

MEMORANDUM

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Subject: Conflict of Interest and “Ethics” Provisions That May Apply to the President

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This memorandum is intended to briefly identify those provisions of federal statute or regulation that (1) respect conflicts of interest or “ethics” and (2) may apply to the President. The memorandum begins by noting why certain provisions would appear to be *inapplicable* to the President. It then notes the remaining provisions that could potentially be seen to *apply* to the President.

The memorandum is solely concerned with the identification and, where relevant, discussion of the specific provisions. It is not intended to discuss whether and how particular provisions could potentially be enforced against the President, although it is important to note that the Department of Justice (DOJ) has previously opined that sitting Presidents are not subject to indictment for violations of federal criminal law.¹

Provisions Apparently Inapplicable to the President

Most provisions in Chapter 11 of the United States Code (“Bribery, Graft and Conflicts of Interest”)—which are considered federal conflict of interest laws in the federal criminal code—do not apply to the President, Vice President, or Members of Congress. This is because the definitions of “officer” and “employee” given in 18 U.S.C. § 202 provide that these terms will not include the President or Vice President for purposes of the following statutory provisions:

- 18 U.S.C. § 203 (compensation for representational activities before the government);
- 18 U.S.C. § 205 (acting as an agent or attorney for anyone before the government);
- 18 U.S.C. § 207 (“revolving door,” post-employment conflict of interest law);
- 18 U.S.C. § 208 (the principal financial conflict of interest law requiring “recusal” or disqualification of officials participating in governmental matters affecting their personal financial interests);
- 18 U.S.C. § 209 (receipt of outside compensation as salary or supplementation of salary for one’s official, governmental duties).

It may be noted that even before the President and Vice President were expressly excluded from the definitions of “officer” and “employee” in 1989, the DOJ was of the opinion that 18 U.S.C. § 208, the

¹ A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (2000).

required recusal or disqualification statute, could not be applied to the President or the Vice President because the statute could interfere with the conduct of their constitutional duties.²

Portions of the Ethics in Government Act of 1978, as amended,³ provide statutory rules, guidelines, and limitations on outside employment, outside earned income, and compensation and affiliation with private, outside business or professional entities for high-ranking noncareer officers and employees.⁴ Although the statute itself is silent as to the application of these provisions to the President and Vice President, it directs the administration of the statutory provisions and limitations to the Office of Government Ethics (OGE) for the entire executive branch.⁵ The regulations promulgated by OGE on these matters expressly exclude the application of these portions of the Ethics in Governments Act (although not other provisions discussed below) to the President and Vice President.⁶

In addition to the criminal conflict of interest laws, and other statutory “ethics” provisions, the OGE has promulgated detailed and extensive regulations on official conduct and conflicts of interest for officers and employees of the executive branch.⁷ These “Standards of Ethical Conduct” regulations address a wide range of issues including the receipt of gifts, conflicting financial interests, impartiality in performing official duties, seeking private employment, misuse of one’s official position, and outside employment and other outside activities. The regulations specifically provide, however, that—other than for the sections on gifts from outside sources and gifts from other federal employees—the definition of employee “does not include the President or Vice President.”⁸

Provisions Potentially Applicable to the President

Given the express exclusions, and given the differences of opinion as to what constitutes an “ethics” law or regulation, the following federal provisions might technically apply to the President:

- U.S. CONST., art. I, § 9, cl. 8 (foreign gifts and emoluments) (“ . . . no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”)
- 5 U.S.C. app. §§ 101-111 (Ethics in Government Act of 1978) (financial disclosure requirements of federal personnel). *See especially* 5 U.S.C. app. § 101(a) & (f).
- 5 U.S.C. § 3110 (Employment of relatives; restrictions).
- 5 U.S.C. § 7342 (Receipt and disposition of foreign gifts and decorations). *See especially* 5 U.S.C. § 7342(a)(1)(E).
- 5 U.S.C. § 7353 (Gifts to Federal employees). *But see* 5 C.F.R. § 2635.204(j) (permitting the President and Vice President to accept certain gifts because of “considerations

² See Letter from Laurence H. Silberman, Acting Attorney General, U.S. DOJ, to the Chairman, Senate Committee on Rules and Administration (Sept. 20, 1974) (concerning the nomination of Nelson A. Rockefeller to fill the vacancy as Vice President).

³ Pub. L. No. 95-521, 68 Stat. 730 (1978), as added by the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (1989).

⁴ See 5 U.S.C. app. §§ 501-505.

⁵ *Id.* § 503(2).

⁶ 5 C.F.R. § 2636.102(c).

⁷ *Id.* §§ 2635.101 - 2635.902.

⁸ *Id.* § 2635.102(h). Although the definitions section does not exclude the President from the regulations regarding gifts from outside sources, the section on such gifts itself generally excludes the President and Vice President from the restrictions, limitations, and requirements on accepting (but not necessarily on soliciting) gifts from outside domestic sources because of considerations of “protocol and etiquette” relating to the conduct of their duties. *See id.* § 2635.204(j).

relating to the conduct of their offices,” including those of protocol and etiquette). Under OGE regulations, the President is prohibited only from soliciting a gift from a prohibited source, or receiving or soliciting a gift in violation of the illegal gratuities provision (i.e., “for or because of” an official act).

- 18 U.S.C. § 201 (Bribery of public officials and witnesses (and the lesser included offense of “illegal gratuities” at 18 U.S.C. § 201(c)(1))).
 - 18 U.S.C. § 211 (Acceptance or solicitation to obtain appointive public office).
 - 18 U.S.C. § 219 (Officers and employees acting as agents of foreign principals).
 - 18 U.S.C. § 1905 (Disclosure of confidential information generally) (prohibiting all officers or employees of the United States from disclosing or divulging “proprietary” information coming to the official in the course of official duties relating to trade secrets, processes, or operations, or the identity, confidential statistical data, amount, or source of any income, profits, losses, or expenditures of any person, firm, partnership, or corporation).
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