1411 K St. NW, Suite 1400
Washington, DC 20005

THE CAMPAIGN LEGAL CENTER

Tel: 202.736.2200
Fax: 202.736.2222

A Short Guide to Conflicts of Interest Review for Presidential Appointments

By Larry Noble
January 10, 2017

Government service is not just a job; it is fundamentally about serving your country. The unprecedented nature of the potential conflicts of interest presented by President-elect Donald Trump's domestic and foreign businesses will likely continue to plague the Trump presidency so long as he continues to deny the seriousness of those potential conflicts and fails to take appropriate prophylactic action.

Although Trump will take office regardless of whether he fully and completely separates himself and his family from his businesses, the same is not necessarily true for more than 1,000 political positions requiring Senate confirmation that President-elect Trump has to fill.

While President-elect Trump wrongly believes "the president can't have a conflict of interest," there is no question that individuals who the Senate confirms to fill these positions are subject to a variety of conflict of interest laws. This document serves as a roadmap to assist U.S. Senators in asking the right questions of the nominees as it relates to their potential conflicts of interest. Part of the traditional nominating process is designed to ensure that high-level members of the incoming administration are not subject to unresolved or unresolvable conflict of interest problems. It is imperative the U.S. Senate ensure these nominees are not in violation of conflicts of interest laws, which are detailed below.

Ethics and the Confirmation Process

Usually, the selection of potential nominees begins with the President-elect's transition team (PETT) conducting a preliminary vetting for possible legal and ethical issues. This process normally begins prior to any public announcement of the selection to avoid the embarrassment of floating the name of someone who may have serious problems that cannot be remedied, whether because the prospective nominee does not want to take appropriate action or the problems are deemed too significant.

However, regardless of how carefully the PETT reviews a potential nominee for conflicts of interest, the president-elect is not the final judge of whether or not a high-level nominee is qualified for office.

Article II, Section 2 of the Constitution of the United States requires the Senate to provide "Advice and Consent" to fill these top government positions. It is the duty of the Senate to prevent the appointment of anyone it believes unfit to hold the office to which he or she is nominated.

The formal process of confirming a nominee includes a background investigation, which can involve the Federal Bureau of Investigation (FBI) and Internal Revenue Service (IRS), as well as a review of the nominee's finances for potential conflicts of interest by the Office of Government Ethics (OGE) and the ethics official of the agency to which the nominee is being appointed. The nominee must also submit several disclosure forms and provide extensive personal information, including past and current positions, as well as financial assets and investments. Potential conflicts of interest are normally resolved by the president-elect's team working with the nominee and OGE to agree on an appropriate solution, such as the nominee selling certain assets, establishing a blind trust, recusing him or herself from certain matters or other appropriate action.

In addition, the Senate committee responsible for recommending whether the Senate confirm a nomination is normally provided with the information gathered in that vetting process, as well as answers to whatever questions the committee itself may have of the nominee.

However, that is not the way President-elect Trump appears to be handling the nominations of people to fill his cabinet, which may present unique dangers.

First, President-elect Trump has shown what can be considered a lack of commitment to, or understanding of, conflicts of interest laws and their rationale. For example, Trump himself is not only ignoring longstanding standards of ethics that previous presidents have followed, but his extensive business interests may, in fact, result in violations of the law.

Second, and possibly related, according to published reports, the Trump transition team does not appear to have followed the normal vetting process in the preliminary stages and has been slow in working with OGE. "In the past, the ethics work was fully completed prior to the [public] announcement of nominees in the overwhelming majority of cases," OGE Director Walter Shaub recently wrote, noting that this process was not followed in the Trump team's case. While OGE is apparently now reviewing nominees, its director has further warned that the current confirmation schedule for several of the nominees does not leave sufficient time to complete the ethics review process — and some Senate committees may not receive financial disclosure paperwork from the nominees prior to their hearings.

Finally, these problems are exacerbated by the fact that many of Trump's named and potential nominees currently hold top positions in multinational corporations and/or have extensive and complicated financial investments around the world. Regardless of whether one agrees with Mr. Trump that successfully running a multinational corporation should be a primary qualification for a top government position, that very wealth and success in private business brings with it a higher risk of potential conflicts of interest.

Given this situation, it is all the more important that the Senate be able to assure the American public that it has carefully reviewed the new administration's nominees and is satisfied that all ethics concerns have been resolved. Disagreements over the nominee's views on policy issues are, by their very nature, political. However, the American public has a right to expect the Senate will transcend partisan divisions and demand the highest standards of ethical conduct from presidential appointees. It is up to the U.S. Senate to ask tough questions to ensure the nominees do not violate conflict of interest laws.

Ethics Laws

There are numerous ethics laws and regulations intended to ensure that government employees work for the American people and not for themselves or other private interests. These laws cover everything from bribery to misuse of government property. However, President-elect Trump's nontraditional view of financial ethics issues, and the broad financial interests and wealth of many of his announced and expected nominees, have put a special emphasis on the conflict of interest laws prohibiting actions affecting a personal financial interest (§ 208) and the use of nonpublic information for private profit (STOCK Act).

Section 208 (18 U.S.C. § 208)

The core statute aimed at preventing financial conflicts of interest is found at 18 U.S.C. § 208**.** It **prohibits** an executive branch employee from **participating personally and substantially in a particular government matter that will affect his or her own financial interests**, or the **financial interests of a spouse, minor child**, **general partner, organization in which he or she serves as an officer, director, trustee, general partner or employee**, or anyone with whom he or she is negotiating for or has an arrangement concerning prospective employment.

