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The Honorable Elijah E. Cummings  
Ranking Member  
Committee on Oversight and Government Reform  
House of Representatives

The Honorable Thomas R. Carper  
United States Senate

The Honorable Elizabeth Warren  
United States Senate

## **Presidential Transition: Information on Ethics, Funding, and Agency Services**

The change from one presidential administration to the next is a complex process requiring coordination among many parties, including the outgoing President, federal agencies, the President-elect, and a Transition Team. During a transition, the President-elect and his or her team decide upon more than 4,000 political appointments and prepare to manage the federal government, an entity with more than 4 million civilian employees and military personnel, and a budget of nearly \$4 trillion. The Presidential Transition Act of 1963 (PTA), as amended, seeks to promote the orderly transfer of executive power during presidential transitions.<sup>1</sup> The PTA has been amended several times as the timeline, roles of government, and expectations of presidential candidates in the transition process have evolved and expanded.

You asked us to review issues related to then President-elect Trump's transition. This report provides information on five areas related to the Trump-Pence Transition: (1) the legal and organizational framework; (2) applicable ethics provisions; (3) Office of Government Ethics' information and services related to ethics; (4) funds for the transition; and (5) the Department of State's (State) information and services related to communication with foreign leaders. We compared aspects of the 2016-2017 Trump-Pence Transition to the 2008-2009 Obama-Biden Transition where information was available for each area except the fourth. Expenditure data from the Obama-Biden Transition was not readily available. Information on the 2000-2001 Bush-Cheney Transition was largely unavailable across all areas.

To address questions on the legal and organizational framework, we reviewed the PTA and related laws and executive orders to understand the organizational framework of a transition including the role of the General Services Administration (GSA) and other government entities. We also met with the Federal Transition Coordinator, who is a senior GSA official, and an official from the Office of Management and Budget who served on one of the transition councils.

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<sup>1</sup>Pub. L. No. 88-277, § 2, 78 Stat. 153 (Mar. 7, 1964). The Presidential Transition Act of 1963, as amended, hereinafter referred to as PTA is set forth in the notes to 3 U.S.C. § 102.

To address questions on applicable ethics provisions, we reviewed ethics provisions, drawn primarily from an Office of Government Ethics (OGE) compilation of federal ethics laws, and described their applicability to the President and Vice President. We reviewed the PTA to determine whether or not members of the Trump-Pence Transition Team were regarded as federal employees for the purpose of applying the ethics provisions. In addition, we reviewed ethical codes of conduct established for the Trump-Pence and Obama-Biden transitions. We interviewed officials responsible for guiding and overseeing ethics, including officials at OGE.

To address questions on OGE's information and services related to ethics, we reviewed relevant OGE documents on information and services made available to, and used by, President-elect Trump, President-elect Obama, and their Transition Teams. We also interviewed officials at OGE regarding OGE's role in presidential transitions, including presidential nominations, and acquired OGE data for numbers of nominee financial disclosure reports received. To assess the reliability of OGE's data, we interviewed OGE officials knowledgeable about the data. Based on this information, we determined the data were sufficiently reliable for the purposes of our reporting objective.

To address questions on funds for the presidential transition, we reviewed the PTA, appropriations laws, GSA and Transition Team memorandums of understanding (MOU), and conducted walkthroughs of GSA processes to manage the federal transition funding. We reviewed transactions data for types and amounts of transition spending from November 9, 2016, through January 31, 2017. We reconciled the total amount of expenditures reported by GSA against the Department of the Treasury's data and verified the classification of 63 transactions that accounted for virtually all of the expenditures at that time. In addition, we interviewed GSA officials. Finally, we summarized information the Trump-Pence Transition Team provided GSA on private funds collected and spent on the transition.

To address questions on State's information and services related to communication with foreign leaders, we reviewed relevant State documents on information and services made available to, and used by, the President-elect, Vice President-elect, and Transition Team. We interviewed officials at State, the Department of Homeland Security (DHS), and the Department of Defense (DOD). During initial interviews with DOD and DHS officials, officials said that DOD and DHS did not have a role in providing information and services related to communications with foreign leaders. For further details on our scope and methodology, see enclosure I.

Because several leaders of the Trump-Pence Transition Team moved to the Executive Office of the President following the inauguration, we contacted the White House Counsel to solicit the perspective of the Trump-Pence Transition Team on information and services made available and provided to them during the transition and obtain additional information on the transition. They did not respond to requests for an interview. We contacted the Office of the Vice President because Vice President Pence also served as the Chairman of the Trump-Pence Transition Team. The Office of the Vice President did not respond to our request to discuss this work. We also contacted the Executive Director and Chief Financial Officer of the Trump-Pence Transition Team. The Transition Team declined our request for an interview and stated that several areas of our report—related to the legal structure for a presidential transition, funding for the Trump-Pence transition, and OGE's information and services—could be addressed by meeting with GSA and OGE officials. They declined to discuss the last area related to communications with foreign leaders due to pending investigations.

We conducted this performance audit from January 2017 to September 2017 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

## Legal and Organizational Framework

### What was the legal and organizational framework that guided the transfer of executive power during the Trump-Pence transition?

The PTA outlines the legal and organizational framework for a presidential transition and has been amended several times. The most recent amendment to the PTA—the Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015 (Transitions Improvements Act)—institutionalized and strengthened processes that were considered effective in past transitions.<sup>2</sup> The framework was used during the Trump-Pence transition and included several mechanisms to guide the presidential transition, such as designating a Federal Transition Coordinator, establishing the White House Transition Coordinating Council and the Agency Transition Directors Council, and authorizing federal funding to carry out transition activities. The PTA emphasizes the importance of early, effective communication and cooperation between an outgoing administration and eligible candidates, one of whom becomes the President-elect.<sup>3</sup> It also requires the outgoing President to take such actions necessary to plan and coordinate activities that facilitate an efficient transfer of power.

### What was the federal organizational framework that guided the Trump-Pence transition?

The Transitions Improvements Act codified GSA’s long-held role in transition planning by establishing the position and duties of a Federal Transition Coordinator. In addition, the legislation requires the President to establish two councils—the White House Transition Coordinating Council and the Agency Transition Directors Council. Prior to the recent presidential transition, the groups were authorized but not required.<sup>4</sup>

- **Federal Transition Coordinator:** Consistent with earlier transitions and in accordance with the law, the Federal Transition Coordinator for the recent transition was a senior career employee at GSA designated by the GSA Administrator. The official’s duties were to coordinate transition planning across agencies, ensure agencies comply with all statutory requirements on transition planning and reporting, serve as a liaison to eligible candidates, and participate in the White House Transition Coordinating Council and Agency Transition Directors Council.

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<sup>2</sup>Pub. L. No. 114-136, 130 Stat. 301 (Mar. 18, 2016).

<sup>3</sup>Eligible candidates include a candidate of a major party for President or Vice President and any other candidate the GSA Administrator determines to be among the principal contenders for the general election.

<sup>4</sup>These groups were authorized by the Pre-Election Presidential Transition Act of 2010. Pub. L. No. 111-283, § 3, 124 Stat. 3045, 3048-49 (Oct. 15, 2010). Prior to this amendment, executive orders issued by both Presidents Clinton and Bush established a Presidential Transition Coordinating Council composed of high-level executive branch officials. Exec. Order No. 13476, *Facilitation of a Presidential Transition*, 73 Fed. Reg. 60605 (Oct. 9, 2008) and Exec. Order No. 13176, *Facilitation of a Presidential Transition*, 65 Fed. Reg. 71233 (Nov. 27, 2000).

