

What Biden's Ethics Pledge Means For Gov't Revolving Door

By **Frederick Dombo, Michael Stroud and William Powers** (February 26, 2021)

On Jan. 20, President Joe Biden released the ethics pledge that will be required of all his appointees. The Executive Order on Commitments by Executive Branch Personnel was one of the first 17 executive orders issued on Inauguration Day.[1]

Earlier that same day, former President Donald Trump released officials of his administration from their obligations under the Trump White House ethics pledge by rescinding it.[2] And while the Trump ethics pledge is rescinded, it is important to note former officials of that administration are still restricted in their ability to represent clients before the U.S. government.

As with the Trump ethics pledge and its predecessor under former President Barack Obama,[3] the Biden ethics pledge is a contractual obligation of his appointees that overlays the criminal and civil penalties provided in federal ethics regulations.

Under Title 18 of the U.S. Code, Section 207, all former executive branch employees are permanently banned from "switching sides" on particular matters involving specific parties, where they participated personally and substantially in government. They are also banned for two years from matters that were under their official responsibility.

As an initial matter, there is a one-year "no contact" or "cooling off" period for senior-level employees in the executive branch.

Violation of these prohibitions is a federal crime punishable by imprisonment for not more than one year. Willful violation is subject to imprisonment for up to five years. A violation may also result in criminal fines and civil penalties, under Title 18 of the U.S. Code, Section 216.

As mentioned above, ethics pledges are contractual obligations that overlay the criminal and civil penalties. The chart below outlines differences among the Biden, Trump and Obama ethics pledges.



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| Rule ¹ | Biden | Trump | Obama |
|--|-------|---|---|
| <p><u>1. Lobbyist Gift Ban</u></p> <p>Subject to availability of certain exceptions to gift ban, including those based on personal relationships, general discounts, gifts because of a spouse's business activities or customarily provided in <i>bona fide</i> discussions with a prospective employer, and other exceptions specifically authorized.</p> | ✓ | ✓ | ✓ |
| <p><u>2. Reverse Revolving Door Ban - Incoming</u></p> <p>2-year ban on involvement with particular mater with specific party related to official's former employers or clients</p> | ✓ | ✓ | ✓ |
| <p><u>3. Reverse Revolving Door Ban – Incoming Lobbyists</u></p> <p>Follows above restriction, plus 2-year look back that would preclude former lobbyist/FARA registrant from participating in (a) particular matter on which they lobbied or engaged in registrable FARA activity, (b) specific issue area in which that particular matter falls, or (c) seeking or accepting employment from agency they previously lobbied or engaged in registrable FARA activity.</p> | ✓ | Same, but only followed (a). | Same, but no reference to “registrable activity under FARA.” |
| <p><u>4. Revolving Door Ban – Leaving Government</u></p> <p>Extends one year post-employment restriction of 18 U.S.C. 207(c) to two years.</p> <p>Ban on all ‘lobbying activity’</p> | | No, one year only. ✓ | ✓ Limited to becoming a registered lobbyist. |
| <p><u>5. Revolving Door Ban – Senior and Very Senior Appointees Leaving Government</u></p> <p>Agree not to “materially assist” others in making communications or appearances from which official would be prohibited – <i>i.e.</i>, ban on “shadow lobbying.”</p> | ✓ | Not included. | Not included. |
| <p><u>6. Revolving Door Ban – Appointees Leaving Government to Lobby</u></p> <p>Agree not to lobby or, engage in FARA activity with, a covered executive branch official for longer of remainder of Administration or 2 years.</p> | ✓ | Same, except FARA registrable activity not covered and time frame of restriction limited to duration of Administration. | Same, except FARA registrable activity not covered and time frame of restriction limited to duration of Administration. |
| <p><u>7. Golden Parachute Ban</u></p> <p>Agree not accept any salary or other cash (or non-cash) payment from former employer, the availability is limited to individuals accepting a position in the U.S. Government.</p> | ✓ | Not included. | Not included. |

The Biden pledge, like Trump's, went further than the Obama ethics pledge in that its revolving door post-employment restrictions apply to all lobbying activity and not just to becoming a registered lobbyist. Like his predecessors, including former President Bill Clinton, Biden included a ban on becoming a registered foreign agent. And like Obama and Trump, Biden includes a flat ban on all gifts from lobbyists with select exceptions.

