



Ready to Serve Webinar Series

Tips for Aspiring Political Appointees: Financial Disclosure, Taxes and Conflicts of Interest

Session Three
October 21, 2020



PARTNERSHIP FOR PUBLIC SERVICE

CENTER *for* PRESIDENTIAL TRANSITION

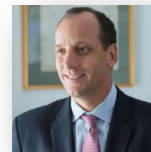
Link: [Ready-To-Serve.org](https://www.ready-to-serve.org)

Today's Agenda

Welcome and introductions

David Marchick

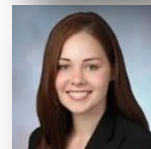
Director, Center for Presidential Transition



Financial disclosure and ethics process overview

Dianna Mullis

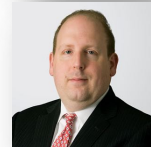
*Political Law Attorney
Former Associate, Steptoe & Johnson LLP*



Disclosure and Form 278e

Charles Borden

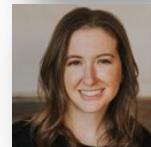
Partner, Holland & Knight LLP



Conflicts of Interest

Heather Samuelson

*Former Assistant White House Counsel
Former State Dept. White House Liaison*



Special Issues including Taxes

Robert Rizzi

Partner, Steptoe & Johnson LLP



Ready to Serve Webinar Series

✓ **Session 1: Wednesday, September 30**
An Overview of Vetting Forms: What Aspiring Political Appointees Should Know

✓ **Session 2: Wednesday, October 7**
Tips for Aspiring Political Appointees: Security Clearances and Background Investigations

Session 3: Wednesday, October 21
Tips for Aspiring Political Appointees: Financial Disclosure, Taxes and Conflicts of Interest

Conflicts of Interest and Financial Disclosure

Conflicts of Interest

- An executive branch employee is prohibited from participating **personally and substantially** in a **particular matter** if it would have a **direct and predictable** effect on the employee's financial interest

Financial Disclosure

- Financial disclosure helps inform conflicts analysis
- Trust-in-government rationale

Two separate, but related, regimes



Steps in Full Vetting of PAS Appointees Up to White House Announcement

PTT/Government Actions

Nominee Actions

1. PTT/PPO Contact

2. Decision to Proceed

3. Distribute SF-86, 278e, Releases
and PDS/Senate Q's

4. Complete Form SF-86/86 Supp

5. Field Investigation

Focus of Today's Session: Disclosure & Conflicts Timeline

**6. Complete Form 278e /
Committee Questionnaire**

7. Formal Interview

8. Conflicts Review

9. Draft Ethics Agreement

10. Negotiate Ethics Agreement

11. Announcement

Players in Disclosure System



Agency/Department Designated Agency Ethics Official (DAEO)



White House Counsel Office / PPO



Private Advisers (lawyers, accountants, bankers)



Office of Government Ethics (OGE)

Types of Disclosure of Financial Interests

- **Financial Disclosure Regimes for executive branch employees**
 - Public Financial Disclosure Regime
 - OGE Form 278e
 - Confidential Financial Disclosure Regime
 - OGE Form 450
- **Periodic transaction reporting on Form 278-T**
- **PAS nominees also disclose detailed financial information on Senate Committee Questionnaires (may or may not be confidential)**
- **Different financial disclosure forms for legislative branch and judicial branch employees, e.g., AO-10 for Judicial Branch**

Integrity Filing System



File electronically at integrity.gov



Transition/administration will provide you with login credentials



You can grant access to private advisors to help input and review



Financial Disclosure

- **Financial disclosure regime principally focuses on:**
 - Assets
 - Sources of income
 - Professional relationships
- **Financial disclosure obligations vary depending on position**
 - Senior positions file OGE Form 278e (public financial disclosure)
 - Other positions file OGE Form 450 (confidential financial disclosure)
- **Life cycle of financial disclosure**
 - Three types of filings: New Entrant, Annual, and Termination
 - Slightly different requirements and time frames for each report
- **Disclosure obligations extend to spouse and dependent children**



Structure of OGE Form 278e

Key issue in responding is understanding which sections you need to fill out and the relevant reporting period

- 1 **Part 1:** Filer's Positions Held Outside of US Government
- 2 **Part 2:** Filer's Employment Assets & Income and Retirement Accounts
- 3 **Part 3:** Filer's Employment Agreement and Arrangements
- 4 **Part 4:** Filer's Sources of Compensation Exceeding \$5,000 in a Year
- 5 **Part 5:** Spouse's Employment Assets & Income and Retirement Accounts
- 6 **Part 6:** Other Assets and Income
- 7 **Part 7:** Transactions
- 8 **Part 8:** Liabilities
- 9 **Part 9:** Gifts and Travel

May need to disclose same asset at multiple points on form (Part 2 and Part 3)

New entrants do not fill out Part 7 (Transactions) and Part 9 (Gifts & Travel)