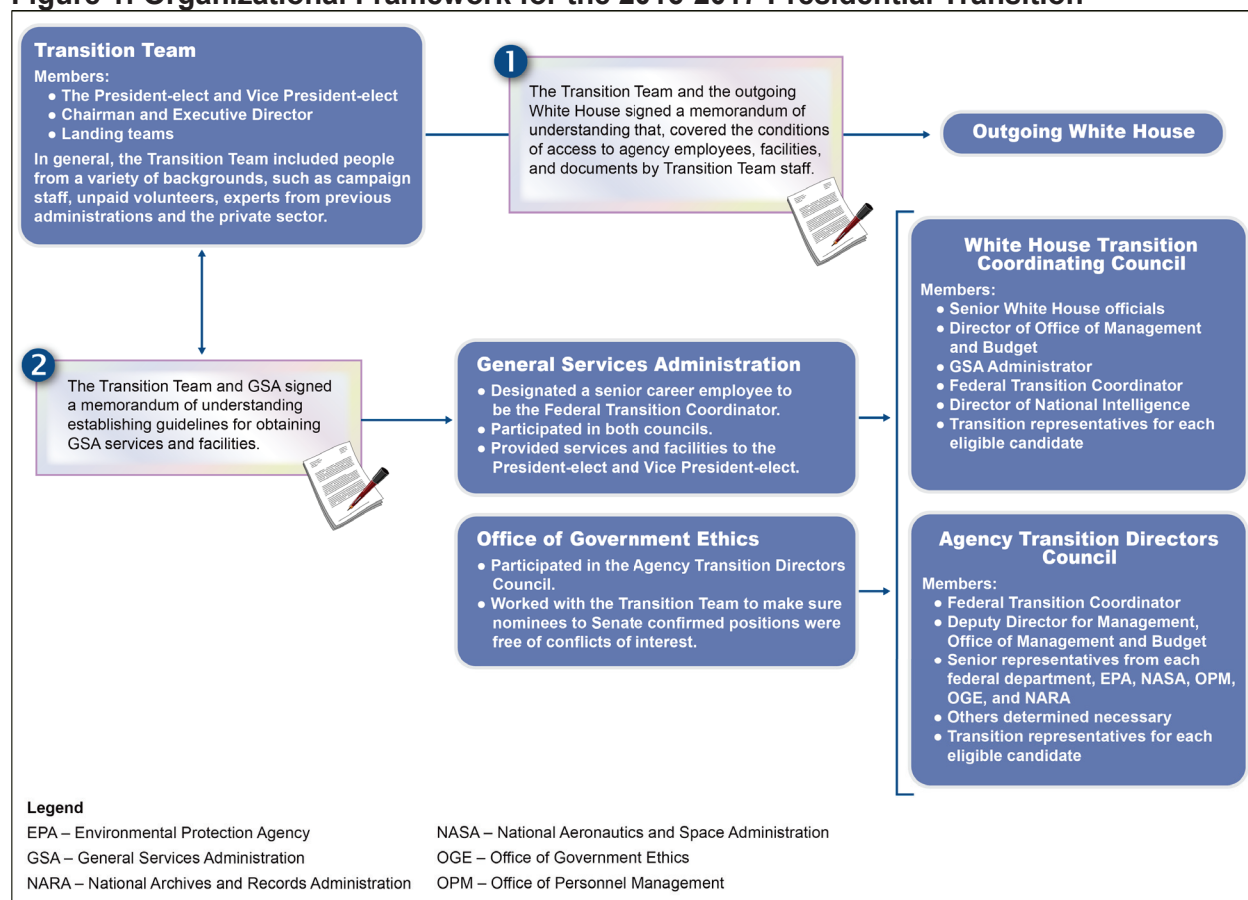
- **White House Transition Coordinating Council:** The council was responsible for (1) providing guidance to agencies and the Federal Transition Coordinator on preparations for transition, including succession planning and preparation of briefing materials; (2) facilitating communication and information sharing between transition representatives of eligible candidates and senior employees in agencies and the Executive Office of the President; and (3) preparing and hosting interagency emergency preparedness and response exercises. In accordance with the law, the White House Transition Coordinating Council was established approximately 6 months before the general election.
- **Agency Transition Directors Council:** This council was responsible for (1) ensuring that the federal government had an integrated strategy for addressing interagency challenges and responsibilities around the transition and turnover of noncareer appointees; (2) coordinating transition activities between the Executive Office of the President, agencies, and the Transition Teams of eligible candidates and, after the election, the President-elect and Vice President-elect; and (3) drawing on guidance provided by the White House Transition Coordinating Council and lessons learned from prior transitions to carry out its duties. The Agency Transition Directors Council met approximately monthly between June 2016 and January 2017, when President Trump was inaugurated.<sup>5</sup> The Federal Transition Coordinator and Deputy Director for Management at the Office of Management and Budget served as co-chairpersons of the council.

The Transitions Improvements Act amendments also required the outgoing administration to negotiate an MOU with eligible candidates by November 1, 2016, to the maximum extent practicable. The MOU was to be based on MOUs from previous transitions and, at a minimum, cover the conditions of access to agency employees, facilities, and documents by Transition Team staff. The Trump-Pence Transition Team signed an MOU with the outgoing administration on Election Day and, following the election, signed a new MOU to accommodate for leadership changes to its Transition Team. Although not required, a separate MOU was also signed between GSA and the Trump-Pence and Obama-Biden Transition Teams that governed the use of GSA services and facilities. Figure 1 depicts the organizational framework for the 2016–2017 presidential transition.

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<sup>5</sup>Other than during this period, the council is to meet at least annually.

**Figure 1: Organizational Framework for the 2016-2017 Presidential Transition**



Source: GAO analysis. | GAO-17-615R

### How was the Trump-Pence transition funded?

The PTA authorizes the provision of certain services, facilities, and the appropriation of federal funds needed to carry out the transition and assigns responsibilities to facilitate government-wide and agency-level planning and implementation.

The PTA authorizes funding to GSA to provide services and facilities to the President-elect, Vice President-elect, and, before Election Day, to eligible candidates to prepare for their assumption of official duties. Over time, amendments to the PTA extended the period that appropriated funds were available for the presidential transition. For the 2016–2017 presidential transition, appropriated funds were available from the day after the general election until 180 days after the inauguration. Between 1988 and 2016, appropriated funds were available until 30 days after the inauguration. And between enactment of the PTA and 1988, appropriated funds were available until the inauguration. The PTA authorizes funds for expenses related to both the outgoing and incoming administrations, and funds were appropriated for these purposes.

- **Outgoing administration:** Funds were appropriated to the White House Office of Administration for President Obama and Vice President Biden to wind up the affairs of their offices.



- **Incoming administration:** Funds were appropriated for GSA to provide the incoming administration—President-elect Trump and Vice President-elect Pence—certain facilities, funds, services, and reimbursements for expenses to prepare for future duties.
- **Appointee orientation:** The Presidential Transition Act of 2000 amended the PTA to authorize the appropriation of funds for appointee orientation activities that acquaint prospective presidential appointees of key positions of the new administration with governance issues, such as records management, human resources management, and performance-based management.<sup>6</sup> Funds appropriated for this purpose are not subject to the PTA's limitations on the period of availability, discussed above, although the associated appropriations acts may impose time limitations of their own. They are available regardless of whether there is a transition. According to GSA officials, as of July 31, 2017, no funds were obligated by the Trump-Pence Transition Team for appointee orientation activities.

To obtain federal services and appropriated funds, the PTA stipulates that the President-elect and Vice President-elect must adhere to certain transition-related contribution limits.<sup>7</sup> In addition, the President-elect and Vice President-elect are required to disclose in a report the receipt and expenditure of all financing—other than federal funds—used to prepare the President-elect and Vice President-elect for office. The report is due to the GSA Administrator within 30 days after the inauguration and identifies the date of contribution, source, amount, and how it was spent in total. The Trump-Pence Transition Team submitted its report on February 19, 2017, which showed that it had collected \$6.5 million in private funds from June 23, 2016, to February 14, 2017. For additional information, see our answer to the question, “How much in private funds did the Trump-Pence Transition Team report collecting and spending?”

#### How was the Trump-Pence Transition Team structured?

The composition or structure of the Transition Team is not covered by the PTA. According to OGE documents published before the Trump-Pence transition, in general, the Transition Team has included people from a variety of backgrounds, such as campaign staff, unpaid volunteers, experts from previous administrations and the private sector, and the President-elect and Vice President-elect. Most team members are not federal employees, although some may have worked in the executive branch previously. The Trump-Pence Transition Team was composed of the following team members with various responsibilities:<sup>8</sup>

- **President-elect and Vice President-elect:** The President-elect and Vice President-elect set the agenda of the Transition Team.
- **Chairman and Executive Director:** During the Trump-Pence transition, Vice President-elect Pence served as the Chairman and Rick Dearborn served as the Executive Director for most of the transition. The Chairman of the transition oversees the entire transition, while the Executive Director serves as the Chief Operating Officer and is responsible for mission accomplishment, day-to-day management, and tracking progress toward goals.

<sup>6</sup>Pub. L. No. 106-293, 114 Stat. 711 (Oct. 12, 2000).

<sup>7</sup>Contribution amounts are limited to \$5,000 from any person, organization, or other entity.

<sup>8</sup>Information on the transition team members' responsibilities is drawn from the Partnership for Public Service, Center for Presidential Transition, *Presidential Transition Guide* (Washington, D.C.: 2016).

- **Landing teams:** Similar to other transitions, the Trump-Pence Transition Team established landing teams in federal agencies. Landing team members gather information about their assigned agency between the election and the inauguration to inform the incoming administration and help them prioritize the issues where attention is most needed. The Trump-Pence Transition Team made public on its website the name, recent employment, and the funding sources of landing team members.<sup>9</sup> According to OMB staff that served on the Agency Transition Directors Council, White House offices, with support from the council, were responsible for checking that paperwork for landing team members was complete prior to their arrival at an agency. However, it was the responsibility of the Trump-Pence Transition Team to ensure their members were in compliance, in particular, with the required ethical code of conduct.

According to the Partnership for Public Service's Center for Presidential Transition, the purpose of the Transition Team is to guide the President-elect and the entire government through the transition process.

### **Applicable Ethics Provisions**

While the concept of ethics is broad, our review focused on provisions of law applicable to executive branch employees that address a range of activities and prohibit, among other things, the use of public office for private gain and other conflicts of interest.

What ethics provisions apply to the President-elect and Vice President-elect and members of the Transition Team, including the Trump-Pence transition?

The President-elect and Vice President-elect are not subject to the ethics provisions applicable to executive branch employees.<sup>10</sup> A private citizen who becomes President-elect or Vice President-elect remains a private citizen until sworn in on Inauguration Day.

Transition Team members are generally not federal government employees except for specified purposes unrelated to coverage under ethics-related provisions.<sup>11</sup> As a result, members of the Transition Team are not subject to the laws and rules governing ethics, although some individuals who assist the Transition Team may be covered. For example, Transition Teams may include federal employees detailed to work for the Transition Team and, as a result, continue to be covered under the executive branch ethics provisions during their detail. Additionally, after the inauguration, individuals may be appointed into temporary agency positions under special hiring authorities to assist the Transition Team, and those temporary

<sup>9</sup>The President-elect and Vice President-elect are required to make this information publically available pursuant to section 6(b) of the PTA. See <https://greatagain.gov/agency-landing-teams-54916f71f462>. We did not verify the accuracy or completeness of the data on the agency landing teams.

<sup>10</sup>Candidates for President and Vice President are required to file "candidate reports" under the Ethics in Government Act of 1978, as amended. 5 U.S.C. app. § 101(a) and (c). Disclosure reports of candidates are filed with the Federal Election Commission.

