



September 27, 2024
LA-24-11

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Shelley K. Finlayson
Acting Director

SUBJECT: Common Ethics Issues that May Arise for Current and Former Federal Employees
Serving on an Incoming Presidential Transition Team

The Presidential Transition Act of 1963 (PTA)¹ authorizes eligible candidates for President² to establish a Presidential Transition Team (PTT)³ to assist them in preparing for a transition between presidential administrations. While many PTT officials are private citizens, it is not uncommon for current and former executive branch employees to serve with a PTT. Because of the unique nature of a PTT, the U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to provide guidance on common ethics issues that may arise for current and former Federal employees serving on a PTT.

This Legal Advisory first explains that a PTT is not part of the executive branch and that private citizens serving with a PTT are not covered by the Federal ethics laws.⁴ The Legal Advisory then discusses how the ethics laws apply to current Federal employees who are serving with a PTT, either in an official capacity on detail from their home agency or as a personal outside activity. The Legal Advisory concludes by briefly discussing an exception that permits former senior and very senior employees to coordinate with the Government on behalf of a PTT.

¹ Presidential Transition Act of 1963, Pub. L. No. 88-277, 78 Stat. 153 (1964), as amended (codified at 3 U.S.C. § 102, note). OGE does not provide advice on the meaning or application of the Presidential Transition Act.

² The term “eligible candidate” is defined in section 3(h)(4) of the Presidential Transition Act.

³ The focus of this Legal Advisory is on service with the incoming Presidential Transition Team. This Legal Advisory does not address issues that might arise because of transition-related services provided by current or former employees to an outgoing President. See *Applicability of Post-Emp. Restrictions in 18 U.S.C. § 207 to a Former Gov’t Off. Representing a Former President or Vice President in Connection with the Presidential Recs. Act*, 25 Op. O.L.C. 120 (2001).

⁴ For purposes of this Legal Advisory, the term “Federal ethics laws” includes 18 U.S.C. §§ 202-209; the Ethics in Government Act, 5 U.S.C. ch. 131; the Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, 126 Stat. 291; Exec. Order No. 12,674, 54 Fed. Reg. 15,159 (Apr. 12, 1989), as modified by Exec. Order No. 12,731, 55 Fed. Reg. 42,547 (Oct. 17, 1990); and the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. pt. 2635.



I. Incoming Transition Team Members Who Are Private Citizens Are Not Covered by the Federal Ethics Laws

A PTT is not a Federal agency and transition team staff are not considered Federal employees for purposes of the Federal ethics laws merely by virtue of their service with a PTT.⁵ Likewise, members of a PTT are not required to file the public or confidential financial disclosure reports required of executive branch employees.⁶

Although PTT members are not covered by the Federal ethics laws,⁷ the PTA requires that each eligible candidate enter into a Memorandum of Understanding (MOU) with the current Administration that establishes how a PTT will access “employees, facilities, and documents of agencies.”⁸ A condition for entering into the MOU is that the eligible candidate must establish an ethics plan for transition team members.⁹ A PTT is solely responsible for developing, implementing, and enforcing the ethics plans established under the PTA, and OGE and agency ethics officials do not have statutory authority to oversee or enforce these ethics plans.¹⁰ Questions concerning PTT ethics plans, and their enforcement, should be sent to the transition representative for the respective PTT.

II. Incoming Transition Team Members Who Are Current Government Employees Must Comply with the Federal Ethics Laws

Current Government employees can generally serve with a PTT in two ways. First, the PTA provides that agencies may detail Government employees to a PTT in their official capacity.¹¹ Second, some Government employees may wish to serve with a PTT as a personal outside activity.¹² Regardless of whether they are serving with a PTT in an official or personal capacity, current Government employees remain subject to the Federal ethics laws.

⁵ See *Payment of Legal Fees in Connection with a Cabinet Member’s Confirmation Hearings*, 5 Op. O.L.C. 126, 127 (1981) (stating that the PTA authorizes appropriations for transitions but “does not create a Federal transition agency”). Section 3(a)(2) of the PTA provides that PTT staff are not considered Government employees except for purposes of certain statutes not relevant here. See Presidential Transition Act § 3(a)(2).

⁶ OGE DAEogram DO-00-048, at 2 (Dec. 28, 2000).

⁷ Transition staffers who are likely to enter the new presidential Administration should, however, note that the Federal bribery and illegal gratuities law applies to “any person who has been nominated or appointed to be a public official . . . or has been officially informed that such person will be so nominated or appointed.” 18 U.S.C. § 201(a)(2), (b), (c).

