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NEWSLETTER

The Presidential Transition, the Inauguration and the New Congress: Contribution, Ethics, and Other Laws and Rules to Note

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The transition from the Obama Administration to the Trump Administration has begun.

President-elect Trump's team, as of the date this article was written, has not yet publicly announced specific ethics policies or requirements that will apply to the Trump Transition or to officials in the Trump Administration to supplement the requirements already in place by law, rule, and regulation. On October 17, 2016, however, Donald Trump announced an Ethics Reform Plan "to drain the swamp and end political corruption in Washington, DC." The Plan included "five steps":

- A five-year ban on all Executive Branch employees lobbying the government after they leave government service, to be passed by Congress so that it cannot be lifted by Executive Order.
- A five-year ban, instituted by Congress, on lobbying by former Members of Congress and their staffs.
- Addressing so-called "shadow lobbying" by expanding the definition of "lobbyist" under the Lobbying Disclosure Act "to encompass former government officials labeling themselves otherwise ... ."
- A lifetime ban on "senior Executive Branch officials" lobbying on behalf of a foreign government.
- Congressional passage of "campaign finance reform" to prevent "registered foreign lobbyists from raising money in American elections."

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No concrete proposals, however, have been put forward in this regard.

The discussion in the rest of this article summarizes the laws, rules, and regulations already in place covering contributions to the Presidential Inaugural Committee and to the Presidential Transition Organization and covering officials and employees as they go through the "revolving door," either to join the government from the private sector or to leave government service.

Contributing to the Presidential Inauguration and the Presidential Transition

Inauguration. The Presidential Inaugural Committee (PIC) is responsible for organizing and financing most of the official inaugural events, including the parade and inaugural balls. U.S. corporations, citizens, and green card holders may contribute to the PIC without limit. By law, however, the inaugural committee must report publicly all contributions of $200 or greater that it receives. Registered federal lobbyists and their employers must list any donations to the PIC on their semi-annual LD-203 reports.

Transition. Separate from the PIC's planning activities the presidential transition organization (PTO) is working to facilitate the transition of the day-to-day operations of government from the Obama Administration to the Trump Administration. Although the presidential transition receives some public funding and support for its activities, individuals and corporations may contribute up to $5,000 toward the transition. Such contributions are not reportable on the LD-203.

Conflict of Interest, Post-Employment, and Transition Ethics Laws and Rules

Government appointees and employees going through the revolving door to the private sector are subject to a wide range of overlapping laws, rules, and regulations restricting both how they seek employment and how they may interact with the government as former officials. Likewise, private sector personnel joining the government must also consider the potential for ethics issues arising from continuing financial interests, including, for example, interests in or payments received from their former employers. Interestingly – because their positions are excluded from the relevant statutory and regulatory definitions of "officer" and "employee," the President and Vice President are not subject to the basic conflict of interest laws and regulations covering continuing financial interests.

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. So ethics issues arising under these statutes can significantly impact the individual employee. And the private sector *employer* of a former government official—or of an employee going to the government—may face significant exposure, too, under some of these same conflict of interest provisions, for example, 18 U.S.C. Section 209 prohibiting private supplementation of government salary or, in the case of government contractors, the Procurement Integrity Act or other statutes.

Transitioning to the Private Sector – Generally: Revolving Door Rules

Executive Branch rules on post-government employment and on seeking employment. Section 207 of Title 18, the principal federal post-employment statute, sets forth seven restrictions applicable to former employees of the Executive Branch who go to the private sector. Title 5 C.F.R. Section 2641 contains the federal regulations interpreting and implementing Section 207. In September 2016, the Executive Branch Office of Government Ethics (OGE) issued a legal advisory providing what it describes as a "plain language discussion" (hope springs eternal) of the primary post-employment restrictions applicable to former Executive Branch employees. In a 23 question-and-answer format, this recent OGE advisory provides definitions, discussion, and examples delineating the terms and scope of the Section 207 post-employment restrictions, and the exceptions thereto, including:

- The lifetime ban applicable to all former Executive Branch employees 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 applicable to all former Executive Branch employees 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 Executive Branch employees, on seeking official actions from their former employing department or agency.
    - By Executive Order, this restriction was doubled to two years for Obama Administration appointees subject to the Ethics Pledge; but the details of whether and, if so, exactly how this term of the Pledge might apply during the Trump Administration to former Obama Administration appointees remains to be seen. Also under the Obama Pledge, appointees agreed not to lobby covered Executive Branch officials (as defined by the Lobbying Disclosure Act) and non-career Senior Executive Service appointees "for the remainder of the Administration." That "remainder" period would appear to end on January 20, 2017.
- The two-year cooling off restriction 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, 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 restrictions—including recusal and notification requirements—as they search for jobs in the private sector. Earlier this year, OGE published a final rule amending the provisions of the Standards of Ethical Conduct for Employees of the Executive Branch (at 5 C.F.R. Section 2635, Subpart F) that govern "seeking other employment." The amendment brought the rule into the 21st century by providing examples of when and how the use of social media in a job search could be considered "seeking other employment." Prospective private employers should be aware of the ethics and legal restrictions applicable during the job search process and should assure that prospective government hires have followed all applicable requirements.

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 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. Under Senate rule, former Senate staff paid below this "highly-compensated" level face a one-year restriction on lobbying their former employing office, committee, or leadership staff. For former highly compensated staff of the House, there is also a one-year communication ban under Section 207, 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, an understanding of the post-employment restrictions applicable to a prospective hire from the government is of essential importance. As a general matter, for example, the Procurement Integrity Act, at 41 U.S.C. Section 2103, imposes restrictions on procurement officials engaged in a search for post-government employment; Section 2104 covers the acceptance of compensation from federal contractors by procurement officials. With respect to employers, the Procurement Integrity Act, at 41 U.S.C. Section 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 on Executive Branch employment from the private sector—and the former employers of such individuals—need to be aware of the potential for ethics issues to arise under both statute and rule in a number of areas, including in connection with:

- *Continuing financial interest.* 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—under Section 208 of Title 18 and under 5 C.F.R. Section 2635—and, under certain circumstances, may require recusal from a matter or even divestment of the financial interest.
- *Appearance of impartiality.* Under Executive Branch ethics standards, an employee must not work for one year after leaving their 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, apply 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 Trump'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. The Trump-Pence transition team has not yet publicly released information as to any such restrictions.

And More Transition ...

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 are: specific bar rules and other standards applicable to attorneys, supplemental ethics regulations applicable to specific governmental departments and agencies and to specific departmental components, and public financial disclosure requirements for presidential appointees. Regarding the subject of presidential appointee financial disclosure, and transition issues more generally, OGE has a number of guides and resources available at https://www.oge.gov/web/oge.nsf/Resources/PRESIDENTIAL+TRANSITION. For the federal government's official Presidential Transition Directory, go to https://presidentialtransition@usa.gov. The Center for Presidential Transition, of the Partnership for Public Service, has published a range of presidential transition resources at presidentialtransition.org.

Whatever one's role in the transition from one Administration, or one Congress, to the next, understanding how all the legal standards apply to your specific situation can seem daunting. During past transitions, Wiley Rein's Election Law and Government Ethics Group has assisted officials and employees entering the government, officials and employees leaving the government for the private sector, and their private sector employers in understanding and safely navigating the laws, regulations, and rules of the transition road.

For more information, please contact one of the authors listed.