<sup>11</sup>The specified purposes for which Transition Team members are considered federal government employees relate to coverage under workers' compensation and federal retirement, health, and life insurance program benefits. See section 3(a)(2) of the PTA.

appointees are federal agency employees generally subject to some executive branch ethics provisions.<sup>12</sup> Transition Teams may employ former federal agency employees who, due to their former federal service, may be subject to postemployment restrictions, which could impact what they can do for the Transition Team.<sup>13</sup> Finally, Transition Teams may include members of Congress who continue to be covered under ethics rules applicable to House of Representatives or Senate members as well as ethics laws applicable to members of Congress.

Both the Trump-Pence and Obama-Biden Transition Teams asked their members to sign an ethical code of conduct prepared by the Transition Team as a condition of service. Both ethical codes of conduct prohibited Transition Team members from having any conflicts of interest that would preclude them from working on the matters assigned to them. Under these codes, members committed to disqualifying themselves from involvement in matters which may directly pose a financial conflict of interest or from matters in which they engaged in regulated lobbying activities. Establishing an ethical code of conduct was a requirement identified in the MOU between the Trump-Pence Transition Team and the White House and the Obama-Biden Transition Team and the White House.

Transition Team members also committed to refraining from accepting gifts under certain circumstances, keeping confidential any nonpublic information provided in the course of the transition, and refraining from using (or permitting use) of such information for private gain, among other things. The ethical code of conduct for the Obama-Biden transition identified the General Counsel to the Obama-Biden Transition Team and designated ethics officials as the appropriate officials to ensure compliance. The ethical code of conduct for the Trump-Pence Transition Team did not identify any officials or entities to provide oversight.

#### What ethics provisions apply to the President and Vice President?

Once inaugurated, the President and Vice President are subject to some, but not all, of the ethics provisions applicable to executive branch employees, some of which are highlighted below. For additional information on these and other ethics provisions that apply to the President and Vice President, see enclosure II.

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<sup>12</sup>After the inauguration, agencies may make a limited number of noncareer appointments necessary to meet the needs of the agency during the ongoing transition. Generally, these appointments may be made for a period of up to 120 days. 5 C.F.R. § 213.3302. Additionally, the Office of Personnel Management delegated temporary authority to agencies to use a limited number of noncareer Senior Executive Service appointment authorities to bring onboard some presidential nominees awaiting Senate confirmation. Agencies were authorized to exercise this authority only from January 20, 2017 until January 30, 2017, and appointments could not exceed 21 days. See the Office of Personnel Management, *Temporary Transition Schedule C Authority and Temporary Transition Senior Executive Service Appointing Authorities* (Jan. 9, 2017), found at <https://www.chcoc.gov/content/temporary-transition-schedule-c-authority-and-temporary-transition-senior-executive-service>. Upon appointment under either of these authorities, the appointee becomes a federal employee subject to executive branch ethics provisions. However, these appointees would be special government employees for purposes of ethics provisions. Special government employees are generally employed to perform temporary duties for not more than 130 days during a 1-year period. They are covered by most ethics rules, but the application of some of those rules is less restrictive than for other employees. For more information, see GAO, *Federal Workforce: Opportunities Exist to Improve Data on Selected Groups of Special Government Employees*, GAO-16-548 (Washington, D.C.: July 15, 2016).

<sup>13</sup>See e.g., OGE, DO-00-048 (Dec. 28, 2000) and 12 Op. Off. Legal Counsel 264 (Nov. 18, 1988).



- **Financial disclosure:** The President and Vice President are required to file public reports of their financial interests with OGE under the public financial disclosure requirements of the Ethics in Government Act of 1978, as amended.<sup>14</sup> A financial disclosure report is intended to provide insight into an individual's financial and other interests that may pose a potential conflict of interest. Generally, an annual public disclosure report includes
  - positions held by filer outside the government;
  - filer's assets and income relating to nonfederal employment (income and retirement accounts, partnership shares, assets related to filer's business);
  - filer's employment agreements and arrangements;
  - spouse's assets and income relating to nonfederal employment;
  - other assets and income;
  - transactions;
  - liabilities; and
  - gifts and travel reimbursements.

The President and Vice President are required to file their first report with OGE upon entering service in the second year of their first term in office.<sup>15</sup> OGE's role in ethics issues involving the President's and Vice President's public disclosure reports is limited to reviewing and certifying them for compliance with filing and reporting requirements.<sup>16</sup> According to OGE officials, OGE does not review for financial conflicts of interest in the same manner as it would for the reports from other filers for whom OGE has review responsibility, because neither the President nor Vice President are covered under most of the criminal conflict of interest statutes or standards of ethical conduct for employees of the executive branch.<sup>17</sup>

Accordingly, President Trump and Vice President Pence are required to file their first annual report by May 15, 2018, which would cover calendar year 2017. OGE is required to certify the reports for compliance with the reporting requirements within 60 days of receipt. Financial disclosure reports for the President and Vice President are made available on the OGE website.<sup>18</sup> Additionally, the President and Vice President are required to file periodic transaction reports no later than 45 days after the sale, purchase, or exchange of stocks, bonds, and certain other assets.<sup>19</sup> Traditionally, Presidents have voluntarily filed an annual financial disclosure report during their first

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<sup>14</sup>5 U.S.C. app. § 101-111.

<sup>15</sup>5 U.S.C. app. §§ 101(d) and 103(b); 5 C.F.R. §§ 2634.201 and 2634.602(b).

<sup>16</sup>Generally, certification of a report indicates that the certifying official (on the basis of the information contained in the report) has determined that the reporting individual is in compliance with applicable laws and regulations. 5 U.S.C. app. § 106(b).

<sup>17</sup>18 U.S.C. § 202(c); 5 C.F.R. § 2635.102(h).

<sup>18</sup>To access Presidential and Vice Presidential Financial Disclosure Reports, see: <https://extapps2.oge.gov/201/Presiden.nsf/President%20and%20Vice%20President%20Index>.

<sup>19</sup>5 U.S.C. app. § 103(l). The requirement to file periodic transaction reports begins immediately upon commencing service.

year in office, covering the last full calendar year prior to entering office. Consistent with this tradition, President Trump filed his financial disclosure report in June 2017 that covers calendar year 2016, and OGE certified the financial disclosure.<sup>20</sup>

- **Criminal statutes on bribery and “revolving door”:** Both the President and Vice President are subject to the prohibitions on accepting or soliciting bribes or illegal gratuities.<sup>21</sup> In addition, the Vice President is covered by some of the “revolving door” prohibitions, including the prohibition, for 2 years after leaving government service, on knowingly communicating or appearing before (with the intent to influence) certain officials on behalf of others seeking official action by an executive branch officer or employee.<sup>22</sup>
- **Prohibition on gifts:** To a limited extent, the President and Vice President are covered under the statutory provision prohibiting gifts to federal employees. Generally, the statute prohibits employees from receiving or soliciting gifts from those whose interests may be substantially affected by the performance of the employee’s duties.<sup>23</sup> According to the standards of conduct regulations implementing this prohibition, the President and Vice President are permitted to accept gifts under circumstances ordinarily prohibited under this statute because of considerations such as protocol and etiquette relating to the conduct of the President’s and Vice President’s offices.<sup>24</sup> Accordingly, the President and Vice President are only prohibited from accepting any gift on his or her own behalf, or on behalf of any family member, where
  - such acceptance would violate the criminal provisions on bribery or illegal gratuities,
  - such acceptance would violate the U.S. Constitution,
  - such acceptance was in return for being influenced in the performance of an official act, or
  - the offer of the gift was solicited or coerced through the use of (or permission to use) the President’s or Vice President’s position or authority.<sup>25</sup>

**Emoluments clauses under the U.S. Constitution:** Two clauses in the U.S. Constitution were designed to protect the independence of government officials and the President.<sup>26</sup> The Foreign Emoluments clause prohibits U.S. government officials, including the President and Vice

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<sup>20</sup>Vice President Pence also filed his financial disclosure report in May 2017 that covers calendar year 2016 which OGE certified.

<sup>21</sup>18 U.S.C. § 201.

<sup>22</sup>18 U.S.C. § 207(d).

<sup>23</sup>5 U.S.C. § 7353. OGE standards of conduct regulations implementing this provision provide for generally applicable exceptions to the prohibition, including permitting receipt of unsolicited gifts having an aggregate market value of \$20 or less. For more details on this and other exceptions, see 5 C.F.R. § 2635.204.

<sup>24</sup>5 C.F.R. § 2635.204(j).

<sup>25</sup>5 C.F.R. § 2635.204(j). See also 5 C.F.R. § 2635.205(a) and (b).

<sup>26</sup>5 Op. Off. Legal Counsel 187, 188 (1981).

President, from receiving gifts, a title, an office, or an emolument from a foreign government without the consent of Congress.<sup>27</sup> The Domestic Emoluments clause prohibits the President, during his term, from receiving additional compensation from the U.S. government, and from receiving any other emolument from the U.S. government or a state.<sup>28</sup> The Department of Justice, through its Office of Legal Counsel, noted in an opinion that emolument has been defined as any “profit or gain arising from station, office, or employment; reward, remuneration, salary.” The Department of Justice notes that the history of these clauses suggests that the term emolument has a strong connotation of payments that have a potential of influencing or corrupting the integrity of the recipient.<sup>29</sup>

### Does the financial conflicts of interest law apply to the President and Vice President?

No. The President and Vice President are not subject to the criminal prohibition on financial conflicts of interest under 18 U.S.C. § 208 (‘section 208’) or related OGE regulations that apply to executive branch employees.<sup>30</sup> This law generally bars an executive branch employee from participating in a particular matter that will directly affect his or her own, or imputed, financial interests.<sup>31</sup> It has been observed that subjecting the President to any prohibition against financial conflicts of interests—thereby barring him from participating in particular matters that conflict with his financial interests—might impede his ability to carry out his constitutional duties.<sup>32</sup>

For executive branch employees covered under this criminal prohibition, financial conflicts of interest can be addressed in a number of ways. In the first instance, the financial interest may be deemed too remote or inconsequential (such as owning a small amount of stock) to affect the integrity of an employee’s service and as such is not deemed a conflict. OGE refers to these

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<sup>27</sup>The Foreign Emoluments clause states: “No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.” U.S. Const., art. I, § 9, cl. 8.

