2017 Year-End Report

Note: A PAC that is a semiannual filer and makes contributions in connection with special elections may have additional reports due. Filing dates that fall on a weekend or holiday are not extended to the next business day. Paper filers must submit their reports on the previous business day. In addition, reports must be received by these filing dates. Only reports sent by registered or certified mail may be postmarked by the filing date, and reports sent by overnight mail must be received by the delivery service by the filing date.

Additional information on FEC reporting is available at www.fec.gov/info/report_dates.shtml.

FEC, IRS, and Lobbying Disclosure Filing Dates for 2017 (continued)

Quarterly House and Senate Candidate Committee Filing Dates

Date	Report
01/31/17	2016 Year-End Report
04/15/17	First Quarter Report
07/15/17	Second Quarter Report
10/15/17	Third Quarter Report
01/31/18	2017 Year-End Report

Note: Filing dates that fall on a weekend or holiday are not extended to the next business day. Paper filers must submit their reports on the previous business day. In addition, reports must be received by these filing dates. Only reports sent by registered or certified mail may be postmarked by the filing date, and reports sent by overnight mail must be received by the delivery service by the filing date. Campaigns for a candidate participating in a special election are subject to additional pre-election reporting requirements.

Additional information on FEC reporting is available at www.fec.gov/info/report_dates.shtml.

Lobbying Disclosure Act Filing Dates

Date	Report
01/23/17	2016 Fourth Quarter Activity Report (LD-2) covering October 1-December 31, 2016
01/30/17	Second Semiannual § 203 Contribution Report (LD-203) covering July 1-December 31, 2016
04/20/17	First Quarterly Activity Report (LD-2) covering January 1-March 31, 2017
07/20/17	Second Quarterly Activity Report (LD-2) covering April 1-June 30, 2017
07/30/17	First Semiannual § 203 Contribution Report (LD-203) covering January 1-June 30, 2017
10/20/17	Third Quarterly Activity Report (LD-2) covering July 1-September 30, 2017
01/22/18	Fourth Quarterly Activity Report covering (LD-2) October 1-December 31, 2017
01/30/18	Second Semiannual § 203 Contribution Report (LD-203) covering July 1-December 31, 2017

Note: When the due date falls on a weekend or holiday, it is extended to the next business day. Additional information on Lobbying Disclosure Act reporting is available online at http://lobbyingdisclosure.house.gov/ and http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm

Pennsylvania, New Jersey, and Maryland Pay-to-Play Deadlines in 2017

By: D. Mark Renaud and Karen E. Trainer

Pennsylvania: February 15

If a company has a nonbid contract with the Commonwealth of Pennsylvania or one of its political subdivisions (including localities), then it is required to make a report of certain political contributions to the Secretary of the Commonwealth by February 15 of each year.

New Jersey: March 30

A business entity is required to file an annual report if it has received $50,000 or more in the aggregate through agreements or contracts with a public entity or entities in the preceding calendar year. This includes agreements and contracts with New Jersey state agencies, counties, municipalities, independent authorities, boards of education, and fire districts. Reports are due even if no reportable contributions have been made. The report is due on March 30 of each year.

Maryland: May 31 and November 30

Whenever a corporation is awarded any contract involving cumulative payment of at least $200,000 over the course of the contract with respect to any single government agency, then the corporation must file electronic reports of certain contributions. Maryland's semi-annual reports are due on May 31 and November 30 of each year, covering the previous six-month periods of November 1 to April 30 and May 1 to October 31, respectively. ▪

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FEC Commissioners Evenly Split on Federal Contractor Question

By: Michael E. Toner and Andrew G. Woodson

Federal law has long prohibited political contributions from federal contractors. Late last year, Federal Election Commission (FEC) commissioners were asked to consider whether this prohibition extended to a U.S. citizen, Christoph Mlinarchik, who was the sole member of a Virginia limited liability company (LLC) that was itself a federal contractor. Although the commissioners considered the issue over several months, they were unable to reach agreement on the analytical framework for the matter – much less the ultimate result – and thus no definitive opinion was issued.