Structure of OGE Form 278e

1

Filer's Positions Held Outside of United States Government

- New entrants report any position they have held with a non-USG organization, including unpaid positions, during current year and two preceding calendar years
- E.g., board member of non-profit, trustee position on family trust
- Limited exceptions (honorary positions, positions with religious entity)

2

Filer's Employment Assets & Income and Retirement Accounts

- New entrants report assets and income related to their employment for current year and preceding calendar year
- Reportable assets are those that either are worth more than \$1000 at time of filing or generated more than \$200 during reporting period
- Reportable sources of income are those sources of earned income that generated more than \$200 during reporting period (e.g., salary, consulting fees, honoraria)
- Need to report exact amount of income earned during reporting period

3

Filer's Employment Agreement and Arrangements

- New entrants report any continuing employment-related arrangements they have with current or former employer at time of filing (e.g., 401k plan with former employer, health care, deferred compensation)

4

Filer's Sources of Compensation Exceeding \$5,000 in a Year

- New entrants report any non-USG source of compensation that paid more than \$5,000 for their services in the current year or in either of two preceding calendar years
- Need to disclose both employers and clients to whom you personal provided services
- Very limited exceptions (e.g., confidential criminal investigation)
- Issue typically for lawyers (including associates) because requires disclosure of specific clients, but increasingly for other client-based professions as well

5

Spouse's Employment Assets & Income and Retirement Accounts

- New entrants report same information for same reporting period as Part 2, except for spouse
- Limited exception – do not need report actual amount of income spouse earned, except for honoraria

6

Other Assets and Income

- New entrants report non-employment-related assets and income for themselves and their spouses and dependent children for current year and preceding calendar year
- Disclosure obligations are same as Part 2
- Aggregate interests of new entrant, spouse, and dependent children in determining whether reporting thresholds are satisfied

8

Liabilities

- New entrants report liabilities over \$10,000 that new entrant, spouse, or dependent child owed at any time during the current year and the preceding year
- Exemptions for certain car loans, debts to family members, alimony or child support obligations
- Most PAS appointees need to disclose residential mortgages, but PA appointees do not

Financial Disclosure: Reporting Challenges

- **Current financial disclosure rules based on assumption that filers will have simple portfolio (stocks, bonds, mutual funds)**
 - Creates challenges in disclosing complex financial holdings (e.g., private equity interests) and compensation arrangements
- **Disclosure of pooled investment vehicles historically were problem (needed disclose all underlying holdings), but changes in definition of Exempted Investment Fund (EIF) have made such disclosures easier**
 - An EIF is a mutual fund, common trust fund of a bank, pension or deferred compensation plan, or any other investment fund, which is:
 - Widely held
 - Publicly traded (or available) or widely diversified
 - The filer neither exercises control over nor has the ability to exercise control over the financial interests held by the fund

Other Financial Disclosure

- **Disclosure requirements for OGE Form 450 are largely the same as those for OGE Form 278e**
 - Most significant distinction is that there is no need to disclose asset values or amount of income/liabilities
 - Also do not need to report certain types of financial holdings (bank accounts, diversified mutual funds)

- **OGE Form 278-T requires monthly transactional disclosure**
 - Only applies while you are in government
 - Aimed at preventing insider trading, so certain types of transactions (real estate and mutual fund) are excluded
 - Problems regarding “unknown” trades

What is a Conflict?

18 U.S.C § 208: Prohibits an executive branch employee from participating **personally and substantially** in a **particular matter** if it would have a **direct and predictable** effect on the employee's financial interest.

- Preventative / Anticipatory Based on Forecasted Duties of the Position
- Review of Financial Assets & Outside Positions
- Employee, Spouse and Minor Children
- Ongoing Review / Annual Reports Once in Role


How are Potential Conflicts of Interest Handled?

- 1 Recuse
- 2 Divest (most common)
- 3 Waiver (rare)
- 4 Qualified Trust (very rarely practical)

Ethics Agreement & Public Disclosure



Nominee must sign an Ethics Agreement to recuse or divest conflicting assets and resign from outside positions



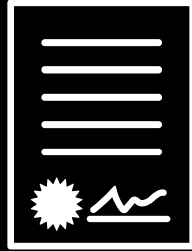
Financial Disclosure Form and Ethics Agreement is shared with Senate committee (if PAS) and made publicly available on OGE's website

Special Financial Issues

- ▶ **Government ethics rules on “financial interests” are primarily technical, “bright-line” rules**
 - Recent Examples: 278-Ts and Ethics Pledges
 - Additional focus on tax review (especially since 2008)
- ▶ **Full compliance is “shield” against ethics-related charges, especially in current “weaponized” ethics environment**

Common Special Questions

- ? *“Why can’t I just use a blind trust?”*
- ? *“I don’t control this fund, so why is it a conflict?”*
- ? *“My spouse and I have completely separate careers; why should his assets create conflicts for me?”*



Certificates of Divestiture

Added in 1989 to reduce disincentives created by divestiture requirements: “to minimize the burden” of complying

