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NEWSLETTER

Presidential Transition and the New Congress: Ethics Laws and Rules to Note

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The transition from the administration of President Bush to the administration of President Obama has begun. Now comes one element of the "change"– the change of government officials.

Government appointees and employees going through the revolving door to the private sector are subject to a myriad of laws, rules and regulations restricting both how they seek employment and how they may interact with the government as former officials. Private sector personnel who join the government—through the "reverse revolving door"—may also face ethics issues arising, for example, from continuing financial interests in or payments received from their former employers.

"Transitional" ethics issues can significantly impact the individual employee: for example, the principal federal conflict of interest statutes Sections 207, 208 and 209 of Title 18 of the United States Code—all carry potential felony criminal penalties. But the private-sector employer of a former government official—or of an employee going to the government – may face significant exposure, too, under, among other standards, some of these same conflict of interest provisions and, in the case of government contractors, under the Procurement Integrity Act or other statutes. This discussion highlights just a few "transitional" ethics issue areas.

Transitioning to the Private Sector—Generally: Revolving Door Rules

Executive Branch rules. Section 207 of Title 18, the principal federal post-employment statute, sets forth seven restrictions applicable to

Authors

Robert L. Walker
Of Counsel
202.719.7585
rlwalker@wiley.law

former employees of the executive branch who go to the private sector. In June 2008, the executive branch Office of Government Ethics (OGE) issued its first comprehensive post-employment guidance in regulation form since Section 207 was substantially revised in 1989. This important new guidance, codified at part 2641 of Title 5 of the Code of Federal Regulations (CFR), provides definitions, discussion and examples delineating the terms and scope of the Section 207 post-employment restrictions, and of the exceptions thereto, including:

- The lifetime ban on representation in connection with a particular matter involving specific parties in which the former employee participated personally and substantially as a government official.
- The two-year ban on representation in connection with a particular matter involving specific parties, which was pending under the former employee's official responsibility.
- The one-year cooling-off restriction, applicable to all former senior employees, on seeking official actions from their former employing department or agency.
- The two-year cooling-off restriction (extended from a one-year ban by enactment of the Honest Leadership and Open Government Act of 2007 (HLOGA)) on former, very senior employees (including, for example, the Vice President, Cabinet-level appointees and others) from seeking official action from certain departments, agencies and officers.
- The one-year restrictions on certain former government officials and employees who participated in trade or treaty negotiations, and on very senior and senior executive branch personnel in connection with representing, aiding or advising a foreign government or political party.

Under some of these restrictions, background advising of the client may be permissible.

Section 207 does not impose direct criminal liability on the private-sector employers of covered former government officials who engage in contacts prohibited under the statute. But, following Sarbanes-Oxley, public companies face requirements to adopt codes of ethics that are designed, among other ends, to promote compliance with applicable governmental laws, rules and regulations by its principal officers. And further, to avoid concerns as to potential derivative legal exposure as well as simply to assure that former government officials may engage in the work they have been hired to do, the prospective private-sector employer of a former government official ought always to ask for and obtain a copy of the written ethics/post-employment guidance given to that official in connection with his or her departure from the government.

Transitioning executive branch employees may also face substantial restrictions as they search for jobs in the private sector. For example, the federal criminal code (at Title 18 U.S. Code Section 208), OGE regulations and the Procurement Integrity Act cover executive branch employees who work on contract matters and who are seeking, negotiating or have an agreement for future private-sector employment. Prospective private employers should also be aware of the ethics and legal restrictions applicable during the job search process.

Congressional Rules. Transition is also happening on Capitol Hill. Members, officers and employees of both the United States Senate and House of Representatives also face restrictions on their post-congressional employment. Under Section 207 of Title 18, Members of the Senate, for two years after they leave office, may

not attempt to influence action by current Members, officers or employees of either house of Congress by communicating directly with them (strictly background advising of a client is generally permissible). The post-employment restriction on former Members of the House is identical in scope to the Senate rule, but not in duration: The ban applies to House Members for only one year after leaving office. The post-employment restrictions on communications applicable to former elected officers of Congress is also for one year but covers only contacts by the former officer with individuals and offices in his or her former employing house of Congress.

For former highly compensated staff of the Senate, there is a one-year ban under Section 207 on attempting to influence any Senator or any officer or employee of the Senate by communicating directly with them. For former highly compensated staff of the House, there is also a one-year communication ban by statute, but the scope of the ban depends on whether the former staff worked in a Member's personal office, on a committee staff or on leadership staff.

