

CONFLICTS OF INTEREST AND ETHICS IN GOVERNMENT

BRIEFING NOTE: UNITED STATES – FEDERAL (EXECUTIVE BRANCH)

I. Jurisdiction Overview

The United States is a federal country with a central government and fifty state governments. Each level of government has its own legislation to deal with conflicts of interest. Within the federal government the three branches, the executive, the legislative, and the judiciary, all have separate regimes in place to deal with ethics issues, including conflicts of interest. It should be noted that the executive branch has by far the most detailed conflict of interest rules of any of the three branches. The executive branch includes the cabinet, which is appointed by the President (drawing upon members of society) and the cabinet appointees must be confirmed by the Senate. It also includes civil servants (both career officials and political appointees), who are charged with implementing government policy.

This note will focus solely on the executive branch of the federal government of the United States, and the provisions in place to deal with conflicts of interest. It deals only with general conflict of interest rules which apply across the executive branch (as many federal agencies have their own more detailed ethics regimes which apply only to the employees who work for that agency).

II. Scope of Coverage of Conflict of Interest Provisions:

At the federal level, all employees of the executive branch of government (including employees of the District of Columbia) are covered by the general conflict of interest provisions, including the President, Vice-President, Cabinet Secretaries, and the members of the civil service. As noted, employees within different federal agencies may be bound by further restrictions, which apply specifically to the agency with which they are employed.

III. Prohibited Activities:

A. General Prohibition on Conflicts of Interest

The federal legislation does not contain a general definition of conflict of interest. However, the legislation creates a general duty for every member of the executive branch to act fairly and impartially, and not to be improperly influenced in their decision making. The legislation notes that “public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.”

The legislation aims to ensure that no employee privately gains from their public position, and it also seeks to ensure that public officials do not use their office to promote the private gain of their friends, families, or associates. Legislation prohibits any executive branch employee from accepting anything in consideration for any appointive office with the United States government.

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The legislation prohibits any person from offering anything of value to a public official, or to a family member or friend of a public official, with the intent to influence any official act, or to in any way influence the proper carrying out of their official public duties.

The federal legislation prohibits any executive branch employee from acting as an agent or attorney in any claim against the United States, or from receiving any gratuity, or share in any interest in any such claim, in consideration of assistance in the prosecution of such claim. Employees are prohibited from acting as agent or attorney for anyone in front of any department or court in connection with any matter in which the United States has a direct and substantial interest.

Furthermore, ethics legislation prohibits any federal government employee from appearing before any court as an expert witness, with or without compensation, in any proceeding in which their employing agency is a party or has a direct and substantial interest.

The federal legislation prohibits executive branch employees from participating in any matter in which they, or their family, friends or business associates, have a financial interest. Furthermore, there is also a prohibition on executive branch employees from participating in any way, through their official duties, with anyone from the private sector whom the employee is negotiating or has any arrangement concerning prospective employment.

There is a prohibition on executive branch employees from sharing any confidential information, such as trade secrets or similar information, which becomes known to them through the course of their employment or their official duties, with any other individual, except as provided by law. This prohibition on sharing confidential information remains after the employee leaves the public service.

Legislation prohibits executive branch employees from receiving a salary, or a supplementation of salary, as compensation for their government services from any source except the federal government of the United States.

B. Gifts

Employees of the executive branch are not permitted to solicit or accept anything of value from a person who is seeking official action from the individual's employing entity or from a person whose interests may be substantially affected by the performance or nonperformance of the individual's official duties. No gift may be accepted in return for being influenced in the performance of any official act. However, executive employees are permitted to personally accept gifts on behalf of the federal government of the United States, while adhering to statutory authority.

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There is a complete ban on receiving any gifts of any value from registered lobbyists or lobbying organizations, during the duration of the employee's time with the executive branch.

There is a ban on executive branch employees giving gifts to superiors within the federal government. Also, employees are barred from accepting gifts from other federal government employees who receive less pay than they do.

Furthermore, executive branch employees and their spouses are not permitted to accept gifts from foreign governments. There is an exception to this rule for gifts of "minimal value", valued under \$100 (all figures U.S.) (such as souvenirs or keepsakes). A gift received which is worth more than \$100 is to be forfeited to the government of the United States.

C. Travel

Generally, an employee in the executive branch may not accept payment for travel expenses. Federal legislation permits the Administrator of General Services, in consultation with the Director of the Office of Government Ethics, to prescribe by regulation the conditions under which an agency in the executive branch may accept payment for travel expenses from non-Federal government sources.

