

President Biden Issues Ethics Executive Order for Appointees; Trump Revokes Ethics Pledge for His Administration

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In the first hours of his new Administration, President Joseph R. Biden issued a new Executive Order (the Order) on Ethics Commitments by Executive Branch Personnel. The Order includes an Ethics Pledge that every executive appointee must sign and abide by. The Pledge includes:

- A lobbyist gift ban
- Revolving door bans applicable to all appointees entering and leaving government, with additional restrictions on lobbyists and foreign agents
- Restrictions on “shadow lobbying” by former senior and very senior appointees
- A first-of-its-kind “golden parachute” ban for incoming appointees

In the final hours of his presidency, President Donald Trump revoked his Ethics Executive Order 13770. This means that former Trump appointees are no longer subject to E.O. 13770’s five-year prohibition on engaging in lobbying activities respecting their former agencies and are no longer subject to a lifetime ban on representing foreign governments or foreign political parties in matters that require registration under the Foreign Agents Registration Act (FARA).

THE BIDEN ETHICS PLEDGE

The Biden Ethics Pledge applies to all “appointees” in the new administration – that is, to “every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior

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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 pledge does not apply to “any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.”

The Biden Pledge opens with a paragraph committing appointees to such general principles of conduct as: making decisions “on the merits and exclusively in the public interest,” upholding “the independence of law enforcement,” and avoiding “improper interference with investigative or prosecutorial decisions of the Department of Justice.” It then continues to the following specific provisions, among others:

Lobbyist Gift Ban

Like the Obama and Trump pledges before it, the Biden Ethics Pledge prohibits appointees from accepting gifts from registered lobbyists and lobbying organizations for the duration of their service. Only a limited number of exceptions apply to this lobbyist gift ban.

“Gift” is defined according to U.S. Office of Government Ethics (OGE) regulations and is subject to the same exceptions that applied under the Obama and Trump ethics executive orders. For example, appointees may accept modest food and non-alcoholic beverages and may attend events where they will be presenting on behalf of their agency. Other permissible gifts for appointees include, for example: gifts based on a personal relationship; discounts available to the public or to a class consisting of all government employees; and gifts resulting from a spouse’s business or employment activities.

Like the Obama and Trump ethics orders, the Biden Executive Order does not extend the full array of exceptions in the OGE gift rules to administration appointees covered by the Order. For example, the exception permitting career executive branch employees to accept individual gifts up to \$20 in value (with a \$50 aggregate annual limit on gifts from a single source) and the exception for free attendance at “widely attended events” are not available to Biden administration appointees.

“Revolving Door” Activity Bans

All Appointees

Entering Government. Like the Obama and Trump pledges, the Biden Pledge prohibits appointees from participating in matters “directly and substantially related” to their former employer or former clients, including regulations and contracts, for a period of two years from the date of appointment.

Leaving Government. Under 18 U.S.C. 207(c), former senior executive branch employees are subject to a one-year post-employment restriction on communicating with, or appearing before, anyone in their former employing agency, with the intent to influence; violation of this statutory provision is potentially punishable as a felony. The Biden Ethics Pledge extends the coverage period for this restriction to two years for administration appointees, recapturing the extension in Obama’s pledge that was discontinued

in Trump's, and also extends the scope of prohibited communications to include communications with senior White House staff.

Additionally, all Biden Administration appointees must agree not to lobby any covered executive branch officials or non-career Senior Executive Service appointees – and not to engage in any activity that would have triggered FARA registration if undertaken on January 20, 2021 – for the remainder of the Biden Administration or for two years post-service, whichever is later. Further – in a novel and potentially highly significant provision – the Biden Executive Order directs OGE to ensure that this post-employment communication restriction is honored not just by appointees, but also by *all* executive branch employees.

“Lobby” and “lobbied” under the Biden Ethics Pledge mean to act or have acted as a registered lobbyist. Except for the provision, discussed below, applicable to Senior and Very Senior appointees leaving government, the Biden Ethics Pledge does not restrict behind-the-scenes activities.

