

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

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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

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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.)

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.