D. Anti-Nepotism Provisions

Federal legislation prohibits executive branch employees from appointing, employing, promoting or advancing, in the agency in which he or she is serving or over which he or she exercises jurisdiction or control, any individual who is a relative of the public official. The legislation prohibits the appointment of a person who has been selected as a result of their status as a relative. Any hiring or other employment decisions made by any executive branch employee must be based on the candidate's qualifications, competence and experience, and not as a result of familial or personal connections.

E. Outside Interests

As noted, federal legislation prohibits executive government employees from receiving a salary, or a contribution to or supplementation of salary, as compensation for their services as an employee of the executive branch of the United States. This does not prevent executive branch employees from continuing to participate in a bona fide pension, retirement, group, life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

Executive branch employees are required to disclose any outside employment. Certain executive branch employees must receive written permission from their specific agency's ethics office before participating in any form of non-governmental employment.

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Legislation prohibits certain high ranking executive branch employees, including full time presidential employees, from engaging in any paid or unpaid work outside of their government jobs.

Executive branch employees are permitted to exercise their right to participate, or to refrain from participating, in the political process of the United States. However, executive branch employees are not permitted to use their official authority or influence for the purpose of interfering or affecting the result of an election, or to engage in political activity while on duty, or while using government property. Also, executive branch employees are not permitted to run for the nomination of a political party or as a candidate for election to a partisan political office.

F. Holding of Certain Assets

There is no government-wide restriction on holding certain financial interests. However, statutory restrictions are contained in agency statutes which limit certain financial interests held by certain executive branch employees.

Certain public office holders may be required to divest for specific property (including stock, a limited partnership interest, and foreign currencies), if the holding of that property will create a conflict of interest in the carrying out of their employment or official duties.

G. Restrictions on Former Lobbyists

Certain employees of the executive branch, who were registered lobbyists at a time prior to their public service, cannot, for two years:

- Participate in any particular matter in which they lobbied within the two years before their entrance into the executive branch.
- Participate in any particular matter in which that particular matter falls; or
- Seek or accept employment with any executive agency which they lobbied within the two years before their entrance into the executive branch.

H. Disclosure of Government Waste

Executive branch employees are required to disclose any knowledge of waste, fraud, abuse, and corruption to appropriate authorities. This positive requirement demands employees disclose public money spent inappropriately, as well as the waste of official time by executive branch employees.

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I. Duties When Seeking Outside Employment

When seeking employment with persons whose financial interests would be directly and predictably affected by particular matters in which the employees participate personally and substantially, executive branch employees have a duty to recuse themselves from any participation in a related matter.

J. Disclosure of Private Sector Contacts / Lobbying

The United States Government has detailed legislation restricting and regulating the activities of lobbyists. Lobbyists who derive more than \$2500 from their services annually, and who spend more than 20% of their official time lobbying on behalf of clients, are required to register with the federal government, and must inform the government as to the client(s) which they represent.

Lobbyists are required by law to make quarter-annual filings to both the Senate and the House of Representatives detailing their lobbying activities, including contacts made with executive branch employees. The filings must include information as to the type of lobbying done and information on the general issue areas which were discussed with executive branch employees.

IV. Affirmative Requirements

A. Duty of Recusal

Federal legislation requires that executive branch employees avoid conflicts of interest, and recuse themselves in any situation where they would be affected by a conflict of interest. When an employee's official duties give rise to potential conflicts, the employee is required to advise their supervisor, so that the conflict can be avoided. An employee who becomes aware of a potential conflict of interest has a positive obligation to inform their superior. Only if the employee is granted express permission by their superior are they allowed to continue to participate in a situation in which they have felt a conflict of interest may arise.

Legislation grants powers to the Office of Government Ethics to force an employee to recuse themselves in situations where the employee has not taken positive steps to recuse themselves from a situation where a conflict of interest could arise.

B. Duty of Disclosure

1. Confidential Report

Within 30 days of assuming the position of employee of the executive branch of the Government of the United States, employees must provide confidential reports including:

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- The source, type and amount of value of income received in the previous calendar year.
- The source, type and amount of value of income which consists of dividends, rents, interest, and capital gains, received during the previous calendar year which values over \$200.
- The identity and value of any property held during the preceding calendar year in a trade or business, or for investment or the production of such income, which has a fair market value which exceeds \$1000.
- The identity and value of the total liabilities owed to any creditor, other than a relative, which exceeded \$10 000 during the last calendar year, excluding mortgages, or loans for motor vehicles or household appliances, as long as the loan does not exceed the purchase price of the item which secures it.
- A brief description of any purchase, sale or exchange within the last calendar year which exceeds \$1000.
- The identity of all positions held during the previous two calendar years in relation to employment, but excluding membership in religious, social, fraternal or political groups.
- A description of the date, parties to, and terms of any agreement or arrangement with respect to:
 - Future employment
 - A leave of absence during the period of the reporting individual's government service.
 - Continuation of payments by a former employer other than the United States Government.
 - Continuing participation in an employee welfare or benefit plan maintained by a former employer.
- The category of the total cash value of any interest of the reporting individual in a qualified blind trust.

