

Dealing with Trump Administration Appointees? Watch Out for These Major New Restrictions in the “Drain the Swamp” Executive Order

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Election and Political Law

President Donald Trump this weekend signed his [promised](#) “drain the swamp” [Executive Order](#), which imposes ethics restrictions on incoming and outgoing Trump Administration appointees. Incoming appointees would, of course, do well to carefully review the provisions of the Executive Order. But companies that deal with the Administration—whether by lobbying the executive branch, by seeing a former executive take a Presidentially appointed position, or by hiring a former Administration appointee—must also be mindful of these, in some cases, extremely restrictive provisions, lest they unwittingly get caught up in an ethics scandal.

While [some](#) in the [media](#) are claiming that the order is a significant weakening of a similar Obama-era Executive Order, the new Trump order is, in several subtle but key respects, much more restrictive than the Obama order. The Trump order imposes four restrictions on appointees’ activities during their government service and four restrictions on appointees after they leave government service. Each is discussed in more detail below.

Restriction on Appointees’ After Government Service

More Restrictive Than Obama Executive Order

- **Lobbying Activities Ban for Duration of Trump Administration.** The Obama [Executive Order](#) prohibited Presidential appointees who later became federally registered lobbyists from lobbying “any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.” As a result of the wording of this restriction, during the Obama Administration, former appointees could take a government relations position without violating the Executive Order as long as they ensured they did not spend enough time lobbying in order to trigger lobbying registration. Or they could register as lobbyists (focusing on Congress) and provide behind-the-scenes advice to their employers about strategies for influencing executive branch action as long as the former appointees did not personally lobby the executive branch.

The Trump order, for the most part, goes further. It prohibits former Trump appointees from engaging in “lobbying activities” with respect to these covered executive branch officials. It then imports the definition of “lobbying activities” in the Lobbying Disclosure Act which covers lobbying contacts [and](#) efforts in support of those contacts, whether the contacts are made by the individual or someone else. This means that a former

employee can violate the Executive Order even if the employee does not become a registered “lobbyist” and even if the employee never personally communicates with executive branch officials. As long as the employee engages in at least some “lobbying activities,” there is a potential violation.

This is a very significant change. Suppose, for example, a cabinet official is hired as CEO of a Fortune 500 corporation. If the CEO meets with her Vice President of Government Relations and they discuss the company’s executive branch lobbying strategies, the CEO might have violated the pledge. Or suppose a former Justice Department appointee joins a law firm and is asked to advise a client on a policy issue, in preparation for the client’s meeting with White House officials. Those few minutes of advice could violate the order.

To be sure, there is an exception for communications or appearances with regard to judicial proceedings, law enforcement proceedings, and “any agency process for rulemaking, adjudication, or licensing.” But it is not clear whether this would allow all communications about agency rule-makings or only those made through public notice-and-comment procedures. Regardless, many discussions of executive branch policy issues will not fall nicely into the judicial, law enforcement, or rulemaking proceedings categories, meaning that they will be prohibited.

In practice, this provision (and the one below) could make it very difficult for former Trump Administration appointees to find policy- or government-focused work. While former appointees can still lobby Congress, executive branch lobbying is largely off-the-table. And it will even be a challenge for former appointees to accept non-lobbying positions, such as positions as strategic advisors or corporate executives with oversight over the company’s government relations activities. Because these positions often involve at least some behind-the-scenes “lobbying activities,” the former appointee may face major limits on the type of activities in which he or she can engage for the new employer.

- **Five-Year Lobbying Ban.** The Trump Executive Order also bans appointees from engaging in “lobbying activities” with respect to their former agency for five years. This ban did not appear in the Obama order and could presumably apply even after the Trump Administration. Again, the use of the term “lobbying activities” is consequential; it will apply to appointees even if they do not register as lobbyists and even if they limit their activities to merely “behind-the-scenes” strategic advice. This signature “drain the swamp” proposal has been criticized in the [press](#) for failing to fulfill then-candidate Trump’s pledge to impose the five-year ban on former Congressional officials as well. But, of course, an Executive Order cannot impose additional post-employment bans on Members of Congress; it would take an Act of Congress and/or modifications to House and Senate Rules to do that.
- **The Lifetime Foreign Agent Ban.** Another novel provision in the Trump Executive Order is a *lifetime* ban on former appointees engaging in activities “on behalf of any foreign government or foreign political party” which would require the appointee to register under the Foreign Agents Registration Act. FARA is an obscure and sweeping federal criminal statute that requires “agents of foreign principals” to register and file detailed reports with the U.S. Department of Justice if they engage in certain activities in the United States on behalf of the foreign principal, such as efforts to influence the U.S. government or any section of the U.S. public or acting as a public-relations counsel.