- While § 208 does not apply the president, according to OGE, "it has been the consistent policy of the executive branch that a President should conduct himself 'as if' he were bound by this financial conflict of interest law."
- A disqualifying financial interest in a particular government matter in which the employee participates exists if:
    - There is a close link between the matter in which the employee is involved and any effect on the asset or other interest, and
    - There is a real possibility of gain or loss as a result of that matter.

What does this mean? A government employee cannot personally participate in any substantial way in any government matter if there is a real possibility that the matter will result in a financial gain or loss for the employee's specific financial investments.

Why does this matter? Human nature is such that we know that a decision a government official has to make on behalf of the American people may be influenced — consciously or not — by the fact that what he or she decides may possibly affect his or her personal financial interests. Even if the official can successfully ignore his or her personal financial interests, the decision may be undermined by the public perception that the decision was influenced by those financial concerns.

There are a number of ways to deal with a financial conflict of interest under 18 U.S.C. § 208:

1. **Recusal**: The employee may be recused from the matter, unless the financial interest is determined to pose a "substantial conflict" because the work cannot be readily reassigned or because it is central or critical to the performance of the employee's Government duties.

2. **Divestment:** If an employee's financial interest poses a "substantial conflict," an employee may be directed to divest (e.g., sell) the financial interest.

    a. Under the tax laws, a person may be able to defer capital gains taxes on property that must be sold to comply with conflict of interest requirements. A certificate of divestiture must be obtained from OGE before selling the property to receive this tax benefit.
    b. The proceeds must be reinvested into permitted property.

3. **Waiver:** An agency may grant a waiver to an employee if an exemption does not remedy the conflict of interest and neither recusal nor divestiture are reasonable options.

4. **Trust**: The employee may establish a qualified trust which must be certified by OGE and meet other requirements. One such entity is a Qualified Blind Trust ("QBT"), where the employee's assets placed into the trust are managed by an independent trustee who, without the employee's knowledge or involvement, takes the actions necessary to avoid conflicts.

    a. Assets placed in the trust will continue to pose a conflict of interest until they are sold by the independent trustee or their value is less than $1,000. New assets purchased by the independent trustee may not be disclosed to the employee.

    b. The trustee must be:

i. A financial institution, an attorney, a certified public accountant, a broker, or an investment advisor,
ii. Independent of and not associated with any interested party, so that the trustee or other person cannot be controlled or influenced by any interested party; and
iii. Someone who is not and has not been an employee of, or affiliated with, or involved in any other investment with, any interested party, and
iv. Not a relative of any interested party.

What does this mean? There are several ways to resolve the potential conflict of interest, depending on the matter and financial interests that conflict. The employee can be prohibited from working on the matter, unless their position or job requires their participation. In many cases, the employee must divest (sell) the assets that cause the conflict. In some cases, the assets may be placed in a "Qualified Blind Trust" to be sold by the trustee. However, there are strict rules regarding the establishment of a "Qualified Blind Trust" to ensure that the trustee is, and will remain, independent of the employee and the employee is truly "blind" to the activities of the trust.

Why does this matter? With government service comes a pledge that the only interest an employee will serve are those of the public. Therefore, once a conflict of interest is identified, it must be resolved in a way that protects the public from the real or apparent influences of that conflict. Sometimes, preventing the employee from working on the matter in conflict can satisfy the problem. However, that becomes more difficult the higher the level of the employee's position. Even where it may be technically possible, recusing the employee from a decision it is his or her job to make, diminishes the value of the employee's services to the public. Therefore, selling the asset may be the only way to resolve the conflict, and this can be done through a QBT, which truly insulates the employee from the handling of their assets.

The STOCK Act

The Stop Trading on Congressional Knowledge Act (STOCK Act), which was signed into law by President Obama in 2012 and amended a year later, makes clear that the "insider trading" prohibitions found in the Securities Exchange Act of 1934 apply to the president, vice president and other executive branch employees (as well as members of Congress, their staff, and members of the judiciary).

The law provides that each of these government employees owes a duty arising from a relationship of trust and confidence to the United States Government and the citizens of the United States with respect to material, nonpublic information derived from such person's position as an executive branch employee…or gained from the performance of such person's official responsibilities.

In addition to prohibiting insider trading of publicly held companies, the STOCK Act also prohibits the president, vice president and other executive branch employees from using any nonpublic information for private gain, or from influencing an employment decision of a private entity solely on the basis of partisan political affiliation.

As applied to the executive branch, the STOCK Act:

- Prohibits the president, vice president, and all other executive branch employees, including those nominated by the president and confirmed by the Senate, from:
  - Engaging in insider trading, and
  - Using, or allowing to be used, nonpublic information for his or her private profit or the private benefit of anyone else.
- Prohibits the president, vice president, and high level executive branch employees from participating in:
  - An initial public offering, and
  - A particular matter directly and predictably affecting the financial interests of any person with whom the official has, or is negotiating for, an agreement of future employment or compensation.
- Requires the president, the vice president, and high level executive branch employees to file periodic public financial disclosure reports for financial transactions involving stocks, bonds, commodities futures, and other forms of securities while they are with the government.

What does this mean? Government officials, especially those in high-level policy positions, are often in possession of nonpublic information that may directly affect the value of stocks and other financial investments. Longstanding insider trading laws make it illegal for others to make investments based on inside information not available to the public about a company. The Stock Act applies the same principles to government employees. It also increases the reporting requirements on government employees so that trading can be monitored.

Why does this matter? Insider-trading by government employees is fundamentally unfair and undermines the credibility of the stock market. It also is a use of a government position for personal gain and can raise questions about whether government decisions are being influenced by decision to affect the value of stocks. It's important to note that this provision makes it illegal for government employee to use insider information for their own financial benefit and for the financial benefit of anyone else.

--

Larry Noble is the general counsel for the Campaign Legal Center and formerly served as general counsel for the Federal Election Commission.