<sup>28</sup>The Domestic Emoluments clause states: “The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.” U.S. Const. art. 2, § 1, cl. 7.

<sup>29</sup>5 Op. Off. Legal Counsel 187, 188 (1981) (discusses application of the Domestic clause and explains the history and purpose of that clause as well as the Foreign Emoluments clause). *See also* 25 Op. Off. Legal Counsel 113 (2001) (in discussing the Foreign Emoluments clause, states that the term “emolument” was intended to cover compensation of any sort arising out of an employment relationship, including a contractual employment relationship).

<sup>30</sup>18 U.S.C. § 202(c). OGE regulations addressing aspects of financial conflicts of interest and impartiality are found at 5 C.F.R. part 2640 and 5 C.F.R. part 2635, subparts D-F and H.

<sup>31</sup>The financial interests imputed to an employee include those of a spouse, minor child, or outside organization in which the employee serves as an officer, director, trustee, general partner, or employee, or a person with whom the employee is negotiating for (or has an arrangement concerning prospective) employment. 18 U.S.C. § 208(a).

<sup>32</sup>Letter opinion from Laurence H. Silberman, Acting Att’y Gen., Department of Justice, to Senator Howard W. Cannon, Chairman, Committee on Rules and Administration (Sept. 20, 1974).

as nonconflicting assets.<sup>33</sup> Otherwise, a conflict may be addressed by employee recusal from participating in the matter. However, if the work cannot be readily reassigned or is central or critical to the performance of the employee's duties, then the employee may be directed to divest the conflicting financial interest.<sup>34</sup> Alternatively, an authorized official (such as an agency ethics official) may be able to grant a waiver in individual circumstances where neither recusal nor divestiture are reasonable options.<sup>35</sup> Finally, an employee may establish a qualified trust to address the conflict of interest.<sup>36</sup>

For several decades OGE has advanced its view that the President and Vice President should conduct themselves as if they are bound by the conflict of interest laws and standards of conduct.<sup>37</sup> Since Congress passed the Ethics in Government Act of 1978, each president through President Obama has either established a blind trust or limited their investments to nonconflicting assets.<sup>38</sup> At a news conference on January 11, 2017, then President-elect Trump's attorney identified several actions the President-elect planned to take to address his conflicts of interest, such as transferring management of his businesses and voluntarily limiting those businesses' ability to engage in transactions that could pose conflict-of-interest concerns. The proposed actions, however, did not include establishing a blind trust or limiting investments to nonconflicting assets.

#### How do OGE and agency ethics officials guide and oversee ethics?

OGE and agency ethics officials are involved in guiding and overseeing ethics in the executive branch and preventing and resolving employees' conflicts of interest. OGE established the standards of conduct regulations to, among other things, address actual conflicts of interest as

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<sup>33</sup>OGE regulations addressing 18 U.S.C. § 208 provide for various nonconflicting assets that are exempt from the requirement to recuse under section 208. See 5 C.F.R. part 2640, subpart B. For example, the regulations provide that an employee may participate in a particular matter affecting one or more holdings of a diversified mutual fund where the disqualifying financial interest in the matter arises because of the ownership of an interest in the fund. See 5 C.F.R. § 2640.201(a). Also, an employee may participate in a particular matter of general applicability (such as rulemaking) in which the disqualifying financial interest of securities issued by one or more entities affected by the matter if the securities are either publically traded (or are municipal securities) or long-term government securities, and the market value does not exceed specified thresholds. See 5 C.F.R. § 2640.202(c).

<sup>34</sup>See 5 C.F.R. § 2640.103(e)(2).

<sup>35</sup>Under section 208(b)(1), an agency may determine in an individual case that a disqualifying financial interest in a particular matter (or matters) is not so substantial as to be deemed likely to affect the integrity of the employee's service to the government. Upon making this determination, the agency may then waive the employee's disqualification notwithstanding the financial interest, and permit the employee to participate in the particular matter. See 5 C.F.R. § 2640.301.

<sup>36</sup>To be considered qualified, a trust must be certified by OGE as meeting the requirements specified under 5 C.F.R. part 2634, subpart D. Under a qualified trust, the employee gives up management of their assets to an independent trustee who makes decisions without the employee's knowledge. These characteristics of a qualified trust assure 'blindness' and therefore an employee who has a qualified trust cannot be influenced in the performance of their official duties by their financial interests in the trust assets. According to OGE officials, currently there are no executive branch employees who have a qualified blind trust.

<sup>37</sup>U.S. Office of Gov't Ethics, Letter to a Deputy designated agency ethics official (Oct. 20, 1983).

<sup>38</sup>The Ethics in Government Act of 1978 created qualified trusts.

well as activities that give rise to the appearance of such conflicts.<sup>39</sup> OGE is also responsible for implementing the financial disclosure system for the executive branch.<sup>40</sup> This system is intended to prevent conflicts of interest and identify potential conflicts of interest through the systematic review of the financial interests of current and prospective executive branch employees.<sup>41</sup>

During a transition, OGE's primary role is to work with the Transition Team to make sure nominees to Senate-confirmed positions are free of conflicts of interest. OGE oversees the review of public financial disclosure reports of about 1,100 presidentially appointed Senate-confirmed nominees. OGE can also assist the President-elect in resolving potential conflicts of interest. Later in this report, we describe the information and services OGE offered to the Trump-Pence and Obama-Biden Transition Teams in more detail.

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<sup>39</sup>OGE's standards of conduct regulations implement the principles of ethical conduct established under Executive Order No. 12674, *Principles of Ethical Conduct for Government Officers and Employees*, 54 Fed. Reg. 15159 (Apr. 12, 1989) as amended, Exec. Order No. 12731, 55 Fed. Reg. 42547 (Oct. 17, 1990). See 5 C.F.R. part 2635.

<sup>40</sup>5 U.S.C. app. §§ 111 and 402. OGE regulations on executive branch financial disclosure are found at 5 C.F.R. part 2634.

<sup>41</sup>5 C.F.R. § 2634.104(b).



## How might a potential ethics violation by a President or Vice President be addressed?

### Department of Justice

The Department of Justice is authorized to investigate and prosecute federal criminal matters, including potential violations of criminal statutes pertaining to ethics. In situations when criminal investigation is warranted but investigation or prosecution by a United States Attorney or division of the Department of Justice presents a conflict of interest, or other extraordinary circumstances exist, the Attorney General may appoint an outside special counsel to handle the matter.<sup>42</sup> As such, the Department of Justice or an appointed special counsel could investigate a President's or Vice President's potential violation of criminal ethics provisions. However, the Department of Justice, through the Office of Legal Counsel, has opined that the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions.<sup>43</sup> These opinions provide that the President's constitutional immunity while in office would not prevent indictment and prosecution once a President left office.<sup>44</sup> Under the department's view, a sitting Vice President is not entitled to immunity from indictment or prosecution.<sup>45</sup>

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<sup>42</sup>28 U.S.C. § 515. Department regulations setting forth grounds under which a special counsel may be appointed and the powers of a special counsel are set forth at 28 C.F.R. part 600. In cases in which the Attorney General is recused, the Acting Attorney General may appoint a special counsel. 28 C.F.R. § 600.1. For a time, provisions of the Ethics in Government Act of 1978 provided for the appointment of independent counsels to investigate and, if appropriate, prosecute certain high-ranking government officials, including the President and Vice President, for violations of federal criminal laws. However, the independent counsel provisions sunset in 1999.

<sup>43</sup>A *Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. Off. Legal Counsel 222 (2000). This 2000 opinion reaffirmed an earlier memorandum. See Memorandum from Robert G. Dixon Jr., Ass't Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, *Re: Amenability of the President, Vice President, and other Civil Officers to Federal Criminal Prosecution while in Office* (Sept. 24, 1973).

<sup>44</sup>*Id.*

<sup>45</sup>A *Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. Off. Legal Counsel 222 (Oct. 16, 2000) (citing Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity (filed Oct. 5, 1973), *In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States* (D. Md. 1973) (No. 73-965)).

### Office of Government Ethics

OGE may investigate and order corrective action to ensure that officers and employees in the executive branch comply with ethics requirements.<sup>46</sup> However, this authority does not extend to the President and Vice President.<sup>47</sup> Nor does it extend to determining whether a criminal statute has been violated.<sup>48</sup> OGE must refer suspected criminal activity to the Department of Justice.<sup>49</sup> When OGE has reasonable cause to believe that an individual has willfully failed to file a disclosure report (or information required to be reported) or has willfully falsified information, it can refer the matter to the Attorney General for civil and criminal action.<sup>50</sup> OGE's responsibility in this regard extends to the President and Vice President.

### Congress

Under the Constitution, Congress of course has the inherent authority to investigate. The power of Congress to conduct investigations is broad and includes alleged corruption, inefficiency, or waste within government.<sup>51</sup> An investigative committee could investigate possible ethical misconduct on the part of a President or Vice President, assuming the power to do so was delegated to it by the full House or Senate.<sup>52</sup> The Constitution also provides for a mechanism for handling alleged wrongdoing by a President or Vice President in that the House has the authority to impeach a President or Vice President. The House sets forth specific allegations of misconduct in approved articles of impeachment. The Senate then has the responsibility to try the matters set forth in the articles of impeachment. A conviction by the Senate will serve to remove the official from office.<sup>53</sup>

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<sup>46</sup>5 U.S.C. app. § 402(b)(9) and (f)(2)(A).