⁸ Presidential Transition Act § 4(g)(1). The PTA describes what each eligible candidate must include in their ethics plan. *Id.* § 4(g)(3)(B).

⁹ *Id.* § 4(g)(3)(A).

¹⁰ See *id.*

¹¹ *Id.* § 3(a)(2).

¹² This Legal Advisory does not consider the application of the Hatch Act, 5 U.S.C. §§ 7321-7326. The U.S. Office of Special Counsel (OSC) enforces and provides guidance on application of the Hatch Act, and agency ethics officials and employees who have questions related to whether the Hatch Act applies to their transition related activities should consult with OSC.

A. Considerations for Employees Serving with a PTT as an Official Duty Activity

The PTA provides that employees of any agency may be detailed to the staff of the transition team on a reimbursable basis, and during that time shall “continue to receive the compensation provided pursuant to law for [their] regular employment.”¹³ Because current employees detailed to a PTT remain Government employees, they continue to be covered by the Federal ethics laws.¹⁴ Common ethics issues that may arise while an employee is serving on detail to a PTT include:

Recusal Obligations: Employees on detail to a PTT are in an official duty status¹⁵ and therefore must avoid participating in any particular matter arising at a PTT in which they have a disqualifying financial interest under the primary criminal conflict of interest law, 18 U.S.C. § 208. For example, an employee on detail to a PTT should not enter into a contract on behalf of a PTT with Company X if they own stock in Company X, unless a regulatory exemption applies.¹⁶

Communications with Federal Officials: Employees on detail to a PTT are not prohibited from communicating with other Federal officials on behalf of a PTT. Such communications are made “in the proper discharge of [the detailee’s] official duties” and not covered by the general prohibition in 18 U.S.C. § 203 or § 205 from acting as an agent or attorney for any other person before the U.S. Government.¹⁷ As a result, an employee who is detailed to a PTT would not be prohibited from, for example, coordinating with an agency’s legislative affairs office as part of preparing an incoming Cabinet member for a nomination hearing.

Acceptance of Pay: The PTA provides that an employee on detail to a PTT is to receive their normal compensation from their home agency, and that a PTT is to reimburse the agency for the employee’s services.¹⁸ As a result, employees should not be provided additional salary or supplemental payments directly from a PTT. Compensation paid to an employee from any other source, including from nonprofit organizations and campaign committees, for the employee’s services while on detail to a PTT would be prohibited under 18 U.S.C. § 209. For example, an employee on detail to a PTT could not

¹³ Presidential Transition Act § 3(a)(2).

¹⁴ See *Applicability of 18 U.S.C. § 207(c) to President-Elect's Transition Team*, 12 Op. O.L.C. 264, 264-265 (1988) (“[T]he [F]ederal employee who is detailed by [their] agency to assist the transition team . . . is clearly a [F]ederal employee, covered by all applicable portions of 18 U.S.C. §§ 201-209, and . . . their status vis-a-vis the United States does not change while they are working with the transition team.”).

¹⁵ See Presidential Transition Act § 3(a)(2). Although an employee on detail is “responsible only to the apparent successful candidate for the performance of [their] duties,” *id.*, the provision does not affect the fact that the employee is performing official actions on behalf of the Government while on detail.

¹⁶ “[B]ecause the [PTA] provides explicit statutory authority for a Federal employee to serve the Government and [a PTT] simultaneously, section 208 would not be violated” simply because the employee takes action in their role as a detailee that might impact the finances of a PTT. See OGE Inf. Adv. Op. 06x10, at 11 (Oct. 19, 2006).

¹⁷ 18 U.S.C. §§ 203(a), 205(a); see also *Applicability of 18 U.S.C. § 207(c) to President-Elect's Transition Team*, 12 Op. O.L.C. 264, 265 (1988) (“[T]he prohibitions in section 203 and 205 do not apply to . . . detailed employees by virtue of the ‘official duties’ exception to those provisions.”); OGE DAEOgram DO-00-048 (Dec. 28, 2000).

¹⁸ See Presidential Transition Act § 3(a)(2).

accept payment directly from a candidate's principal campaign committee for official work provided to a PTT while on detail.

