Ready to Serve Webinar Series
Tips for Aspiring Political Appointees: Financial Disclosure, Taxes and Conflicts of Interest

Session Three
October 21, 2020

Link: 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

Ready to Serve Link: Ready-To-Serve.org
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

Focus of Today's Session: Disclosure & Conflicts Timeline

PTT/Government Actions

1. PTT/PPO Contact
3. Distribute SF-86, 278e, Releases and PDS/Senate Q's
5. Field Investigation

Nominee Actions

2. Decision to Proceed
4. Complete Form SF-86/86 Supp
6. Complete Form 278e / Committee Questionnaire
8. Conflicts Review
10. Negotiate Ethics Agreement

9. Draft 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.

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

7. **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
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)
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?”
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!
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.

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

Link: presidentialtransition.org/readytoserve/financial-disclosure-and-ethics/#forms