<sup>47</sup>OGE's coverage here extends over 'officers' and 'employees.' The definitions of 'officer' and 'employee' in title 5 of the United States Code (5 U.S.C. §§ 2104 and 2105, respectively) cover only appointed individuals and therefore exclude the President and Vice President.

<sup>48</sup>5 U.S.C. app. § 402(f)(5). OGE is authorized to recommend that an agency investigate possible violations of any rule, regulation, or executive order relating to conflicts of interest or standards of conduct and may request assistance from an agency Inspectors General in conducting investigations. See 5 U.S.C. §§ 402(f)(2)(A)(ii) and 403(a), respectively. According to OGE officials, agency inspectors general are better positioned to investigate potential ethics or conflict of interest violations by individual agency employees than OGE.

<sup>49</sup>28 U.S.C. § 535.

<sup>50</sup>5 U.S.C. app. § 104(b). According to OGE officials, the firsthand knowledge required to make a referral (i.e., reasonable cause to believe) is more likely to come from the agency for which the employee works. Agency officials are also responsible under this provision for referring such matters to the Attorney General.

<sup>51</sup>*Eastland v. United States*, 421 U.S. 491, 504 (1975); *Watkins v. United States*, 354 U.S. 178, 187 (1957).

<sup>52</sup>See *Eastland*, 421 U.S. at 505-06; *Watkins*, 354 U.S. at 200-01, *United States v. Rumely*, 345 U.S. 41, 44 (1953).

<sup>53</sup>The President and Vice President (and any civil officer of the United States) shall be removed from office upon impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. U.S. Const. art. II, § 4. See also U.S. Const. art. I, § 2, cl. 5 and § 3, cl. 7 and 8.

### Litigation

Currently, a number of suits have been brought in federal court against the President by private and governmental parties alleging ethics violations by the President.<sup>54</sup> At the outset, in each case, the court needs to determine whether the suit will be permitted before addressing the merits.

### **OGE's Information and Services Related to Ethics**

#### What information and services did OGE provide to both major party campaign teams prior to the 2016 election?

OGE provided information and services to both major party campaign teams—the Trump-Pence and Clinton-Kaine teams—prior to the election to assist them in preparing for ethics-related aspects of the presidential transition, particularly with regard to the review of the financial interests of nominees for Senate-confirmed positions for conflicts of interest. OGE provided formal briefings and training to both major party campaign teams leading up to the election. The briefings and training covered

- OGE's role and the support that it can provide to the campaigns and to the future Transition Team leading up to and after the election;
- a detailed review of the nominee financial disclosure process; and
- information on using *Integrity*—OGE's electronic filing system for processing financial disclosure reports of incoming nominees—including technical aspects of identifying campaign staffs to act in administrative roles.<sup>55</sup> Prior to the election, both campaigns completed the technical set-up needed to collect financial disclosure information from prospective nominees and share that information with OGE through *Integrity*, according to OGE officials.

OGE provided numerous ethics-related resources in hard copy during initial briefings with both campaign teams and in multiple formats throughout the pre-election period. These resources included information targeted both to campaign teams and to prospective presidential nominees on the nomination process and financial disclosure requirements, as well as the executive branch ethics program (see table 1).

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<sup>54</sup>See, e.g., *Blumenthal v. Trump*, No. 1:17-cv-01154 (S.D.N.Y. filed June 14, 2017); *District of Columbia v. Trump*, No. 8:17-cv-01596 (D.M.D. filed June 12, 2017); *Citizens for Responsibility and Ethics in Washington v. Trump*, No. 1:17-cv-00458 (S.D.N.Y. filed Jan. 23, 2017).

<sup>55</sup>Prior to the inauguration, the Transition Team must assign members of its own staff temporarily to administrative roles in *Integrity* that will be used by the new administration when processing nominees' reports. After the inauguration, the White House's Presidential Personnel Office oversees the nominee process while the White House Counsel's Office is responsible for sending nominees' reports to OGE and the nominees' agencies for review.

**Table 1: Presidential Transition Resources Provided by the Office of Government Ethics (OGE) to Both Major Party Campaign Teams in 2016**

<b>Guide for the Presidential Transition Team</b>	Developed as a resource for the Transition Team. Explains the nominee ethics process, provides detailed information for Transition Team members directly involved in nominations, such as a timeline of critical milestones, and provides strategies for establishing a strong ethical culture in the new administration.
<b>Ethics Guide for Nominees and Appendix</b>	Developed as a resource for potential nominees during the upcoming transition. Provides an overview of the ethics component of the nomination process and instructions for financial disclosure and using <i>Integrity</i> . The appendix provides additional guidance and resource materials, as well as a detailed checklist applicable to all nominees and supplemental checklists targeted at specific professions.
<b>Public Financial Disclosure Guide</b>	An interactive tool developed to assist individuals who file or review public financial disclosure reports, including instructions and answers to frequently asked questions.
<b>Ethics Agreement Guide</b>	Developed for OGE staff and agency ethics officials, the guide provides standardized language for drafting nominees' ethics agreements.
<b>Presidential, Vice Presidential, Appointee, and Nominee Records</b>	Presidential, Vice Presidential, appointee, and nominee financial disclosure reports are publicly available on OGE's website.
<b>Ways OGE Can Help in the Presidential Transition</b>	One-page graphic outlining information on services OGE offers to the Transition Team and milestones for providing services before and after the election.
<b>List of Positions for which OGE Reviews Nominees</b>	Developed by OGE to assist the Transition Team in identifying the civilian presidentially appointed, Senate-confirmed positions traditionally subject to OGE's review in the nomination process.
<b>Certificate of Divestiture Guide</b>	One-page guide explaining the application process for certificates of divestiture.
<b>Integrity User Manual and Materials</b>	Training on using <i>Integrity</i> , the electronic system for filing financial disclosure reports. OGE developed a detailed, online user manual to explain the system's features. In addition, OGE provided various video tutorials for using <i>Integrity</i> .
<b>Government Ethics Statutes and Regulations</b>	Relevant government ethics statutes and regulations applicable to presidential nominees and appointees are accessible via OGE's website.

Source: GAO analysis of OGE documents. | GAO-17-615R

In addition, OGE designated a staff member to work with each of the campaign teams beginning in October 2016. According to OGE officials, the staff member answered questions from and provided additional information on an as-needed basis to both campaign teams.

What information and services did OGE recommend and provide to the Trump-Pence Transition Team to use after the 2016 election?

After the election, OGE assisted the Trump-Pence Transition Team primarily with the nominee financial disclosure review process, working with agency ethics officials to determine whether, and to what extent, prospective nominees may have potential conflicts of interest. Based on its experience during previous transitions, OGE made recommendations on the information and

services it could provide to the Trump-Pence Transition Team. Although the transition team is not required to use the information and services recommended by OGE, according to OGE officials, the recommendations are intended to expedite the ethics review process and establish a strong ethics program in the White House. OGE officials provided the following information on whether and how the Trump-Pence Transition Team applied the recommendations.

**Obtaining a government ethics expert:** OGE recommended that the Transition Team detail or hire a government ethics expert prior to inauguration to manage the nominee process, including coordinating with OGE to address comments on nominees' reports. OGE provided the Transition Team with a list of recommended senior ethics officials from executive branch agencies who could serve in this capacity. According to a public statement from the White House, President Trump secured the services of Stefan Passantino, an ethics expert from outside the government, after the inauguration to oversee the White House Counsel's ethics office.

**Early review of nominee draft financial disclosure reports:** To expedite the ethics review process, OGE suggested that the Transition Team work with prospective nominees to collect financial information and begin to submit draft financial disclosures to OGE as early as possible, particularly for nominees to high-priority positions. According to OGE officials, there are usually several rounds of revisions to reports which can take weeks to address. Getting an earlier start on reviewing helps OGE and agency ethics officials address revisions, such as technical issues with reporting, that typically contribute to delays later in the review process. According to OGE officials, the Trump-Pence Transition Team began to submit draft nominee financial disclosure reports to OGE in December of 2016. As of January 20, 2017, OGE had received 25 draft nominee financial disclosure reports from the Trump-Pence Transition Team. As of July 31, 2017, OGE had received 506 draft financial disclosure reports, according to OGE officials. OGE offered two additional recommendations for working through the financial disclosure process effectively and efficiently:

- **Preliminary consultations on prospective nominees and "blind" reviews of nominee reports:** In circumstances where the Transition Team was not ready to provide a nominee's financial disclosure report to OGE, OGE offered preliminary consultations to determine whether a potential nominee's financial interests would likely pose a conflict of interest for a particular position. OGE officials could not confirm whether OGE provided preliminary consultations on any of the Trump-Pence Transition Team's prospective nominees. OGE also offered "blind" reviews of reports for technical compliance in situations where the individual nominee's identity is sensitive. According to OGE officials, the Transition Team did not give OGE financial information to conduct blind reviews of prospective nominees.
- **Preclearance prior to public nomination decisions:** OGE recommended that the Transition Team allow OGE to preclear nominees' ethics packages prior to publicly releasing the names of the intended nominees. A nominee's ethics package is "precleared"—or tentatively approved—when OGE officials have received a nominee's draft financial disclosure report, determined that the financial disclosure report meets technical reporting requirements, and all identified conflicts of interest are addressed in



an ethics agreement.<sup>56</sup> According to OGE documents, preclearance is a pivotal step in the nomination process because it ensures that the nominee's potential ethics issues are resolved and protects the privacy of the prospective nominee, who is a private citizen. For example, prospective nominees may choose to withdraw themselves from consideration after learning how ethics rules will affect their personal finances. Similarly, Transition Teams may reverse their selection of a nominee after reviewing the ethics package and other vetting materials. According to OGE officials, President Trump initially announced the majority of his intended nominees prior to OGE receiving and preclearing their financial disclosure reports. At a press conference on May 8, 2017, the White House Press Secretary announced that the administration was changing its appointment process to allow nominees to go through OGE's review prior to announcing the names of individual nominees. According to OGE officials, since then, OGE has received financial disclosure reports for and precleared nearly all of President Trump's intended nominees' ethics packages prior to their announcement.

