

The Biden Transition and Presidency: What to Expect in Ethics, Lobbying, and Campaign Finance Regulation and Reform

November 2020

I. Biden-Harris Transition Team Ethics Plan and Code of Ethical Conduct

During his candidacy, President-elect Joe Biden was the first presidential candidate to be statutorily obligated to file a transition team ethics plan with the General Services Administration (GSA), pursuant to the Presidential Transition Enhancement Act of 2019. On September 30, The Biden-Harris campaign submitted and publicly released a Transition Team Ethics Plan and Transition Team Code of Ethical Conduct, to be agreed to and signed by all Team members.

Restrictions applicable to all Transition Team members. Under the Ethics Plan and Code, all Biden-Harris Transition Team members must pledge to avoid actual and apparent conflicts of interest. Transition members must pledge that they, along with their spouses, minor children, and financial advisors or agents, will not “buy or sell any stock in any entity” without prior approval for the duration of their service. The investment ban “does not apply to ‘excepted investment funds’ as defined by the Office of Government Ethics (i.e., funds that are independently managed, widely held, and either publicly traded or widely diversified).” Further, Transition Team members:

- May **not** participate in any particular Transition matter that they know conflicts or may conflict – actually or apparently – with a financial interest of the Transition Team member, an immediate family member, partner, client or other individual or organization with which the Team member has or has had a business relationship within the past 12 months.

Authors

Michael E. Toner
Partner
202.719.7545
mtoner@wiley.law

Carol A. Laham
Partner
202.719.7301
claham@wiley.law

D. Mark Renaud
Partner
202.719.7405
mrenaud@wiley.law

Caleb P. Burns
Partner
202.719.7451
cburns@wiley.law

Andrew G. Woodson
Partner
202.719.4638
awoodson@wiley.law

Brandis L. Zehr
Partner
202.719.7210
bzehr@wiley.law

Lee E. Goodman
Partner
202.719.7378
lgoodman@wiley.law

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

Practice Areas

- May **not**, for the duration of their service and 12 months thereafter, “communicate with or appear before, with the intent to influence, any federal department or agency with respect to which he or she has substantial responsibility during the activities of the Biden-Harris Transition Team, on behalf of any other person or entity.”
- May **not** “solicit or accept any money or thing of value as an inducement, reward or thank you to influence in any way the Biden-Harris Transition Team’s operations or decisions.”
- May **not** refer to their work on the Transition in “any business or other professional marketing materials” during the duration of their service and for 12 months thereafter.

Election Law & Government Ethics
Federal & State Campaign Finance
Federal & State Lobbying
Government Ethics
Lobbying & Campaign Finance Reporting Services
Political Law Compliance Counseling

Additional restrictions on lobbyists and foreign agents. Also per the Ethics Plan and Code, registered federal lobbyists and persons who have represented, aided, or advised a foreign government or foreign political party in the previous year (including, but not limited to, persons registered under the Foreign Agents Registration Act (FARA)) may only serve as Transition Team members with prior approval of the Transition’s General Counsel, Jessica Hertz. Federally registered lobbyists who are Transition Team members must “cease all registrable lobbying activity” while serving and are prohibited from soliciting contributions for, and incurring expenses on behalf of, the Transition. In addition, Transition Team members – even if not registered as lobbyists – will be disqualified from working on Transition matters on which they have engaged in “regulated lobbying activities” in the past 12 months or on which they anticipate they will engage in such lobbying activities in the next 12 months, unless otherwise approved by the General Counsel. Transition Team members may not represent, aid, or advise any foreign government or foreign political party for the duration of their service on the Transition and for 12 months thereafter.

The entire text of the Biden-Harris Transition Team Ethics Plan and Code of Ethical Conduct may be found [here](#). Rob Walker and Hannah Miller discussed the Biden-Harris Transition Team Ethics Plan and Code of Ethical Conduct on a recent episode of Wiley’s Political Law Podcast.

II. What to Know Before Contributing to or Communicating with the Biden-Harris Transition

Contributions. Contributions to the Biden-Harris Transition are governed by the Presidential Transition Act of 1963, which permits the Transition to accept donations of up to \$5,000 from individuals, corporations, and other entities. Similar to fundraising restrictions self-imposed by the Biden-Harris campaign, however, the Biden Transition is not accepting contributions from PACs, corporations, lobbyists, unions, fossil fuel executives, FARA registrants, or foreign nationals. All contributions – regardless of amount – must be itemized and reported by the Transition to GSA, which will make such reports public.