A focal point of the Democratic commissioners' analysis was the fact that the LLC was treated as a "disregarded entity" for federal tax purposes. (The activities of disregarded entities activities are reflected on their owners' tax returns rather than on separate tax filings by the LLC.) Because the LLC and its owner were effectively treated as one entity for tax purposes, the Democratic commissioners believed that there was also "resulting unity" between the LLC and its owner for purposes of the prohibition on contributions by federal contractors. The Democrats further anchored their analysis in the 2015 opinion from the United States Court of Appeals for the District of Columbia Circuit, *Wagner v. FEC*, 793 F.3d 1 (*en banc*), wherein that court upheld the federal contractor contribution prohibition as necessary to guard against *quid pro quo* corruption and to preserve the concept of merit-based public administration. In particular, the Democrats felt that prohibiting Mr. Mlinarchik from contributing would help further the underlying goal of the statutory prohibition by preventing the appearance of corruption, as citizens observing a contribution from Mr. Mlinarchik might not see any difference between his funds and those of the LLC.

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The Commission's three Republicans reached the opposite conclusion, reasoning that the issue was controlled by principles of state law regarding LLCs – not federal tax law – and that in Virginia, an LLC and its sole member were treated as distinct entities. The Republicans also noted that the Commission's regulations explicitly recognize that the prohibition on contributions by federal contractors does not apply to personal funds used by "employees, officers, or members" of such contractor.

With the commissioners split 3-3 on the matter, no opinion was issued, leaving resolution of this question for a later date. In the upcoming months, the FEC is also expected to rule on one or more enforcement matters involving the federal contractor contribution prohibition, including a complaint filed against a construction company that reportedly gave $200,000 to a super PAC supporting Hillary Clinton. ▪

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Pre-Order the 2017 Lobbying and Gift Law Survey
50 States Plus the District of Columbia

The 2017 Lobbying and Gift Law Survey is a comprehensive guide to the lobbying laws and gift rules for all 50 states and the District of Columbia. Our Survey is available through an online portal that includes timely updates.

View a sample of the portal **here**, which contains 2014 information for Illinois and North Dakota. The username is *wileydemo*, and the password is *demo123*.

For more information on the 2017 Lobbying and Gift Law Survey or to pre-order, please contact Carol A. Laham at 202.719.7301 or claham@wileyrein.com.

President Trump Extends Obama Ethics Executive Order for Appointees; Some Differences in Details

Ó^:ÁRobert L. WalkerÁæ) åÁÒ¦ã&ÁY æ) *

President Trump issued a flurry of executive orders during his first full work week. Adhering generally to his campaign themes, most of these orders have contrasted sharply with the policies of President Obama's administration. The executive order President Trump issued this past Saturday setting forth "Ethics Commitments by Executive Branch Appointees" in his administration was thus notable for its similarities with his predecessor's ethics policy, although the two policies appear to differ in some subtle but significant respects.

As a general matter, President Trump's ethics order applies to the same range of "appointees" as were covered by the Obama ethics order. The Trump order applies to "every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency." The Trump order does not apply to "any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer."

President Trump's executive order imposes the same restrictions on gifts from lobbyists contained in former President Obama's ethics executive order. Specifically, just as appointees to the Obama Administration were prohibited from accepting any "gift" (with limited exceptions) from federally-registered lobbyists and organizations that employ or retain federally-registered lobbyists, Trump Administration appointees are subject to this same restriction.

A "gift" again is defined according to Office of Government Ethics (OGE) regulations and is subject to the same exceptions that applied under the Obama executive order. For example, modest food and non-alcoholic refreshments, as well as attendance at events where an official will be presenting on behalf of his or her agency, are still permitted. Likewise, there are still exceptions for gifts based on personal friendship, discounts available to the general public, and items resulting from a spouse's business or employment activities. (As discussed on page 1 of this issue, OGE made some slight changes to its gift regulations late last year that became effective at the start of this year; these changes are incorporated by reference in the new executive order.)

