

Political Law Alert

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President Biden Signs Executive Order Establishing Ethics Pledge

On January 20, 2021, President Joe Biden signed an executive order, “Ethics Commitments by Executive Branch Personnel,” requiring certain appointees to sign an ethics pledge (Biden Pledge). Similar to presidential ethics pledges issued by former Presidents Barack Obama and Donald Trump, the Biden Pledge defines covered “appointees” as any full-time, non-career political appointees, regardless of whether they are appointed by the president, the vice president, an agency head or otherwise. Individuals appointed to a career position are not required to sign.

Also on January 20, 2021 — prior to President Biden’s noon inauguration — then-President Trump rescinded his executive order, “Ethics Commitments by Executive Branch Appointees,” thereby immediately releasing Trump appointees from their commitments under his ethics pledge (Trump Pledge). These now-repealed requirements included, among other restrictions, a five-year prohibition on engaging in lobbying activities with respect to an appointee’s former agency and a lifetime ban on engaging in activities on behalf of a foreign government or political party that would trigger registration under the Foreign Agents Registration Act of 1938 (FARA).

Below is a summary of the notable provisions of the Biden Pledge, as well as a review of the differences from the Trump Pledge.

Lobbyist Gift Ban

The Biden Pledge, like the Trump Pledge, prohibits covered appointees from accepting gifts from registered lobbyists, lobbying firms or lobbyist employers for the duration of their appointment. Many of the exemptions that exist under the Office of Government Ethics (OGE) gift rules are eliminated for covered appointees, while other minor exemptions are retained. Please note that there were additional exemptions resulting from OGE guidance under both the Obama and Trump Pledges, including free attendance at press events or widely attended charitable events, that OGE has indicated also apply under the Biden Pledge.

Eliminated exemptions. The following commonly used exemptions under OGE rules do not apply to covered appointees under the Biden Pledge:

- gifts from a single source of \$20 or less per occasion and \$50 or less per calendar year;
- gifts provided by a former employer to attend a reception or similar event when other former employees have been invited to attend;

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- free attendance at widely attended gatherings; and
- meals, refreshments and entertainment in a foreign area.

Retained exemptions. The following notable exemptions remain available to covered appointees under the Biden Pledge:

- gifts based on a personal relationship;
- gifts resulting from a spouse's business or employment;
- gifts customarily provided by a prospective employer in connection with employment discussions;
- gifts authorized by supplemental agency regulation;
- gifts accepted under specific statutory authority;
- modest items of food and refreshments (soft drinks, coffee and donuts) that are offered other than as part of a meal;
- greeting cards and items with little intrinsic value (plaques, certificates and trophies) which are intended solely for presentation;
- loans from banks and other financial institutions on terms generally available to the public;
- opportunities and benefits, including favorable rates and commercial discounts, available to the public or to a class consisting of all government employees or all uniformed military personnel;
- rewards and prizes given to competitors in contests or events open to the public, unless the employee's entry into the contest or event is required as part of his official duties;
- pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a former employer;
- anything which is paid for by the government or secured by the government under government contract;
- free attendance to certain events at which the official assigned to present information on behalf of his or her agency; and
- anything for which market value is paid by the employee.

The gift restrictions outlined above are unchanged from the Trump Pledge.

Ban on 'Golden Parachute' Payments From Former Employers

Under the Biden Pledge, appointees are required to attest that they have not and will not accept any payment or non-cash benefit from a former employer that is only offered to individuals accepting positions in the U.S. government. This includes such a payment or benefit accepted prior to being appointed.

This restriction was not included in the Trump Pledge.

Revolving Door Bans for Appointees Entering Government

Working on Matters Involving a Former Client or Employer

As was the case under the Trump Pledge, the Biden Pledge prohibits an appointee, for two years after being appointed, from participating in particular matters involving specific parties that are directly and substantially related to a former client or employer for whom the appointee worked in the two years prior to his or her appointment, including regulations and contracts.

Under OGE regulations, a "particular matter involving specific parties" involves a specific proceeding affecting the legal rights of the parties and, in rare circumstances, can include regulations if focused on the rights of specifically identified parties. However, in the Biden Pledge the phrase is broadened from its regulatory definition to also include any communication or meeting with a former client or employer relating to the performance of one's official duties other than those concerning matters of general applicability where all interested parties may attend. This language suggests that even if the former employer or client is not a party to the matter, appointees generally are barred from communicating with them on any issue within the scope of their responsibilities, including broad policy matters, unless regarding broad policy matters in a meeting or other event that is open to all interested parties. According to OGE guidance, "open to all interested parties" does not literally mean open to all comers, but that the meeting should include a multiplicity of parties. As an example, it would be permissible for a former employer or client to attend a meeting with the appointee on a generally applicable policy or piece of legislation if the meeting includes five or more stakeholders.

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Lobbyists and Registered Foreign Agents Entering Government

The Biden Pledge prohibits individuals who were registered under the Lobbying Disclosure Act (LDA) or FARA in the previous two years from seeking or accepting appointment to any executive agency he or she lobbied, or with respect to which he or she engaged in covered activity under FARA without obtaining a waiver (as discussed in more detail below).

Additionally, if an appointee was registered under the LDA or FARA, he or she is prohibited for two years after appointment from participating (1) in any particular matter regarding which he or she lobbied or engaged in covered activity under FARA in the two years prior to her appointment or (2) in the specific issue area in which that particular matter falls. A “particular matter” includes only matters that are focused upon the interests of specific persons, or a discrete and identifiable class of persons, even if it does not involve formal parties, and may include governmental action such as legislation or policymaking narrowly focused on the interests of such a discrete and identifiable class of persons.