Biden's ethics pledge is noteworthy for going beyond those of his predecessors in a few respects.

First, Biden addresses so-called shadow lobbying, a practice long decried by reformers. Biden officials commit that for one year following the end of their appointment they, "will not materially assist others in making communications or appearances that I am prohibited from making myself."

This provision is an attempt to restrict departing Biden administration officials from becoming the type of strategic adviser or special policy adviser who profits from advising on how to influence the Biden administration without registering to lobby.

In the past, high-level officials in consulting roles purported to act merely as a resource to clients regarding the thought processes and personalities of White House officials, as well as on the suitability of certain strategies to achieve policy goals.

This prohibition still turns on the definition of "lobbying activity" in the federal Lobbying Disclosure Act. Enforcement will still depend upon whether the particular consulting activities of former Biden administration officials become known.

Another notable focus of the Biden ethics pledge is a ban on an incoming official from receiving a so-called golden parachute. The pledge requires officials forswear any salary, bonus or noncash payment (i.e., stock options) from a former employer. The key to this provision is that the payment not be something that is available only to those individuals joining the U.S. government.

It is foreseeable that further clarification will be required for situations where higher-level executives departing for the Biden administration are to receive a bonus that is customary for executives at their level, but not clearly proscribed in the policies and procedures of their private sector employer.

The Biden ethics pledge's post-employment restrictions, however, are not as stringent as those issued in the Trump pledge, which included a five-year post-employment restriction on lobbying, and a lifetime ban on activity under the Foreign Agents Registration Act.

Although the Trump post-employment restrictions were more strongly worded when issued in 2017, that pledge has been rescinded, so the restrictions would no longer apply. In addition, the ethics pledges issued via executive order are contractual obligations between the appointee and the administration.

And while a ban on FARA representations has been included in ethics pledges at least as far back as the Clinton administration, in practice, they are not enforceable beyond the life of the particular administration.

Although much of the Biden ethics pledge may feel familiar, the distinctions, which are outlined in the table above, are worth reviewing since these differences — or enhancements — may be the areas more closely scrutinized by the press and the White House itself.

The Biden administration prioritized its ethics pledge on day one to demonstrate the importance it places on the conduct within the White House and at the highest levels of the executive branch.

Similarly, the U.S. House of Representatives is considering the For the People Act of 2021, and reserved bill number H.R. 1 for it to indicate its importance. The bill would add independent authority for the U.S. Office of Government Ethics to enforce executive ethics obligations.

If H.R. 1 becomes law, it will represent a significant update to federal ethics law, not to mention changes to campaign finance, lobbying laws and voting rights laws.

In the arena of executive branch ethics, H.R. 1 would largely codify the substantive provisions of the Biden ethics pledge. The bill would also enhance the independent enforcement authority of the OGE, including by giving it independent subpoena authority.

As we have seen in our ethics compliance practice, ethical pledges and codes of conduct remain only aspirational unless they are accompanied by real consequences and a cop on the beat to enforce them.

That cop on the beat could be a reality, as H.R. 1 would bolster the enforcement resources for the executive branch.

Specifically, the bill authorizes increased enforcement funding for the U.S. Department of Justice's FARA unit.

The bill would also require, by law, that all presidential appointees recuse themselves from any matter involving the president, the president's spouse or any entity in which either has substantial interest. This of course begs the question about the president's family members, but this is a significant step toward an absolute bar on appointees being involved in politically related matters.

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[1] <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-ethics-commitments-by-executive-branch-personnel/>.

[2] <https://www.federalregister.gov/documents/2017/02/03/2017-02450/ethics-commitments-by-executive-branch-appointees>; <https://apnews.com/article/donald-trump-lobbying-e911209abab83899eadd18b5776f6095>.

[3] <https://obamawhitehouse.archives.gov/the-press-office/ethics-commitments-executive-branch-personnel>.