Like the Obama executive order, the Trump executive order does not extend the full array of exceptions in the OGE gift rules to administration appointees covered by the order, such as the $20 limit on individual gifts and $50 aggregate annual limit on gifts from a particular source and the exception for "widely attended events." The Trump executive order also directs OGE to initiate a rulemaking to extend the lobbyist gift ban set forth in the order to all Executive Branch employees, which would, in effect, remove many of the exceptions that are currently available under the OGE rules. OGE previously had initiated such a rulemaking pursuant to similar language under the Obama executive order, but the rulemaking was never completed.

With respect to so-called "revolving door" lobbying activity by administration officials after they leave government service, President Trump's executive order in many ways appears to broaden the restrictions contained in his predecessor's order. Specifically, the Trump executive order prohibits any appointee, after leaving the administration, from "engag[ing] in lobbying activities," as that term is defined under the Lobbying Disclosure Act (LDA), with respect to certain Executive Branch officials for the remainder of the Trump Administration. Importantly, however, the Trump executive order exempts "communicating or appearing with regard to" agency rulemaking, adjudication, and licensing proceedings. (Certain forms of participating in these agency proceedings are already exempt under the LDA.)

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By contrast, the Obama ethics executive order prohibited former officials of his administration from “lobby[ing]” the same categories of Executive Branch officials, but defined “lobby[ing]” narrowly only to include acting as a registered lobbyist. Thus, it appears that President Trump’s executive order would prohibit “lobbying activities” by alumni appointees of his administration, even if such activities comprise background, behind-the-scenes activities and fall below the LDA’s registration thresholds. On the other hand, the Obama executive order did not exempt lobbying on agency rulemaking, adjudication, or licensing proceedings. The apparent difference in scope of these provisions of the new ethics order and of the Obama order would appear to merit clarification in further explicatory guidance by the OGE.

Other new features in President Trump’s executive order include a five-year prohibition after an appointee leaves the Trump Administration against engaging in “lobbying activities” with respect to his or her former agency – even, apparently, if an appointee were to leave at the end of the Trump Administration and a subsequent administration takes over. In addition, Trump Administration appointees are subject to a lifetime ban against representing foreign governments or foreign political parties in matters that would require such individuals to register under the Foreign Agents Registration Act. (Under FARA, any agent of a foreign government or foreign political party that is hired or retained to influence U.S. government policy generally is required to register.)

One difference between the Trump and the Obama executive orders that has raised some initial confusion concerns a post-employment restriction under section 207(c) of Title 18 of the federal criminal code. This provision prohibits certain high-level Executive Branch and independent agency officials and personnel from communicating or appearing before their former agencies on behalf of a client to influence any official agency action for one year. While this prohibition overlaps to some extent with the lobbying bans under both the Trump and Obama executive orders, it also covers many activities that would not be considered “lobbying” or “lobbying activities” under either order. Former President Obama’s executive order notably had extended this prohibition for a total of two years after an administration official left Executive Branch service. President Trump’s executive order merely requires his appointees to “agree [to] abide by those [one-year] restrictions” in the statute, thus appearing to reverse the Obama executive order in this respect. If some other meaning was intended, clarification will be necessary.

Other provisions of note in President Trump’s ethics order that are carried over from the Obama executive order include:

- A prohibition against participating in the administration in any “particular matter involving specific parties that is directly and substantially related” to an appointee’s former employer or clients for two years from the date of appointment;

- For anyone who was registered as a lobbyist within two years before being appointed to the administration, a prohibition against participating in any “particular matter” on which the individual lobbied, as well as participating in the “specific issue area” covering that particular matter.

Just as the OGE issued guidance to clarify provisions in the Obama executive order, the agency likely will do so again with the Trump executive order. Attorneys in Wiley Rein’s Election Law and Government Ethics Practice will stay on top of any new guidance, and other ethics developments, as the Trump Administration moves forward. ▪

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SPEECHES/UPCOMING EVENTS

The Revolving Door and Financial Conflicts: The Challenges and Risks You Face
Robert L. Walker, *Panelist*
The National Institute for Lobbying & Ethics
January 30, 2017 | Washington, DC

What Major Actual and Proposed Legislative Changes Mean for Complying Firms' Positions
Roderick L. Thomas, *Speaker*
ACI's 4th Advanced Forum on False Claims and Qui Tam Enforcement
January 30, 2017 | New York, NY

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