**Resolving the President-elect's potential conflicts of interest:** According to OGE officials, OGE offered to assist with plans to resolve the President-elect's potential conflicts of interest during initial communications with the Transition Team. At a news conference in January 2017, then President-elect Trump's attorney identified several actions the President-elect planned to take to address his conflicts. OGE officials told us that they were not involved in developing the President-elect's plan but offered to provide feedback, including recommendations for how he could resolve his potential conflicts of interest. According to OGE officials, they have not been asked to provide assistance to the President with how to resolve his potential conflicts of interest.

**Ethics review of prospective White House appointees:** OGE offered to help review financial disclosure information of prospective White House appointees—who are not subject to Senate confirmation and do not require OGE's pre-appointment review—to determine whether they had potential conflicts of interest. According to OGE officials, OGE consulted with representatives for one senior White House appointee regarding the resolution of conflict of interest issues prior to the appointee entering the government.

**Technical assistance with ethics initiatives:** OGE offered to provide technical assistance to the President-elect with ethics-related initiatives, such as drafting an executive order or other instructions that would impact the executive branch ethics program. According to OGE's Presidential Transition Guide, OGE can provide expertise by explaining the practical effect of a policy decision or specific language and provide options to achieve the President-elect's intended outcome. President Trump issued Executive Order 13770, "Ethics Commitments by

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<sup>56</sup>OGE works with agency ethics officials responsible for drafting nominees' ethics agreements to outline the specific actions that each nominee will take to resolve his or her potential conflicts of interest, such as recusals, divestitures, and resignations from nonfederal businesses or other entities. For example, a nominee may be required to recuse his or her self from agency matters that might present financial conflicts between their personal life and their governmental responsibilities. According to OGE officials, OGE staff and agency ethics officials prepared and finalized ethics agreements for all prospective nominees for whom OGE certified a financial disclosure report. For example, OGE and ethics officials prepared and approved an ethics agreement for then-potential nominee for Secretary of State Rex Tillerson, who agreed to specific actions to address his potential conflicts, including divestiture from stock in ExxonMobil Corporation where he resigned as Chairman and Chief Executive Officer before assuming public office.

Executive Branch Appointees,” which requires political appointees in each executive branch agency, including the Executive Office of the President, to sign an ethics pledge.<sup>57</sup> According to OGE officials, the Executive Office of the President did not consult with OGE in developing the executive order. Consistent with prior administrations, OGE issued interpretative guidance following the issuance of the executive order to ensure that agency officials implement the Ethics Pledge uniformly.

OGE also offered assistance to the Transition Team in regard to setting up the White House ethics program, such as consulting on ethics training and procedures. According to OGE officials, OGE provided detailees to the White House, but has not been asked to provide any additional technical assistance.

What information and services did OGE recommend and provide to the Obama-Biden Transition Team to use after the 2008 election?

After the election, OGE assisted the Obama-Biden Transition Team primarily with the nominee financial disclosure review process. According to OGE officials, OGE made similar recommendations on the information and services it could provide to the Obama-Biden Transition Team and Trump-Pence Transition Team to expedite the ethics review process and establish a strong ethics program.

**Obtaining a government ethics expert:** OGE officials could not recall whether a formal list of senior government ethics officials was offered to the Obama-Biden Transition Team. According to OGE officials, the Obama-Biden Transition Team hired a government ethics expert after the inauguration to assist with technical reporting requirements in the financial disclosure process.

**Early review of nominee draft financial disclosure reports:** According to OGE officials, the Obama-Biden Transition Team began to submit draft nominee financial disclosure reports to OGE in November 2008. As of January 20, 2009, OGE had received 90 draft nominee financial disclosure reports from the Obama-Biden Transition Team. As of July 31, 2009, OGE had received 564 nominee financial disclosure reports, according to OGE officials. To work through the financial disclosure process effectively and efficiently, OGE offered the Obama-Biden Transition Team and Trump-Pence Transition Team the same two additional recommendations:

- **Preliminary consultations on prospective nominees and “blind” reviews of nominee reports:** According to OGE officials, the Obama-Biden Transition Team used preliminary consultations and blind reviews for prospective nominees.
- **Preclearance prior to public nomination decisions:** According to OGE officials, OGE received draft financial disclosure reports for and precleared nearly all of President-elect Obama’s intended nominees’ ethics packages prior to the public announcement of those nominees.

**Resolving the President-elect’s potential conflicts of interest:** According to OGE officials, prior to the 2008 election, then Senator Obama took actions, including liquidating investments

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<sup>57</sup>82 Fed.Reg. 9333 (Jan. 28, 2017).

so that he held only nonconflicting assets, which largely addressed his potential conflicts of interest. OGE officials told us that the Obama-Biden Transition Team consulted with OGE with regard to blind trust regulations and OGE advised the Transition Team that a blind trust was not needed because President-elect Obama only retained nonconflicting assets. In addition, the Obama-Biden Transition Team requested OGE's assistance with ethical considerations related to then-President-elect Obama's existing book deal, according to OGE officials. The ethics expert for the Obama-Biden Transition Team also worked with OGE to address technical reporting requirements on President-elect Obama's financial disclosure report.

**Ethics review of prospective White House appointees:** According to OGE officials, the Obama-Biden Transition Team consulted with OGE for assistance with resolving conflict of interest issues for several White House appointees prior to their entering government service.

**Technical assistance with ethics initiatives:** According to OGE officials, OGE assisted the Obama-Biden Transition Team with drafting the ethics pledge set forth in President Obama's Executive Order 13490, "Ethics Commitments by Executive Branch Personnel."<sup>58</sup> OGE issued interpretative guidance following the issuance of the executive order to ensure that agency officials implemented the Ethics Pledge uniformly.

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<sup>58</sup>74 Fed. Reg. 4673 (Jan. 21, 2009).

## Funds for the Trump-Pence Transition

### How much federal funding was made available for the post-election Trump-Pence transition?

Fiscal year 2017 appropriations acts provided \$9.5 million to GSA for post-election activities of the presidential transition.<sup>59</sup> As shown in table 2, the \$9.5 million appropriation was made available to support both the incoming and outgoing administrations, with funding for each available for obligation through specified dates.<sup>60</sup>

**Table 2: GSA's Appropriated Funding for Post-Election Activities of the Presidential Transition**

<b>Funding description</b>	<b>Amount in millions</b>	<b>Availability for Obligation<sup>a</sup></b>
Outgoing administration funding:		
To cover expenses related to winding up the affairs of the outgoing President and Vice President	\$2.5	Through July 21, 2017
Incoming administration funding:		
To cover expenses on behalf of the President-elect and Vice President-elect	\$6.0	Through July 19, 2017
To cover expenses for appointee orientation (transition directory, briefings, workshops, and other orientation activities)	\$1.0	Through September 30, 2017
<b>Total</b>	<b>\$9.5</b>	<b>Not applicable</b>

Source: The Continuing Appropriations Act, 2017, as amended, Consolidated Appropriations Act, 2017, the Presidential Transition Act of 1963, as amended, and the General Services Administration (GSA) Fiscal Year 2017 Congressional Justification. | GAO-17-615R

<sup>a</sup>An obligation is a definite commitment that creates a legal liability of the government for payment. Payment may be made immediately or in the future.

<sup>59</sup>See Continuing Appropriations Act, 2017, Pub. L. No. 114-223, div. C, § 125, 130 Stat. 857, 912 (Sept. 29, 2016), *as amended by* Pub. L. No. 114-254, div. A, 130 Stat. 1005 (Dec. 10, 2016) and Pub. L. No. 115-30 (Apr. 28, 2017); and Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, div. E (May 5, 2017). Congress provides separate appropriations for presidential transition activities that occur prior to elections. The Consolidated Appropriations Act, 2016, appropriated to GSA approximately \$13.3 million for purposes related to pre-election preparation for the 2017 presidential transition. In addition, this act also provided that (1) amounts may be transferred and credited to GSA's Acquisition Services Fund or its Federal Buildings Fund to reimburse obligations incurred for these purposes in fiscal years 2015 or 2016, and (2) amounts available shall be in addition to any other amounts available for such purposes. GSA reported to us that for the period ending on July 31, 2017, it had expended approximately \$8.3 million from its Acquisition Services Fund and approximately \$7.2 million from its Federal Buildings Fund to prepare necessary services and facilities for use by the presidential Transition Team. However, the scope of our work did not include a review of funds appropriated for pre-election activities of the presidential transition, or of any related expenditures from the Acquisition Services Fund, or the Federal Buildings Fund.

<sup>60</sup>The scope of our work did not include a review of the federal funding made available to support the outgoing administration.

The PTA, as amended, authorized GSA to provide the President-elect and Vice President-elect, upon their request, with services and facilities to use as they prepare to assume their official duties, including

- office space,
- compensation of staff members (not to exceed the rate provided for GS-18),<sup>61</sup>
- expert or consultant services,<sup>62</sup>
- travel expenses and subsistence allowances,
- communication services,
- equipment and supplies,
- printing and binding expenses,
- shipping and mail, and
- briefings, workshops, or other orientation activities for presidential appointees.

What were GSA's processes to manage the federal funding made available to the incoming administration during the post-election Trump-Pence transition?

GSA and the Trump-Pence Transition Team signed an MOU that identified the services and facilities (including goods) to be made available to the President-elect and broad procedures to pay out funds in accordance with the PTA, as amended. The MOU designated Transition Team fund managers to approve all expenditures against the appropriation. Expenditures were also to be approved by a GSA fund certifying official.