Travel Expenses and Gifts: Employees are prohibited from receiving or soliciting gifts that are given because of an employee's official position or that are from any person who is a prohibited source.¹⁹ Travel and travel-related expenses, as well as use of services, facilities, transportation, and other items provided or reimbursed by GSA out of appropriated funds are considered from the United States and are neither gifts nor illegal supplementation of an employee's salary.²⁰ Employees on detail to a PTT may accept in-kind travel or other services paid for by a PTT out of non-appropriated funds so long as those expenses are necessary and appropriate to the conduct of a detailee's work.²¹ For example, an employee on detail could accept transportation or travel expenses provided by a PTT to attend a meeting at an agency, regardless of whether a PTT paid for the transportation out of appropriated or non-appropriated funds.

Nonpublic Information: Employees on detail are prohibited from sharing nonpublic information with a PTT,²² except as is permitted by the PTA and the MOU entered into between the incumbent Administration and a PTT.²³

B. Considerations for Employees Serving with a PTT as a Personal Outside Activity

Employees may serve with a transition team as a personal activity if they do so in compliance with all applicable ethics laws. Because the application of the ethics laws is fact-specific, OGE strongly encourages all employees who are seeking to work with a PTT in a personal capacity to discuss their plans with an agency ethics official in advance of any such work.²⁴ Common issues that may arise for employees serving with a PTT as a personal outside activity include:

Prior Approval: Many agencies have outside activity prior approval requirements,²⁵ and employees of those agencies should seek and receive any required approval before agreeing to work with or for a PTT.

¹⁹ 5 U.S.C. § 7353(a); 5 C.F.R. § 2635.202(a)-(b).

²⁰ See 18 U.S.C. § 209(a) (prohibiting receipt of any salary or supplementation of salary as compensation for Federal service "from any source other than the Government of the United States" (emphasis added)); 5 C.F.R. § 2635.203(b)(7) (excluding from the definition of gift anything that is "paid for by the Government or secured by the Government under Government contract").

²¹ Cf. *Payment of Legal Fees in Connection with a Cabinet Member's Confirmation Hearing*, 5 Op. O.L.C. 126, 128 (1981) (finding that payment of legal expenses related to an incoming cabinet member's confirmation hearing was primarily for the benefit of the President-elect and did not violate 18 U.S.C. § 209(a)).

²² See 5 C.F.R. § 2635.703; Presidential Transition Act § 4(g).

²³ Presidential Transition Act § 4(g)(1).

²⁴ For example, certain ethics laws have differing application to employees who are "special Government employees," as defined in 18 U.S.C. § 202.

²⁵ Agencies may only impose prior approval requirements on employees through supplemental ethics regulation. See Exec. Order No. 12,674, § 301, 54 Fed. Reg. 15,159, 15,160 (Apr. 12, 1989), as modified by Exec. Order No. 12,731, 55 Fed. Reg. 42,547 (Oct. 17, 1990); 5 C.F.R. § 2635.105. Approved agency supplemental regulations are published in title 5 of the Code of Federal Regulations.

Recusal Obligations: Employees who are officers, directors, trustees, general partners, or employees of a PTT in a personal capacity are prohibited from working on any particular matter as a Government employee that could have a financial impact on a PTT pursuant to the primary criminal conflict of interest law, 18 U.S.C. § 208. Employees who volunteer with a PTT will have a covered relationship with a PTT for purposes of the impartiality regulation found at 5 C.F.R. § 2635.502,²⁶ and may not participate in an official capacity in any particular matter involving specific parties in which a PTT is or represents a party if a reasonable person would question their impartiality in the matter.²⁷

Communications with Federal Officials: Employees who are serving on a PTT as an outside activity generally cannot communicate with officers or employees of the executive branch on behalf of a PTT pursuant to 18 U.S.C. § 205(a)(2). Such employees would also be prohibited from receiving compensation for making such communications pursuant to 18 U.S.C. § 203(a). Special Government employees²⁸ serving with a PTT as an outside activity may, however, communicate with officers or employees of the executive branch on behalf of a PTT, and receive compensation for such communications, subject to the limitations set forth in 18 U.S.C. §§ 203(c) and 205(c).²⁹

Acceptance of Pay: Most employees who are serving with a PTT as an outside activity can receive compensation from a PTT for their services, so long as pay is clearly for their work with a PTT and not for Government services, consistent with the restriction on supplemental salary at 18 U.S.C. § 209. Political appointees who are covered by the outside earned income ban set out in Executive Order 12674 or the outside earned income limitations set forth in the Ethics in Government Act at 5 U.S.C. § 13143 and 5 C.F.R. part 2636 may not accept compensation in violation of those limitations.