Communications. Under the Presidential Transition Act, Transition Team members are not government employees or covered officials for Lobbying Disclosure Act (LDA) solely because of their work for the Transition. However, current government employees may serve on the Transition, so special attention should be paid to who you are communicating with and whether that communication is covered by the LDA.

III. Government Ethics and Lobbying Reform Under a Biden Presidency

In Wiley's last *Election Law News*, we outlined then-candidate Joe Biden's government ethics and lobbying reform platform. Although, as of the date of this article, President-elect Biden has yet to announce or discuss further the specific steps he will take to effectuate his ethics and lobbying reform plan, coalitions like the Declaration for American Democracy – a coalition of over 150 watchdog groups, including the Brennan Center for Justice, the Sierra Club, and the Southern Poverty Law Center – are calling on President-elect Biden to take immediate measures in January.

As President, Joe Biden will have significant latitude – through issuance of Executive Orders – in setting the ethics policies for and practices of Executive branch officials and employees. For example, President Biden will certainly follow through on his campaign promise to issue by Executive Order – “on Day one” of his Administration – an Ethics Pledge that will “build[] and improve[] on the Obama Ethics Pledge.” The specific contents of the Biden Ethics Pledge have yet to be released, but using the Obama Ethics Pledge (which applied only to “appointees” to the Obama Administration) as a baseline the Biden Ethics Pledge will include **at least** the following components applicable to Biden Administration personnel covered by the Pledge:

- A ban on Administration appointees accepting gifts from registered federal lobbyists and lobbying organizations.
- A “revolving door ban” for all appointees entering the Administration.
 - Under the Obama Ethics Pledge, appointees could not, for a period of two years from the date of appointment, participate in any particular matter involving specific parties that was directly and substantially related to their former employer or former clients, including regulations and contracts.
- Additional “revolving door” restrictions for former lobbyists entering the Administration as appointees.
 - In addition to the more general restrictions on all appointees, lobbyists entering the Obama Administration as appointees could not, for a period of two years: participate in any particular matter on which they lobbied within the two years before the date of appointment; participate in

the specific issue area in which that particular matter fell; or seek or accept employment with any Executive agency they lobbied within the two years before the date of their appointment.

- A “revolving door ban” for appointees leaving government.
 - Appointees leaving the Obama Administration agreed that, if they were covered by the statutory (per 18 U.S. Code Section 207(c)) one-year post-employment ban on communicating with or appearing before their former employing agency, they would abide by this ban for two years following their Administration service.
- Additional “revolving door” restrictions on appointees leaving the Administration to lobby.
 - In addition to the “revolving door” restrictions imposed on all appointees leaving the Obama Administration, any such appointee leaving the Administration to lobby also agreed that, upon leaving government service, they would not lobby any covered Executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

In what ways will the Biden Ethics Pledge “build and improve” on the Obama Ethics Pledge, as outlined above? For example, will the scope of Biden Administration personnel covered by the Pledge be broader than just “appointees”? (In this regard, the Declaration for American Democracy has already called on President-elect Biden to institute an ethics pledge that covers not just appointees, but **all** Administration officials and employees, including part time advisors who retain their private sector employment.) What will the process for obtaining waivers from the restrictions of the Biden Ethics Pledge look like, and how strict and how public will this process be? Will the restrictions on lobbying imposed on personnel leaving the Biden Administration include restrictions just on engaging in actual lobbying contacts or (as the Trump Ethics Pledge did, at least on paper) extend to restrictions on behind-the-scenes “lobbying activities.” Will the Biden Ethics Pledge include specific restrictions on former personnel acting as agents of a foreign government (as the Trump Ethics Pledge did but as the Obama Pledge did not)? Answers to all these questions will be of great importance to individuals thinking about entering the Biden Administration and to the current – and potential future – private sector employers of such individuals. Wiley’s Election Law & Government Ethics Group will provide answers to these questions as they become available.