Please note that the inclusion of FARA work as a trigger for these restrictions and the prohibition against accepting a position with a lobbied agency or that was the subject of FARA activity are both changes from the Trump Pledge.

Revolving Door Bans for Appointees Leaving Government

Ban on Lobbying Executive Branch for the Remainder of the Biden Administration or for Two Years

The Biden Pledge prohibits appointees from lobbying any covered executive branch official (as defined under the LDA) or any non-career Senior Executive Service (SES) appointee for the remainder of the Biden administration or for two years after leaving their position, whichever is later. For purposes of this provision, “lobbying” is defined as acting as a registered lobbyist. While the scope of “acting as a registered lobbyist” is not clear, the fact that the Biden Pledge includes a separate, specific prohibition on assisting others with their lobbying efforts (discussed below), as well as that a person would not have to register as a lobbyist unless there are at least two contacts with a covered official, suggest that this prohibition may apply only to contacts with the foregoing officials.

The Trump Pledge prohibited a former appointee from engaging in “lobbying activities,” including behind-the-scenes preparatory activity, with respect to the entire executive branch for the remainder of the Trump administration and with respect to his or her former agency for a period of five years after leaving his or her position. Please note that President Trump rescinded the Trump Pledge on January 20, 2021 thereby releasing Trump appointees from its restrictions.

Ban on FARA Registration for Foreign Governments or Political Parties for the Remainder of the Biden Administration or Two Years

Appointees also are prohibited from engaging in any activity on behalf of a foreign government or political party that would trigger registration under FARA for the remainder of the Biden administration or for two years after leaving their position, whichever is later.

The Trump Pledge included a lifetime prohibition on activity triggering registration under FARA on behalf of a foreign government or political party. Please note that President Trump rescinded the Trump Pledge on January 20, 2021 thereby releasing Trump appointees from its restrictions.

Cooling-Off Period Extended for ‘Senior’ Appointees

Under 18 U.S.C. Section 207(c), certain “senior” appointees (as defined in the next section) are prohibited from communicating with or appearing before their former agency regarding official action for one year. The Biden Pledge extends this ban to two years and adds senior White House staff to the list of persons with whom the former official may not communicate.

Both the extension of the cooling-off period to two years for former senior appointees and the inclusion of senior White House staff as prohibited contacts for such former appointees are departures from the Trump Pledge.

Prohibition on ‘Behind-the-Scenes’ Lobbying for ‘Senior’ and ‘Very Senior’ Appointees

In addition to the statutory cooling-off periods banning certain communications or appearances and the extension noted above, the Biden Pledge imposes a one-year prohibition applicable to “senior” and “very senior” appointees that restricts them from materially assisting others in making communications or appearances that the appointees themselves would be prohibited from

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making by either “(a) holding [themselves] out as being available to engage in lobbying activities in support of any such communications or appearances or (b) engaging in any such lobbying activities.” “Lobbying activities” is defined with reference to the same term in the LDA, and includes lobbying contacts and “behind-the-scenes” efforts in support of such contacts, including preparing and strategizing for those contacts.

“Senior” appointees include those (1) paid on the Executive Schedule, (2) paid an amount equal to or greater than 86.5% of the compensation paid to a person paid on Level II of the Executive Schedule, (3) military members in pay grade O-7 and above, and (4) those appointed by the president or vice president under 3 U.S.C. Section 105(a)(2)(B) or 3 U.S.C. Section 106(a)(1)(B).

“Very senior” appointees include (1) the vice president, (2) those paid at the rate of basic pay of Level I of the Executive Schedule, (3) those employed in a position in the Executive Office of the President at a rate of pay equal to Level II of the Executive Schedule, and (4) those appointed by the president or vice president under 3 U.S.C. Section 105(a)(2)(A) or 3 U.S.C. Section 106(a)(1)(A).

The Trump Pledge prohibited former appointees from engaging in “lobbying activities,” including behind-the-scenes preparatory activity, with respect to the entire executive branch for the remainder of the Trump administration and with respect to his or her former agency for a period of five years after leaving his or her position. Please note that President Trump rescinded the Trump Pledge on January 20, 2021 thereby releasing Trump appointees from its restrictions.

Other Requirements

The Biden Pledge also requires that appointees commit to:

- making hiring and employment decisions based on a candidate’s qualifications, competence and experience;
- decision-making on the merits and exclusively in the public interest, without regard to private gain or personal benefit;

- conduct that upholds the independence of law enforcement and precludes improper interference with investigative or prosecutorial decisions of the Department of Justice; and
- ethical choices of post-government employment that do not raise the appearance that appointees used their government service for private gain, including by using confidential information acquired and relationships established for the benefit of future clients.

With the exception of the requirements for employment decisions, none of these provisions were included in the Trump Pledge.

Waiver

The director of the Office of Management and Budget (OMB), in consultation with the counsel to the president, may grant waivers to the Biden Pledge, in writing, if the literal application of a restriction is inconsistent with the purposes of the restriction or if it is in the public interest to grant the waiver. Waivers will be made public within 10 days of being signed by the director of OMB.

Under the Trump Pledge, the president or his designee granted waivers, rather than the director of OMB.

Enforcement

As was the case with the Trump Pledge, the Biden Pledge may be enforced by debarment proceedings within any affected executive agency or civil action by the attorney general for declaratory, injunctive or monetary relief. Further, any former appointee who is determined to have violated the Biden Pledge may be barred from lobbying any officer or employee of that agency for up to five years, in addition to the time period covered by the Biden Pledge.

The full text of President Biden’s executive order may be found [here](#).

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