As with executive branch personnel, Section 207 sets forth a number of exceptions for post-employment communications by Members, officers and employees of Congress. Also applicable to members, officers and certain employees of Congress are the one-year restriction in Section 207 based on their official participation in trade or treaty negotiations and the one-year restriction on representing, aiding or advising a foreign government or political party.

Transitioning to the Private Sector—Government Contractors

Where the private employer is a Government contractor, sufficient understanding of the post-employment restrictions applicable to a prospective hire from the government is of particular importance. For example, Section 847 of the Fiscal Year 2008 National Defense Authorization Act may impose severe penalties on a government contractor who knowingly compensates a former Department of Defense official without having determined that the official sought and received a written opinion from his or her ethics official as to the applicability of post-employment restrictions, including the provisions of 18 U.S.C. Section 207. (*See More "Revolving Door" Requirements,* by Daniel P. Graham, Wiley Rein *Government Contracts Issue Update*, Summer 2008.) Similarly, the Procurement Integrity Act, at 41 U.S.C. 423(d)(4), subjects a "contractor who provides compensation to a former official knowing that such compensation is accepted by the former official in violation of" the post-employment provisions of the Act to significant financial penalties and administrative action, including cancellation of the procurement and/or initiation of suspension or debarment proceedings.

Transitioning to the Government: Conflicts of Interest

What potential ethics concerns await through the reverse revolving door? Individuals entering executive branch employment from the private sector—and the former employees of such individuals—need to be aware of the potential for ethics issues to arise in a number of areas, including those in connection with:

- Continuing financial interests. Executive branch officials and employees may have stock or stock options in a former private employer or may participate in a pension plan or other type of deferred compensation or benefit plan. Such continuing financial interests in a former employer may create a

conflict and, under certain circumstances, may require recusal from a matter or even divestment of the financial interests.

- Appearance of impartiality. Under executive branch ethics standards, an employee must not work for one year after leaving his or her former private employer on any contract or other particular matter in which the former employer is a party or represents a party, if the employee or relevant agency ethics official determines that a reasonable person would question the employee's impartiality.
- Payments from former employer. Section 209 of Title 18, for example, prohibits private payment or supplementation of an executive branch employee's government salary. According to OGE guidance, "Section 209 may apply if a former employer makes a payment to a government employee and there is an indication that the payment is intended to compensate the employee for doing his government job, rather than to compensate the person for past services to the former employer . . . ." Section 209, and the potential civil and criminal penalties for violations thereof, applies directly not just to the individual employee receiving prohibited payments but also to the "individual, partnership, association, corporation, or other organization" making the payment.

Transitioning to the Transition

Current executive branch employees who are detailed to President-elect Obama's transition team remain subject to executive branch ethics laws, rules and regulations but do not violate applicable standards by making agency contacts on behalf of the transition. Similarly, a congressional employee who is working in connection with the transition remains subject to all relevant congressional ethics standards.

Members of the transition team who are not already government employees generally are not subject to federal ethics laws and regulations. Presidents-elect in recent history, however, have promulgated their own codes of ethical conduct that members of the transition team were required to sign and follow. Indeed, the Obama-Biden transition has adopted several rules for the transition, including an aggressive gift ban, the specifics of which have yet to be officially released.

Among other things:

- Federal Lobbyists may not contribute financially to the transition.
- Federal lobbyists are prohibited from any lobbying during their work with the transition.
- If someone has lobbied in the last 12 months, they are prohibited from working in the fields of policy on which they lobbied.
- If someone becomes a lobbyist after working on the transition, they are prohibited from lobbying the administration for 12 months on matters on which they worked.

Just Part of the Picture

This survey covers some, but by no means all, of the ethics issues and concerns that may arise in connection with the Presidential transition. Among areas not discussed here were: specific bar rules and other standards applicable to attorneys; supplemental ethics regulations applicable to specific governmental departments

and agencies, and to specific departmental components; standards applicable to private-sector participants in the Information Technology Exchange Program; and public financial disclosure requirements for presidential appointees. Regarding the subject of presidential appointee financial disclosure, and transition issues more generally, OGE has just issued a guide, *A Resource for the Presidential Transition*, accessible on the OGE web site.

One clear message should come out of this discussion of the transition. The frequency with which the revolving door turns during the presidential transition period, and the number of different ethics issues that may arise for individuals and organizations in connection with the transition, underscores the need for private-sector employers to have in place comprehensive training and compliance programs addressing the full range of federal post-employment, conflict of interest and related restrictions.