Gifts and Travel Expenses: Employees who are serving with a PTT as an outside activity may accept travel expenses and other gifts from a PTT “when it is clear that such benefits are based on the[ir] outside business or employment activities [with a PTT] and [the gifts] have not been offered or enhanced because of the employee’s official status.”³⁰ Employees may also accept items from a PTT that do not meet the definition of a “gift” for purposes of the Federal ethics rules³¹ or that meet another exception to the general rule against acceptance of gifts.³²

²⁶ 5 C.F.R. § 2635.502(b)(1)(v).

²⁷ *Id.* § 2635.502(a).

²⁸ A special Government employee is an “employee of the executive or legislative branch of the United States Government . . . who is retained, designated, appointed, or employed to perform, with or without compensation . . . temporary duties either on a full-time or intermittent basis” for 130 days or less in any period of 365 days. 18 U.S.C. § 202(a).

²⁹ Pursuant to 18 U.S.C. §§ 203(c) and 205(c), a special Government employee is prohibited from representing an outside party back before the Government on any particular matter involving specific parties they have worked on personally and substantially in an official capacity. In addition, a special Government employee cannot represent an outside party before their agency on any particular matter involving specific parties pending before the agency, if the special Government employee has actually served in the agency for more than 60 days in the preceding year.

³⁰ 5 C.F.R. § 2635.204(e)(2).

³¹ *See id.* § 2635.203(b).

³² *See id.* § 2635.204.

Use of Nonpublic Information: Employees serving with a PTT as an outside activity may not use, or provide other individuals, with nonpublic information gained through their Government service.³³

III. Incoming Transition Team Members Who Are Former Senior and Very Senior Government Employees May Rely on an Exception to Represent a PTT

The Federal post-employment laws found at 18 U.S.C. § 207 are not normally implicated by the work of a PTT. However, given the breadth of the post-employment prohibitions that apply to former senior and former very senior employees,³⁴ Congress has provided a statutory exception permitting any “communication or appearance [that] is made solely on behalf of a candidate in [their] capacity as a candidate . . . or a person or entity who represents, aids, or advises only [such a candidate]” notwithstanding the prohibitions of 18 U.S.C. § 207(c) and (d).³⁵ Because an apparent successful candidate³⁶ for President remains a candidate until assuming office, OLC has advised that for purposes of 18 U.S.C. § 207, former senior and very senior employees are permitted to communicate with the Government on behalf of a PTT until the President takes office.³⁷

IV. Conclusion

The smooth transition of power from one presidential administration to another is vital to ensuring the continuity of government. While current and former employees who serve with a PTT can play an important role in facilitating this transition, “the unique circumstances of a presidential transition require balancing the ability of a new President to conduct transition activities as completely and effectively as possible, and in a manner [the President] desires, with the necessity of maintaining public confidence.”³⁸ To that end, agency ethics officials must be cognizant of how the Federal ethics rules may impact current and former employees’ service with a PTT. Agency ethics officials that have additional questions about this Legal Advisory may contact their OGE Desk Officer.

³³ *Id.* § 2635.703.

³⁴ A former senior employee is a person who has terminated service in a position listed in 18 U.S.C. § 207(c)(2)(A). *See also* 5 C.F.R. § 2641.104 (defining “Former senior employee”). A former very senior employee is a person who has terminated service in a position listed in 18 U.S.C. § 207(d)(1)(A)-(C). *See also id.* § 2641.104 (defining “Former very senior employee”).

³⁵ 18 U.S.C. § 207(j)(7); *see also* 5 C.F.R. § 2641.301(g); OGE Inf. Adv. Op. 08x4 (Mar. 26, 2008).

³⁶ The term “apparent successful candidate” is defined in section 3(c)(1) of the Presidential Transition Act.

³⁷ *Definition of “Candidate” Under 18 U.S.C. §207(j)(7)*, 24 Op. O.L.C. 288 (2000). Given the statutory exception to 18 U.S.C. § 207(c) and (d), appointees who are subject to the ethics pledge set forth in section 1 of Executive Order 13989 are also not prohibited by paragraphs 4 and 5—which lengthen the restrictions set out in 18 U.S.C. § 207(c) and (d)—from communicating on behalf of a PTT.

³⁸ H.R. REP. NO. 100-532, at 6-7 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1372, 1376.