When the Transition Team submitted a request for goods or services to GSA, GSA referred to the authorizing statute, available appropriations, and relevant principles of appropriations law to determine if the request should be paid. Once approved by both a Transition Team fund manager and a GSA fund certifying official, GSA could either execute a procurement action to use one of its vendors for the purchase of goods and services, reimburse the Transition Team, or pay the Transition Team's vendor directly.

Processes varied depending on the Transition Team's preferred acquisition method for goods and services and the type of expenditure processed. Based on discussions with GSA officials and a formal walk-through of their process to manage the transition funds, we obtained an understanding of the flow of information between GSA and the Trump-Pence Transition Team. Below are some examples of processes GSA followed based on the Transition Team's preferred acquisition method:

**Payroll:** The Transition Team used a third-party vendor to process payroll. When processing payroll expenditures, the Transition Team submitted charges for compensation of its personnel, based on the invoices provided by its vendor, to GSA, and then GSA ensured that the amount

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<sup>61</sup>The GS-18 limit translates to a salary cap at the Executive Schedule (EX) level IV. Section 101(c) of the Federal Employee Pay Comparability Act of 1990 (FEPCA) provides that for provisions outside of Title 5 of the United States Code which existed before FEPCA was enacted (such as the Presidential Transition Act of 1963), the salary limitations should be considered a reference to the maximum rate under 5 U.S.C. § 5376 at the time, which is EX level IV.

<sup>62</sup>5 U.S.C. § 3109 establishes a salary cap for experts and consultants at (the daily rate equivalent of) the highest rate payable for GS-15, step 10 (excluding locality pay), unless otherwise authorized.



for each staff member did not exceed the limit established by the PTA, as amended. GSA submitted reimbursing payments to the Transition Team or the payroll vendor.

**Travel:** The Transition Team used a third-party vendor for charter flights for high-ranking Transition Team officials. This is a permissible expense per the PTA. When processing charter flight expenditures, the Transition Team submitted invoices to GSA which reviews the invoices for reasonableness by comparing the vendor's rates to GSA rate schedules for similar services. GSA submitted payments directly to the Transition Team's charter flight travel vendor. If there are other parties aboard the charter flights that are not on Transition business, such as the press and the U.S. Secret Service, GSA coordinated with each party to obtain reimbursement for its pro-rated portion of the flight expense.

For travel expenses of other Transition Team personnel (noncharter flights), GSA used its own vendor, which functioned like a travel agent. When processing noncharter flight travel expenditures, the Transition Team submitted authorization forms to GSA with travel details. GSA reviewed the forms to ensure that the timing and amount were reasonable in accordance with GSA's travel regulations and confirmed with the Transition Team that the travel was for transition-related activities. GSA then provided the Transition Team with an authorization code for booking travel with GSA's vendor. After reviewing and approving the travel charges, GSA submitted payments directly to its vendor.

What types and amounts of expenditures were made with the federal funding made available to the incoming administration for the post-election Trump-Pence transition?

According to GSA, as of July 31, 2017, expenditures made with funds available to the incoming administration for the post-election presidential transition totaled \$4.39 million. We did not perform any data reliability procedures to validate the information provided by GSA for the period covering February 1, 2017, through July 31, 2017.

For the period ending on January 31, 2017, GSA reported \$3.13 million in expenditures, which we tested to ensure proper classification by object class (i.e., type of good or service purchased by the federal government).<sup>63</sup> These expenditures represented approximately 45 percent of the \$7 million made available to the incoming administration for the post-election presidential transition, as shown in table 3.<sup>64</sup>

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<sup>63</sup>The expenditure transactions were classified into three categories per the object class codes assigned by GSA based on the Office of Management and Budget (OMB), *Preparation, Submission, and Execution of the Budget*, OMB Circular No. A-11 (revised July 2016). Object classes are categories in a classification system that present obligations by the items or services purchased by the federal government.

<sup>64</sup>Because funds are available to use until later in 2017 (as mentioned above), these figures and the proportion of funds expended will change in the future.

**Table 3: Federal Funding Available and Expended for the Presidential Transition Post-Election Activities of the Incoming Administration for the Period Ending on January 31, 2017**

Dollars in millions

<b>Funding description</b>	<b>Available funds</b>	<b>Expenditures for the period ending Jan. 31, 2017<sup>a</sup></b>
To cover expenses on behalf of the President-elect and Vice President-elect	\$6.00	\$3.13
To cover expenses for appointee orientation (transition directory, briefings, workshops, and other orientation activities)	\$1.00	\$0.00 <sup>b</sup>
<b>Total</b>	<b>\$7.00</b>	<b>\$3.13</b>

Source: Continuing Appropriations Act, 2017, as amended, Consolidated Appropriations Act, 2017, the Presidential Transition Act of 1963, as amended, and General Services Administration (GSA) Fiscal Year 2017 Congressional Justification, and GSA expenditure data. | GAO-17-615R

<sup>a</sup>Because funds are available to spend until later in 2017, these figures will change in the future.

<sup>b</sup>As of January 31, 2017, the Transition Team had not spent the \$1 million available for appointee orientation activities.

The \$3.13 million of total expenditures for the period ending on January 31, 2017, is classified into three categories, as shown in table 4, and our testing of \$3.09 million of the expenditures confirmed that these transactions were properly classified. The majority of expenditures were for payroll. According to GSA officials, approximately 110 personnel employed by the Transition Team were compensated with federal funding. Travel expenditures were the next largest type of expenditure for the period ending on January 31, 2017. Travel expenditures included charter flights for the Vice President-elect and airfare and transportation for Transition Team personnel. According to GSA officials, none of the travel expenditures were for expenses incurred by the President-elect.

**Table 4: Classification and Amount of Expenditures Made with Federal Funding for Post-Election Activities of the Incoming Administration for the Period Ending on January 31, 2017**

Expenditure classification	Description	Amount expended for the period ending Jan. 31, 2017, in millions <sup>a</sup>	Percentage of amount expended for the period ending Jan. 31, 2017 <sup>a</sup>
<b>Payroll</b>	Compensation for personnel employed by the Transition Team.	\$1.88	60.06%
<b>Travel</b>	Charges for domestic travel. Travel transactions also included reimbursements from the U.S. Secret Service to cover its portion of charter flight expenses incurred while providing protection services to the Vice President-elect.	\$1.20	38.34%
<b>Other</b>	Other expenditures included charges for office supplies, equipment (cell phones and laptops), shipping costs, and mail.	\$0.05	1.60%
<b>Amount Expended for the period ending Jan. 31, 2017</b>	<b>Not applicable</b>	<b>\$3.13</b>	<b>100%</b>

Source: GAO analysis of the General Services Administration expenditure data. | GAO-17-615R

<sup>a</sup>Because funds are available to use until later in 2017, these figures and the proportion of funds expended will change in the future.

We reviewed 63 expenditure transactions totaling \$3.09 million and confirmed that these transactions were properly classified.<sup>65</sup> The reviewed transactions represented almost 99 percent of the \$3.13 million in total expenditures for the period ending on January 31, 2017.

#### How much in private funds did the Trump-Pence Transition Team report collecting and spending?

In its report submitted on February 19, 2017, which included contributions and spending through February 15, 2017, the Transition Team reported to GSA that it had collected \$6.5 million in private funds. The report listed over 3,000 contributions that ranged from \$1 to \$5,000 from

<sup>65</sup>Our testing was limited to expenditure classifications to report on the types of expenditures made with federal funding. We did not test the dollar amounts within each expenditure category to provide any level of assurance that the amounts were accurate or reasonable. Transactions were selected using different methodologies depending on the dollar value and volume of transactions within each expenditure category. For the portion of travel expenditures related to noncharter flights, we selected a statistical sample. Although we found no exceptions, sampling error is inherent in all statistical samples. As such, we are 95 percent confident that the sampling error associated with the noncharter flights travel sample is no more than 4.99 percent.

June 23, 2016, to February 14, 2017.<sup>66</sup> The Transition Team reported spending almost \$4.7 million, approximately 72 percent of the \$6.5 million in private funds collected (see table 5).<sup>67</sup>

**Table 5: Spending by the Trump-Pence Transition Team with Private Funds Collected as Reported on February 19, 2017**

Spending type	Amount in thousands
Payroll and taxes	\$1,026
Travel and relocation	\$1,800
Legal and consulting	\$923
Rent and utilities	\$258
Fundraising	\$249
Communications	\$213
Operations	\$177
Events	\$32
Technology	\$22
<b>Total</b>	<b>\$4,700</b>

Source: Contribution report provided to the General Services Administration by the Trump-Pence Transition Team. | GAO-17-615R

Note: Data presented as reported by the Trump-Pence Transition Team. We did not perform any data reliability procedures to validate this information.

## State's Information and Services Related to Communication with Foreign Leaders

### What protocols govern the communication between the President-elect or Vice President-elect and foreign leaders?

According to State officials, as private citizens, the President-elect and Vice President-elect do not have protocols for their communication with foreign leaders. Furthermore, according to a senior State official, the majority of calls between the United States and foreign leaders are not secure and therefore do not warrant a secure line. Secure communications are only necessary to convey classified information and, according to State officials, most calls with foreign leaders do not include discussions of classified information.

### What information and services did State provide President-elect Trump, Vice President-elect Pence, and their Transition Team regarding communications with foreign leaders?

State provided the Transition Team with telephone support and written and oral briefing materials. After Election Day 2016, the Operations Center within State collected incoming congratulatory calls from foreign leaders for the President-elect and Vice President-elect,

<sup>66</sup>The PTA requires the report on private funding, including dates of contribution, sources, amounts, and total expenditures, to be submitted to GSA within 30 days after the inauguration. There are no additional reporting requirements beyond this. Pursuant to Section 6(c) of the PTA, the maximum contribution allowed is \$5,000 from any person, organization, or other entity for purposes of carrying out activities authorized by this act.

