

MEMORANDUM

From: Harrison Wellford
To: Lisa Brown
Re: Transition Teams – Restrictions on Employment
Date: September 16, 2008

Lisa –

Below please find my response to the queries you have posed on employment and pay of agency review team members. Do call if you have any further questions.

– Harrison.

QUESTIONS (AND ANSWERS)

1. Can individuals be on agency review teams post-election without being on the government payroll?

Yes.

2. Are there any restrictions beyond the transition team's ethics code on whom they can be working for?

Restrictions on employment of transition team members include not only the team's ethics code, but also: (a) the Memorandum of Understanding between the President and President-elect, which will likely include its own conflict-of-interest provision; and (b) the requirement that federal employees work only with the permission of their agency heads. Note that political concerns may also discourage use of some legislative staff and employees of government contractors or lobbyists.

3. Can they be paid by privately raised transition funds, or employed and volunteering their time?

Transition team members can be paid by privately-raised transition funds, or employed and volunteering their time. Notably, however, the transition team will have to disclose the sources of funding supporting the activities of transition team members.

BACKGROUND / ANALYSIS

Presidential Transition Act of 1963 (as amended)

The Presidential Transition Act of 1963 (as amended), section 5(b) [*see* 3 U.S.C. § 102 note] explicitly contemplates the use of public, private, and volunteer transition team assistance. It reads:

- (1) The President-elect and Vice-President-elect . . . shall make available to the public—
 - (A) the names and most recent employment of all transition personnel (full-time or part-time, public or private, or volunteer) who are members

of the President-elect or Vice-President-elect's Federal department or agency transition teams; and

(B) information regarding the sources of funding which support the transition activities of each transition team member.

(2) Disclosures under paragraph (1) shall be made public before the initial transition team contact with a Federal department or agency and shall be updated as necessary.

The Act also notes that federal employees may be detailed to transition teams, but only on a reimbursable basis, with the consent of the lending agency head. *See* 3 U.S.C. § 102 note [Presidential Transition Act of 1963 (as amended), section 3(a)(2)]. Note that career employees may be a useful resource for transition teams. Secretarial and clerical career employees in particular know the procedures, organization, and personalities of their agencies, and might be valuable workers for transition teams.

Memorandum of Understanding

The Memorandum of Understanding between the President and President-elect will likely impose a specific conflict of interest standard on the incoming team. The MOU between George H.W. Bush and Bill Clinton's respective teams in 1992 stated:

The Chairman of the President-elect's Transition Team will furnish in writing to the Director of the President's Transition Team the name of each individual authorized by the President-elect's Transition to work with particular Departments and agencies. The Chairman of the President-elect's Transition Team will also indicate in writing that each individual on the list has met the applicable public disclosure requirements of the Presidential Transition Act, as amended, has agreed to abide by the Transition's standards of conduct, *and that the Transition certifies that the individual has no conflict of interest that precludes the individual from working on the matters the Transition has authorized the individual to work on with that Department or agency. . .*

(emphasis added).

The 1992 MOU also noted concerns about improper use of nonpublic information. The President-elect's transition team was required to designate an official or officials to make "certifications regarding ethics matters." (Para. 7) The designated official was required to certify that the team member receiving information "has no financial interest or imputed financial interest that will be directly and predictably affected by a particular matter to which the information is pertinent." (Para. 8)

Note that the Memorandum of Understanding offered by the outgoing Bush administration in 2008 may well differ from that offered by the outgoing Bush administration in 1992. Given the likely relevance of the 2000 MOU as a model for the current administration, I would suggest you speak with John Podesta to see if he has a copy at hand.

Other Notes

Legislative Branch Employment. In past transitions concerns have been raised that congressional staffers as members of transition teams used the opportunity to go through files for their own (or their members') political interest, rather than in service to the president-elect. Care should be taken, and separation of powers issues should be carefully considered, in allocating members of congressional staffs to transition teams.

Corporations / Contractors. Concerns have been raised in the past that volunteers from corporations – especially defense contractors – have been able to gain unfair advantage for their businesses by their participation on transition teams. This concern should be dealt with by the conflict-of-interest test noted above. Nevertheless, team management will need to be vigilant, and members of the transition teams ought to be “squeaky clean” on this score.

As further background, I am attaching here: (a) the 1992 MOU; (b) a copy of 3 U.S.C. § 102; (c) the 1992 Transition Code of Ethical Conduct; (d) Administrative Conference of the United States Recommendation 88-1, *Presidential Transition Workers' Code of Ethical Conduct* (June 9, 1988); and (e) the Administrative Conference Report for Recommendation 88-1, by Philip Harter (published May 1988).

The last of these is especially helpful in fleshing out the analysis of transition team workers' legal status. To my understanding the underlying law has not changed since 1988 in such a way as to affect the Report's basic analysis.