Supervising ethics offices within executive departments have the authority to request any executive branch employee to submit a confidential disclosure form at any time, requiring them to disclose the above mentioned items.

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2. Public Disclosure

Federal legislation requires that certain employees of the executive branch (generally high-ranking officials) must publicly disclose their personal financial interests, to ensure confidence in the integrity of the federal government by demonstrating that they are able to carry out their duties without compromising the public trust. The public disclosure shall include:

- A brief description of any interest in property held by the filer at the end of the reporting period in a trade or business, or for investment or the production of income, having a fair market value in excess of \$1,000.
- Any personal liability owed to the filer, spouse, or dependent child by a spouse, or by a parent, brother, sister, or child of the filer, spouse, or dependent child.
- The source, type, and in the case of public financial disclosure reports the actual amount or value, of earned or other noninvestment income in excess of \$200 from any one source which is received by the filer or has accrued to his benefit during the reporting period.
- A brief description, the date and value of any purchase, sale, or exchange by the filer during the reporting period, in which the amount involved in the transaction exceeds \$1,000, of any real property and of stocks, bonds, commodity futures, mutual fund shares, and other forms of securities.

3. Disclosure of Gifts

Federal legislation requires that executive government employees disclose all gifts received which value over \$100, from any source other than relative or friends in a 12 month period. The employee must provide the identity of the source of the gift, a brief description of the gift, and the valuation of the gift. Any food, lodging, or entertainment received by an employee as personal hospitality need not be disclosed.

Any gift deemed to have been received improperly must be returned to the donor, or the employee who received the gift must reimburse the donor with regards to the market value of the gift. In certain circumstances (for example, if the gift is perishable), it may be either donated to charity, or destroyed.

V. Enforcement

The Office of Government Ethics exists to provide overall direction of executive branch policies related to preventing conflicts of interest on the part of executive branch employees. The head of the office, the Director of the Office of Government Ethics, is appointed by the President, and confirmed by the Senate. Any executive branch employees seeking guidance on ethics issues can contact the Office of Government Ethics for advice.

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The Director has the power to develop, in consultation with the Attorney General and the Office of Personnel Management, rules and regulations to be promulgated by the President or the Director pertaining to the identification and resolution of conflicts of interest. The Office of Government Ethics has the power to order the specific resolution of conflicts of interest, but does not have the power to enforce its own orders. In a case where the matter is not resolved in the manner ordered by the Office of Government Ethics, the Director has the power to appeal to the President and to the Congress for the resolution of the matter.

It should also be noted that individual agencies have their own ethics officers which deal with conflicts of interest issues which arise amongst employees within their specific government agency.

VI. Sanctions

The conflict of interest legislation includes a process for determining punishments for those found guilty of breaching their duties, and establishes procedures for both criminal and civil prosecution of those in breach of their duties.

Any employee who is found to have constituted an offence in relation to a conflict of interest is liable to imprisonment for up to 1 year, or a fine (depending on the offence in question), or both.

Anyone who *willfully* engages in the conduct constituting the offence is liable to imprisonment for up to 5 years, or a fine of up to \$100 000 for a misdemeanor or in the case of a felony, \$250 000, or both.

The Attorney General of the United States may bring a civil action in the appropriate United States district court against any person who offends the conflict of interest legislation. Upon proof of such conduct, such person is liable to pay not more than \$50 000 per violation, or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is found to be greater.

Under the legislation, if the Attorney General has reason to believe that a person is engaging in conduct constituting an offence under any of the conflict of interest legislation, then the Attorney General may petition an appropriate United States district court for an order prohibiting that person from engaging in such conduct if the court finds that the conduct constitutes such an offence. The filing of a petition by the Attorney General does not preclude any other remedy which is available, such as a possible civil action.

VII. Post-Employment Prohibitions

Legislation restricts certain actions of former federal government employees after they leave their position with the executive branch, which aims to limit the potential influence

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and allure that a private arrangement may have on a current federal official, and to protect the government from the use against it of information gained by former executive branch employees during the fulfillment of their official duties.

There is a permanent ban on former executive branch employees from intending to influence, or appearing before an officer or employee of any department, agency, court or court martial of the United States, in connection with a particular matter in which the United States has a direct and substantial interest, in which the person participated in personally and substantively as such officer and employee, and which involved a specific party or specific parties at the time of such participation. This lifetime ban on lobbying does not apply to general policy making matters or agency rulemaking, but rather to specific matters such as a government contract, investigation, or legal action.

