

Guidelines for Interacting with President-Elect Trump's Transition Team

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Election and Political Law

Over the next nine weeks, the Trump Presidential Transition team will formulate policy and staffing recommendations for the new administration. This alert gives a broad overview of the Transition and the laws that regulate interactions with Transition team members on issues related to appointments and policy recommendations. Persons interested in this topic may also wish to view our client alert on the presidential appointee [vetting process](#).

What Is the Presidential Transition?

The Presidential Transition is the formal process by which the federal government turns over from one administration to another. The Transition has an important role in shaping the incoming administration, serving essentially as a “government-in-waiting.” It takes the “big ideas” from the campaign and crafts the policies to implement them. It also identifies and prepares the individuals who President-elect Trump will eventually appoint to lead those policy efforts throughout the Executive Branch. As part of this process, the Obama Administration and Trump Transition work together to facilitate the transfer of power and identify issues that the new administration will confront.

Trump for America, Inc., which operates as an IRS 501(c)(4) tax-exempt entity, is the formal structure for much of the Transition. The Transition works from General Services Administration (“GSA”) office space near the White House, though Transition staff may also have offices within individual agencies and departments.

Who Is a Part of the Transition?

President-elect Trump has announced that Vice President-elect Mike Pence will be the head of the Transition, replacing New Jersey Gov. Chris Christie, who had served in that role during the campaign. The Transition continues to announce new members on a regular basis. The Transition can hire paid staff and outside consultants, and will also rely on volunteers. Each agency and department in the Obama Administration will have team members who coordinate with the Transition team.

How Does the Nomination and Appointment Process Work?

One of the most important and public roles of the Transition is to begin selecting appointees for some of the thousands of positions the new President must fill. These appointees will be vetted before their selection, and some must also be confirmed by the Senate. Many potential

appointees, especially those seeking senior positions and ambassadorships, hire private counsel and government relations experts to guide them through the process.

Individuals seeking an appointment should consider when their sought-after position will get filled, whether it requires Senate confirmation, and what the vetting process will require of them. They should also keep in mind that the President-elect is the center of this system. While some high-level appointees will in turn select their own subordinates, in many cases even lower-level positions are filled by the White House.

Knowledge of which positions will be open, and when, is a key part of the process. Many appointees serve at the pleasure of the President and will turn over with the Administration. Other appointees, however, will serve terms that extend beyond the end of the preceding administration. This is especially true in independent agencies such as the Federal Trade Commission. These positions will be filled as terms expire or members resign. While judges are not part of the Administration, they also are appointed by the President. There are about 100 federal judicial vacancies at present, including one on the Supreme Court.

The timing of appointment or nomination is also important. Those positions that are most important and pressing generally get filled first. The nonprofit Partnership for Public Service's Center for Presidential Transition suggests that the White House should be fully staffed by the inauguration. The Center's data shows that in the George W. Bush and Obama Administrations, deputy secretaries, assistant secretaries, undersecretaries, and general counsel were largely nominated between March and June. Ambassador nominations largely began in May for Bush and June for Obama, and U.S. Attorneys in July for Bush and June for Obama. Interspersed throughout were various commissioners and board members. By August, each administration had nominated over 400 individuals who required Senate confirmation.

About 1,000 of the 4,000 positions filled by Presidential appointment require Senate confirmation. Those nominations must be approved by one or more Senate Committees and then by a vote in the full Senate. Senate confirmation tends to be required for top-level positions, including Ambassadors. The Administration may assign a staff member to help guide the nominee through this process.

Whether or not the position requires Senate confirmation, each appointee or nominee will have to pass through a vetting process first. A short list of individuals for each position will be vetted by the Transition or, after inauguration, the Administration, with those who "pass vet" moved on towards selection. The government will also conduct background investigations of nominees and appointees. Nominees who require confirmation will receive another vetting when their nomination arrives at the Senate.

What Rules Govern Interactions with and Efforts to Influence the Transition?

The Transition is a powerful organization, and presents an early opportunity to shape policies and appointments in the new administration. A patchwork of laws govern interactions with the Transition. The exact application of these laws may vary depending on the situation.

What Rules Apply to Funding the Transition?

The Transition is funded by private individuals, businesses, and other entities, as well as through public funds. Federal campaign finance laws do not regulate donations to the Transition. Instead, the Presidential Transition Act of 1963, as amended, limits private contributions to a transition to \$5,000 per person. The Transition must disclose to the GSA the date, source, and amount of private donations it receives, and account for how it spends those donations. Those disclosures are due thirty days after the inauguration and will be made public. The Transition must also inform the public of the name, most recent employment, and source of funding for anyone working for the Transition.

The Clerk of the House and Secretary of the Senate have advised that organizations registered under the Lobbying Disclosure Act (“LDA”) and their lobbyists do not need to include donations to the Transition on their semi-annual LD-203 reports of contributions and donations.

Are Efforts to Influence the Transition “Lobbying”?

Whether efforts to influence the Transition and its team members are “lobbying” under the LDA depends on whether the team members involved are currently federal government officials or employees. Transition team members who are private sector employees and are otherwise not employed by the government, do not become government employees or officials for LDA purposes simply by working for the Transition. However, communications with federal employees about the transition, such as efforts to influence current employees in the Executive Office of the President, top Senior Executive Service employees, Admirals, Generals, and other government employees assigned to the Transition, will generally be considered lobbying under the LDA.

Can I Give Gifts to Transition Team Members?

Similar to the lobbying rules, the gift rules turn on who employs the person working on the Transition. For example, executive branch employees must continue to abide by the appropriate executive branch rules when working on the Transition. Similarly, state officials like Vice President-elect Pence may continue to be covered by state law, depending on the state. On the other hand, the vast majority of Transition staff and volunteers are not explicitly governed by federal law. Instead, Transitions commonly adopt a Code of Ethics which prohibits soliciting gifts and limits the amount that can be accepted.

Are there Insider Trading Law Considerations?

Transitions have generally required participants to sign confidentiality agreements that prohibit private use of information gained during the Transition process. Using that information in connection with securities trading decisions might also be prohibited by insider trading laws. Because Transition team members have a duty not to disclose such confidential information, trading based on material non-public information received from the transition team could violate insider trading laws. The risk is greatest where the information ultimately came from a government source.

The Stop Trading on Congressional Knowledge Act (“STOCK Act”), a 2012 law, made clear that federal government officials owe a duty to the public with respect to material, nonpublic information. This means that an insider trading case can be brought against a federal government official who buys or sells securities on the basis of material, non-public information. It also means, however, that a case can potentially be brought against *anyone* who buys or sells

securities on the basis of material, non-public information obtained from the government. For example, if the Transition team member passed on information she or he had learned from full-time government employees during the Transition, trading based on that information could be prohibited if the inside government information was material and non-public. But, again, in light of the confidentiality agreements signed by Transition staff, trading decisions based on any material, non-public information received from the Transition—regardless of whether the Transition staffer obtained the information from a federal employee—carry significant risks.

Covington’s Election and Political Law Practice Group includes a multi-disciplinary and bipartisan group of lawyers specializing in campaign finance, lobbying and government ethics law. Firm lawyers have been actively involved in the transition process in prior administrations.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Election and Political Law practice:

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