As President, Joe Biden will also have authority to effectuate other called-for ethics reforms by, for example, enforcing the conclusions of the U.S. Office of Special Counsel with respect to Hatch Act compliance, publishing White House visitor logs, requiring senior members of his Administration to disclose personal financial interests, and directing the Justice Department’s prosecutorial priorities.

Other proposals in Joe Biden’s government reform platform – like establishing a Commission on Federal Ethics to “oversee and enforce federal anti-corruption and ethics laws” – will require legislative action and may be off the table, depending on which party is in control of the Senate in the next Congress. However, even if Republicans hold the Senate, some of Biden’s legislative proposals on government ethics and lobbying regulation, or compromise versions thereof, may well have a path forward. For example, there could be bipartisan support for some form of “reform” of the Lobbying Disclosure Act (LDA) and related lobby disclosure requirements. (In the current Congress, for example, Sen. Chuck Grassley was a driving force

behind bipartisan efforts to reform FARA; and in past congresses, Sen. Grassley sponsored legislation to impose periodic reporting and disclosure requirements on “political intelligence” operatives and firms, similar to the requirements imposed by the LDA on lobbyists and lobbying firms.) The Biden lobby reform proposals include requiring:

- Elected officials to disclose monthly all meetings and communications with any lobbyist or special interest trying to influence the passage or defeat of a specific bill;
- Members of Congress to disclose any legislative language or bill text submitted by any lobbying party;
- Executive branch officials to disclose any regulatory text submitted by any outside entity;
- Members of Congress and senior Executive branch officials to develop and disclose any access policies governing requests for appointments.

As a candidate, President-elect Biden also proposed legislation to “lower the threshold for when those seeking to influence government must register as ‘lobbyists’. . . .” This would include a requirement to register as a lobbyist for “anyone who earns more than \$1,000 annually to be involved in developing or overseeing a lobbying strategy.” As noted in the prior Wiley *Election Law News* article on this subject, it is not clear whether or how this proposed \$1,000 threshold is intended to replace the current registration threshold for those who actually engage in lobbying contacts with covered officials: At present, registration is required with respect to lobbying work for a client when a person makes more than one lobbying contact over any period of time for that client and spends 20% or more of their time for that client in any given three-month period on lobbying activities. What is clear is that this proposed new \$1,000 threshold would require registration and regular disclosure by so-called “stealth lobbyists” – that is, persons who advise clients “behind-the-scenes” on developing lobbying strategy but who do not themselves make any direct contacts or communications with covered government officials.

The Biden proposals would also require lobbyists to disclose more details about their lobbying activity, including who they are meeting with, what materials they share, proposed legislative or regulatory language, and exact outcomes sought.

IV. Campaign Finance Under a Biden Presidency

Joe Biden’s campaign platform called for a number of sweeping revisions to the federal campaign finance laws. Nearly all of these changes, however, require congressional approval of new legislation or – in some cases – ratification of a constitutional amendment, leaving them unlikely to move forward in a Republican-controlled Senate.

Biden has, for example, advocated for the wholesale abolition of private dollars from federal campaigns. While this would require a constitutional amendment to effect, which his campaign acknowledged, Biden has called for legislation in the interim that would provide for public funding for many federal campaigns. Similarly, Biden has criticized the *Citizens United* decision, and has advocated for legislation to restrict one byproduct of that decision – super PACs – until a constitutional amendment outlawing super PACs could be

enacted. Biden's campaign platform also called for increased reporting, proposing a national database of online advertising as well as a 48-hour reporting requirement for entities that spend money on advertising in the 60 days before an election to disclose their contributors.

As to candidate contributions, Biden has advocated for legislation that would ban corporate PAC contributions to candidates, as well as a prohibition on the officers and directors of federal government contractors contributing to campaigns. While these measures would also likely involve legislation, it is nonetheless possible that a President Biden might attempt to use his Executive powers to inhibit contributions by those connected to federal contractors, in particular.

The other area in which President Biden could have an impact on campaign finance is through his power to appoint new FEC commissioners. President Trump is on track to fill all three currently vacant seats at the Commission by the end of this year. But two existing commissioners are serving on expired terms, and a President Biden could fill those seats with his own nominees in the coming years.

Hannah J. Miller made a very significant contribution to the drafting of this article.