The legislation imposes a 1 year ban on any former employee of the executive branch from aiding or advising any other person (except the Government of the United States) concerning any ongoing negotiation.

There is a two-year prohibition on former executive branch employees making representational communications with or appearances before government agencies in particular matters involving a specific party or parties that were under their “official responsibility” during their time in government (which is distinguished from the lifetime ban on matters in which they had a “personal and substantial” involvement).

There is a one-year prohibition on certain former senior executive branch employees making representational communications with or appearances before their former agencies in any matter whatsoever.

There is a one-year prohibition on certain senior executive branch employees making communications with or appearances before either their former agencies or senior employees of other executive branch agencies.

Executive branch employees who leave government to lobby are prohibited from lobbying any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration which is in power at the time the employee leaves the public service.

There is a one year prohibition on certain former members of the executive branch of government from aiding or advising any person (other than the federal government of the United States) regarding trade negotiations in which the former employee had participated in while in government.

Legislation prohibits certain former executive branch employees from lobbying any executive branch officials or non-career Senior Executive Services appointees for the remainder of the Administration in which they worked.

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Legislation imposes a one-year ban on “senior” and “very senior” executive branch officials from lobbying the executive branch on behalf of foreign governments.

VIII. References

The following list contains the relevant legislation dealing with conflict of interest and ethics issues for the executive branch of the United States federal government.

5 C.F.R. Part 2635. Standards of Ethical Conduct for Employees of the Executive Branch, online: http://www.usoge.gov/laws_regs/regulations/5cfr2635.aspx

2 U.S.C. 1601. Lobbying Disclosure Act of 1995, online: http://senate.gov/legislative/Lobbying/Lobby_Disclosure_Act/compilation.pdf

5 U.S.C. § 7357. Gifts to Federal Employees

18 U.S.C. § 201. Bribery of Public Officials and Witnesses, online: http://www.usoge.gov/laws_regs/pdf/comp_fed_ethics_laws.pdf

18 U.S.C. § 203. Compensation to Members of Congress, Officers and Others in Matters Affecting the Government, online: http://www.usoge.gov/laws_regs/pdf/comp_fed_ethics_laws.pdf

18 U.S.C. § 205. Activities of Officers and Employees in Claims Against and Other Matters Affecting the Government, online: http://www.usoge.gov/laws_regs/pdf/comp_fed_ethics_laws.pdf

18 U.S.C. § 207. Restrictions on Former Officers, Employees, and Elected Officials of the Executive and Legislative Branches, online: http://www.usoge.gov/laws_regs/pdf/comp_fed_ethics_laws.pdf

18 U.S.C. § 208. Acts Affecting a Personal Financial Interest, online: http://www.usoge.gov/laws_regs/pdf/comp_fed_ethics_laws.pdf

18 U.S.C. § 209. Salary of Government Officials and Employees Payable Only by the United States, online: http://www.usoge.gov/laws_regs/pdf/comp_fed_ethics_laws.pdf

18 U.S.C. § 210. Offer to Procure Appointive Public Office, online: http://www.usoge.gov/laws_regs/pdf/comp_fed_ethics_laws.pdf

18 U.S.C. § 216. Penalties and Injunctions, online: http://www.usoge.gov/laws_regs/pdf/comp_fed_ethics_laws.pdf

31 U.S.C. § 1353. Acceptance of Travel Related Expenses from Non-Federal Sources, online: http://www.usoge.gov/laws_regs/pdf/comp_fed_ethics_laws.pdf

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Executive Order 12731 – Principles of Ethical Conduct for Government Officers and Employees, Signed by President George H.W. Bush, October 17th, 1990, online: http://www.usoge.gov/laws_regs/exec_orders/eo12731.aspx

Executive Order 13490 - Ethics Commitments by Executive Branch Personnel, Signed by President Barack Obama, January 21st, 2009, online: http://www.whitehouse.gov/the_press_office/ExecutiveOrder-EthicsCommitments/

PUBLIC L. 110-81, 121 STAT 735 HONEST LEADERSHIP AND OPEN GOVERNMENT ACT,
ONLINE: [HTTP://FRWEBGATE.ACCESS.GPO.GOV/CGI-BIN/GETDOC.CGI?DBNAME=110 CONG PUBLIC LAWS&DOCID=F:PUBL081.110.PDF](HTTP://FRWEBGATE.ACCESS.GPO.GOV/CGI-BIN/GETDOC.CGI?DBNAME=110_CONG_PUBLIC_LAWS&DOCID=F:PUBL081.110.PDF)