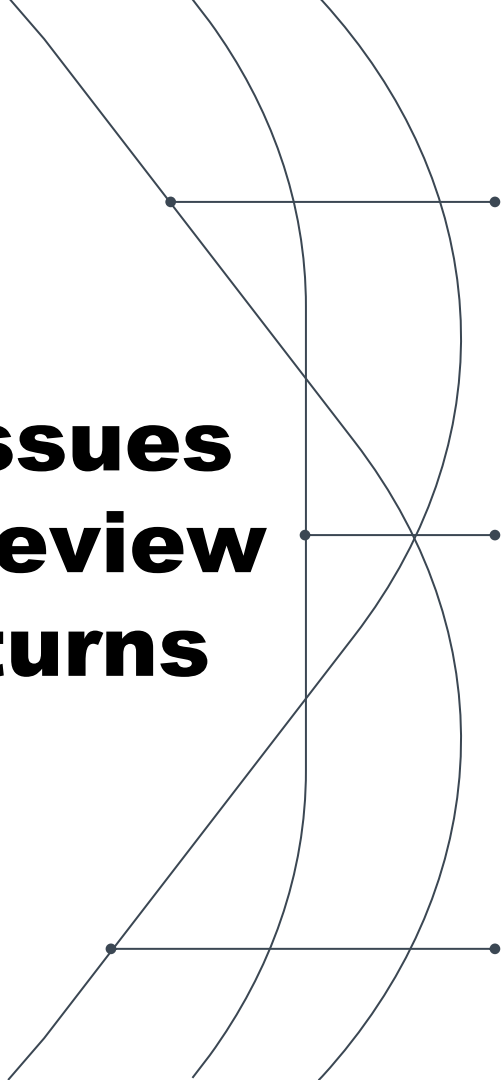
- Tax Code section 1043 permits **deferral**, roll-over into diversified mutual funds and Treasuries
 - Gain triggered when sell replacement property
-

Various limitations, including capital gain only (no stock options) and the same line of business, or “where an unfair or unintended benefit would result” (as defined by OGE)

- “If circumstances would otherwise create the appearance of a conflict with the conscientious performance of Government responsibilities”

Do not sell conflict assets before getting a CD!

Tax Issues and Review of Returns



Since 2008, greater focus on review of tax returns (see Geithner/Daschle)

- Years of returns varies with Senate Committee – from 3-5 years
- Years of tax issues (e.g., any “penalties” or audits) – up to 10 years
- WH may undertake separate review – often 5 years

“Hot button” tax issues

- From Session #1: nanny taxes, charitable deductions, tax shelters, others
- Generally don’t review business returns
- Tax issues identified in Form 86, 86 Supp, and Committee questionnaire, as well as PDS and other reviews

Tax return review “not an audit” – may be worse

What to Do to Prepare Now?

- **Data:** Pending access to Integrity, gather bank statements etc. and prepare spreadsheet using Excel template (see Center’s website)
 - Include all retirement accounts and trusts
 - Copies of tax returns and back up (charitable receipts, 1099s, etc.)
 - Note requirements to identify clients for whom you have provided >\$5000 of services
- **Exit strategies:** Prepare “exit plan” for all positions, and for illiquid assets (not real estate)
- **Ready to Serve:** Be ready to say that you are ready to complete disclosure and can address all conflicts that may be identified

Resources: Ready to Serve Financial Disclosure & Ethics

Financial Disclosure and Ethics

Appointees are expected to be guardians of the public trust, so as a nominee, be prepared for an extensive financial and ethics screening process. The specifics of the screening process will depend on your proposed position, with senior positions requiring more public disclosure. You will be asked to provide information about your personal finances and the finances of your spouse and dependent children so that ethics officials can identify and resolve any potential conflicts of interest.

Familiarize yourself with the financial and ethics forms and questions, and get your answers and materials ready. One of the biggest bottlenecks involves nominees who do not submit their forms in a timely fashion – so start early!

This section includes the key forms you will need to complete, the ethics review process and top tips.

Key Forms | Top Tips | The Ethics Review Process

FROM THE PODCAST
Leslie Kiernan on What Nominees Should Do Now
Listen to the full podcast episode

ON THE BLOG
Advice for prospective political appointees: Get an early start filing out security and financial disclosure forms
Demystifying the presidential appointee vetting process

WEBINAR
AN OVERVIEW OF VETTING FORMS: WHAT ASPIRING POLITICAL APPOINTEES SHOULD KNOW
Download the slide deck

Podcast by vetting expert Leslie Kiernan

Blog posts on completing forms & vetting process

Recording of today's webinar

Link to today's slide deck

Links to Key Forms

Top Tips from experts

Process overview

Additional Resources:

- Bush, Obama and Trump White House Questionnaires
- OGE Check List on documents required
- OGE Public Financial Disclosure Guide
- Bush, Obama and Trump White House Questionnaires
- Outline of financial and legal information you could be asked to provide