The Order also requires the Director of OGE, in consultation with the Attorney General, Counsel to the President, and the Director of OPM, to report to the President on steps that can be taken to extend post-employment restrictions under the Pledge “to all executive branch employees who are involved in the procurement process such that they may not for two years after leaving Government service lobby any Government official regarding a Government contract that was under their official responsibility in the last 2 years of their Government service.” The Obama ethics order contained a similar provision.

Lobbyists and FARA Registrants

Entering Government. The Biden Order uniquely enumerates restrictions that apply not only to appointees who were registered under the Lobbying Disclosure Act (LDA), but also to appointees who were registered under FARA.

Biden appointees who were registered under the LDA or FARA within two years before the date of their appointment may not, for a period of two years:

- Participate in any “particular matter” on which the appointee lobbied, or engaged in registrable activity under FARA, within two years before the date of his or her appointment;
- Participate in the specific issue area in which that particular matter falls; or
- Seek or accept employment with any executive agency that the appointee lobbied, or engaged in registrable activity under FARA, within the two years before the date of his or her appointment.

Leaving Government. As discussed, all appointees must agree to post-employment restrictions on activity regulated by the LDA and FARA.

Senior and Very Senior Appointees

Leaving Government. As promised in the Biden-Harris campaign platform, the Biden Ethics Pledge includes a provision to restrict so-called “shadow” or “stealth” lobbying. “Senior” appointees (subject to the one-year post-employment communication ban under 18 U.S.C. § 207(c), as discussed above) and

“Very Senior” appointees (subject to a broader, two-year post-employment communication ban under 18 U.S.C. § 207(d)), may not “materially assist others in making communications [to] or appearances [before]” employees in the appointee’s former agency.

Significantly, this provision broadens the scope of the statutory post-employment communication bans to also prohibit certain behind-the-scenes activity intended to assist others in communicating with or appearing before the government. The definition of “materially assist” however does not include “providing background or general education . . . based upon an individual’s subject matter expertise.” Given this potentially broad exception, the scope – and effectiveness – of the shadow lobbying ban in the Biden Ethics Pledge may depend on further explanatory and implementing guidance from OGE.

Golden Parachute Ban

In another historically novel provision of the Biden Ethics Pledge, appointees in the new administration must affirm that they have not and will not accept any salary, cash payment, or non-cash benefit from a former employer, if the eligibility for receipt of such a payment or benefit is limited to individuals accepting a government position.

Waivers

The Biden Executive Order empowers the Director of the Office of Management and Budget (OMB) to grant waivers to current and former appointees when “it is in the public interest to grant the waiver.” The Biden Order specifies several factors that the OMB Director may consider when granting a waiver, such as exigent circumstances related to national security, the economy, public health or the environment; the uniqueness of the individual’s qualifications to meet the government’s needs; and whether the individual’s prior lobbying activities were *de minimis*. The Biden Order also requires that all waivers be made public.

Administration and Enforcement

The administration and enforcement provisions of Biden’s Ethics Order are largely similar to those incorporated in the ethics orders of the past two administrations. OGE will administer the Order and, as during the Obama presidency, is required to provide an annual public report on the same.

Violations of the Pledge are enforceable “by any legally available means,” including agency debarment proceedings and judicial civil proceedings for declaratory, injunctive, or monetary relief. If, after notice and hearing, a former appointee is found to have violated his or her pledge, that person may be barred from lobbying any officer or employee of that agency for up to five years, in addition to any time period covered elsewhere in the Pledge. The Attorney General is authorized to investigate violations and initiate civil actions against violators.

Following precedent in previous administrations, OGE will likely issue guidance to explain and clarify provisions of the Biden Executive Order. Attorneys in Wiley’s Election Law and Government Ethics Practice will monitor all new guidance and other government ethics developments as the Biden Administration moves forward.