Less Restrictive Than Obama Executive Order

- **Post-Employment Restrictions on Communications with Employees of Former Agency.** Federal criminal law prohibits certain senior executive branch officials from, among other things, communicating, with the intent to influence, with employees in their former agency for one year following their departure. The Trump Executive Order requires appointees to pledge to abide by this one-year restriction. The Obama Executive Order went further, extending this restriction to two-years.

Restriction on Appointees' During Government Service

Identical to Obama Executive Order

- **Gift Restriction.** The Trump Executive Order prohibits appointees from accepting gifts from individual lobbyists and entities registered under the Lobbying Disclosure Act. Executive branch employees are already prohibited by law from accepting gifts from certain “prohibited sources,” but federal regulations spell out many different exceptions to these restrictions. Unlike other executive branch employees, Trump appointees will not be permitted to rely on many of these exceptions. For example, Trump appointees cannot rely on the exceptions for gifts of \$20 or less, awards and honorary degrees, gifts of free attendance at widely attended gatherings (unless the official is speaking or presenting information in an official capacity), social invitations, meals and entertainment in foreign areas, and informational materials. This gift restriction is identical to the Obama gift restriction. The Director of the Office of Government Ethics is also required to adopt rules applying this more restrictive gift ban to all executive branch employees and not just appointees—something the Obama Executive Order also required but which was never done.
- **Revolving Door Ban on Appointees Entering Government.** Under the Obama Executive Order, appointees were barred, for two years, from participating in any “particular matter involving specific parties” that is directly and substantially related to their former employer or former clients. For example, an appointee to the Department of Defense could not approve a contract involving her former employer for two years. This provision was retained in the Trump Order.
- **Hiring Decisions.** Like the Obama Executive Order, the Trump order requires appointees to make hiring or employment decisions “based on the candidate’s qualifications, competence, and experience.”

Less Restrictive Than the Obama Executive Order

- **Revolving Door Ban on Lobbyists Entering Government.** Under the Obama Executive Order, those entering government who were registered lobbyists in the two years prior to their appointment were prohibited from (i) participating in any particular matter on which they lobbied in the prior two years; (ii) participating in the “specific issue area” in which that particular matter falls; or (iii) seeking or accepting employment with any executive agency the individual lobbied in the prior two years. The Trump Executive Order drops the third restriction but keeps the first two. This will make it easier for former lobbyists to join the Administration, but there will still be significant limitations on their activities once they have joined the Administration. The former lobbyist will still be restricted from participating on matters on which they lobbied. In addition, they will be barred from working in the broader universe of “specific issue areas” in which those

particular matters fall. “Specific issue area” was not defined in the Obama order and is not defined in the Trump order. Depending on how broadly the White House and Office of Government Ethics interpret this term, however, it could still pose a very significant limitation on the kinds of government activities in which former lobbyists may engage.

Waivers and Enforcement

The Obama Order permitted waivers granted by “the Director of the Office of Management and Budget, or his or her designee” if certain factors were satisfied. The Trump Executive Order allows the “President or his designee” to grant waiver and does not list the factors that will be consulted in making these waiver determinations.

Additionally, while the Obama Order required the Director of the Office of Government Ethics to provide certain reports on compliance to the President, and provide an annual public report on administration of the pledge, no such reports are required under the Trump Order.

Finally, one might ask how this Executive Order can be enforced against federal appointees at all once they have left federal government service? The Trump Executive Order makes use of the same creative enforcement mechanism adopted by the Obama Administration. Appointees are required to sign an “Ethics Pledge” in which they agree to abide by the restrictions in the Executive Order. If they fail to comply, the Attorney General can bring a civil action against them for “declaratory, injunctive, or monetary relief.” As far as we know, there were no enforcement actions brought against alleged violators of the Obama Ethics Pledge. Whether that will be the case in the Trump Administration remains to be seen.

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