<sup>67</sup>We did not perform any data reliability procedures to validate this information. Therefore, we do not provide any level of assurance on the accuracy of this information.

compiled them into a list, and provided the information to the Transition Team. At the request of the Transition Team, the Operations Center arranged phone connections between the Vice President-elect and foreign leaders. An official at State and an official at DOD confirmed that, the day after the election, the Executive Secretary of the National Security Council informed State and DOD that State's Operations Center would consolidate all incoming foreign leader call requests to pass to the Transition Team. The National Security Council is situated organizationally within the Executive Office of the President.<sup>68</sup>

State provided numerous written and oral briefing materials to members of its Landing Team beginning when they arrived at State on November 18, 2016, including overviews for bureaus within State, organizational charts, recent reports, and budget materials. According to State officials, some of the materials provided to the State Landing Team could be used to inform President-elect Trump and Vice President-elect Pence's calls with foreign leaders. For example, State provided issue papers on specific countries. The issue papers covered general information, such as the leadership in the country and the United States' diplomatic presence there.

Prior to the election, State designated two senior officials to serve as transition co-coordinators.<sup>69</sup> In addition, State's Office of the Executive Secretary coordinated, documented, and approved all requests made by the State Landing Team for information and services. Requests were tracked in electronic logs kept by the Office of the Executive Secretary.

#### What information is available on the Trump-Pence Transition Team's use of State's services?

State has some information on the services the Trump-Pence Transition Team used. Based on a review of State call logs, the Operations Center connected 16 calls between Vice President-elect Pence and foreign leaders during the presidential transition. The calls occurred from December 1 through 8, 2016. According to State officials, the nature of these calls was understood to be congratulatory. State officials did not participate on the calls. The Operations Center did not connect any calls between President-elect Trump and foreign leaders.

According to the Transition Team website—Greatagain.gov—approximately 60 calls occurred between President-elect Trump or Vice President-elect Pence, and foreign leaders between Election Day and the inauguration. Many of these calls occurred before November 18, 2016, when the State Landing Team arrived at State.

#### How did the services offered by State for the Trump-Pence transition compare to the Obama-Biden transition?

Based on a review of State call logs, during the Obama-Biden presidential transition the Operations Center connected approximately 70 calls between President-elect Obama and Vice

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<sup>68</sup>During initial interviews with DOD and DHS officials, they said that DOD and DHS did not have a role in providing information and services related to communications with foreign leaders. Furthermore, there are no policies, directives, or protocols that they do so. We contacted the National Security Council, but it declined to provide any comments on our written questions.

<sup>69</sup>During the course of our review, both of the senior officials separated from the State Department and we were unable to meet with them.



President-elect Biden and foreign leaders between Election Day and Inauguration Day. State officials provided limited information on the materials they provided to the Obama-Biden Transition Team and its State Department Landing Team. The information appeared similar to that provided to the Trump-Pence Transition Team, and included overviews for bureaus within State, organizational charts, recent reports, and budget materials.

Enclosure I: Scope and Methodology

Enclosure II: Application of Ethics Provisions to the President and Vice President

Enclosure III: Comments from the Office of Government Ethics

### **Agency Comments**

We provided relevant sections of this report to the Department of Justice for their review and comment. We provided a draft of this report to the Acting Administrator of the General Services Administration, the Director of the Office of Government Ethics, the Director of the Office of Management and Budget, the Secretaries of State, Defense, and Homeland Security, and the White House Counsel for their review and comment. OGE provided technical comments orally that were incorporated, as appropriate. We also received written comments from OGE's Acting Director which are reprinted in their entirety in Enclosure III. DOJ, GSA, OMB, State, and DHS responded that they had no comments on the report. DOD and the White House Counsel did not provide comments.

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As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from this date. At that time, we will send copies of this report to the appropriate congressional committees, the Attorney General, the Acting Administrator of the General Services Administration, the Acting Director of the Office of Government Ethics, the Director of the Office of Management and Budget, the Secretaries of State and Defense, the Acting Secretary of Homeland Security, the White House Counsel, the Trump-Pence Transition Team, and other interested parties. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you and your staff have any questions, please contact J. Christopher Mihm at (202) 512-6806, [StrategicIssues@gao.gov](mailto:StrategicIssues@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Major contributors to this report were Heather Krause (Director), Carol M. Henn (Assistant Director), Tracy W. Burney, Thomas Costa, Joseph P. Cruz, Karin Fangman, Gina R. Hoffman, Hynek Kalkus, Heena R. Patel, Edda Emmanuelli Perez, Carol Peterson, Mary Raneses, Nina M. Rostro, Erinn L. Sauer, Cynthia M. Saunders, Mackenzie D. Verniero, and John C. Wren.

A handwritten signature in black ink, reading "J. Christopher Mihm". The signature is fluid and cursive, with the first name "J." being a simple, stylized letter, and the last name "Mihm" ending in a large, looping flourish.

J. Christopher Mihm  
Managing Director, Strategic Issues

Enclosures - 3

## Enclosure I: Scope and Methodology

### Legal and Organizational Framework

To describe the legal and organizational framework guiding the transition and how it has changed over time, we reviewed the Presidential Transition Act of 1963 (PTA), subsequent amendments to the PTA, and related laws to understand the role of the General Services Administration (GSA) and other government entities in guiding the transition. In addition, we met with GSA officials to better understand GSA's role.

To describe recent changes to the presidential transition process, we reviewed the Edward "Ted" Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015. We met with the Federal Transition Coordinator and the Office of Management and Budget. We also met with the Partnership for Public Service because they established a Center for Presidential Transition to help presidential candidates and their transition teams, the outgoing administration, and federal agencies navigate the transition process.

### Applicable Ethics Provisions

To identify the ethics provisions that apply to members of the Transition Team, we reviewed the PTA to determine whether or not the members of the Transition Team are regarded as federal employees for the purpose of applying the ethics provisions.

To address what ethics provisions apply to the President and Vice President we consulted the Office of Government Ethics Compilation of Federal Ethics Laws, found at <https://www.oge.gov/Web/oge.nsf/Resources/Compilation+of+Federal+Ethics+Laws> for a comprehensive listing of all ethics statutes. Generally, we included in our report those ethics laws identified in the list except where we determined either that

- the law is not an ethics provision (e.g., establishes definitions, 41 U.S.C. § 2101, or sets forth penalties and injunction authority for violations of certain conflict of interest laws, 18 U.S.C. § 216),
- the law does not apply to the President or Vice President (e.g., prohibition on Members or Delegates of Congress from using or benefiting from a federal contract under 18 U.S.C. § 431),<sup>70</sup>
- the law generically applies to anyone who engages in the specified prohibited conduct regardless of whether a government official (e.g., prohibition on embezzlement of government funds under 18 U.S.C. § 641),

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<sup>70</sup>This determination was made in the first instance by reference to the law's language defining coverage or scope. However, in some instances, we utilized opinions from Office of Legal Counsel (OLC), Department of Justice. For example, we relied on an OLC opinion concerning the proper interpretation of the terms "officer" and "employee" when they are contained in provisions under title 18 of the United States Code. 29 Op. Off. Legal Counsel 1 (2005) (for purposes of title 18 provisions, unless otherwise defined, the definitions of "officer" and "employee" contained in 5 U.S.C. § 2104 and § 2105, respectively, can be used).

- the law's application to the President or Vice President is unclear (prohibition on knowingly soliciting political contributions from any officer, employee, or person under 18 U.S.C. § 602), or
- the law's application to the President or Vice President is remote or unlikely to occur (e.g., prohibition on ex parte communications related to administrative hearings in 5 U.S.C. § 557(d)).

However, we do include some laws otherwise excludable under these criteria where we determined doing so was necessary for an informed discussion. For example, we include the criminal conflict of interest provision 18 U.S.C. § 208 although it does not apply to the President or Vice President because it is a principal provision in executive branch ethics.

In addition to ethics statutes, we reviewed the Office of Government Ethics' (OGE) regulations on executive branch standards of conduct and executive orders pertaining to ethics in the executive branch to determine their application to the President and Vice President. We also reviewed the U.S. Constitution for provisions that address the conduct of the President or Vice President.

To identify the steps that the Trump administration has taken in relation to ethics, we reviewed Executive Order 13770, "Ethics Commitments by Executive Branch Appointees," and related guidance from OGE.

To identify how a potential ethics violation by a President or Vice President might be addressed, we reviewed federal statutes, regulations, the U.S. Constitution, and federal case law. Additionally, we reviewed opinions of the Office of Legal Counsel (DOJ), Congressional Research Service publications, law review and journal articles, and other scholarly publications.

### **OGE's Information and Services Related to Ethics**

To identify the information and services related to conflicts of interest and financial disclosure OGE provided to major party campaign teams prior to the election and to the Trump-Pence Transition Team after the election, we reviewed relevant information that OGE developed for the Trump-Pence Presidential Transition and made publicly available on its web page, such as guidance on the nominee financial disclosure review process. We also met with OGE officials to understand how and when information and services were made available to both major campaign teams and to the Transition Team. In addition, we reviewed e-mail communication between OGE and Transition Team staff.

To determine how the Transition Team used the information and services provided by OGE after the election, we obtained and reviewed written documentation from OGE summarizing the information provided and the services that the Transition Team participated in and we reviewed e-mail communication between OGE and the Transition Team. We also interviewed OGE officials and acquired OGE data for nominee financial disclosure reports received. To assess the reliability of OGE's data, we interviewed OGE officials knowledgeable about the data. Based on this information, we determined the data points were sufficiently reliable for the purposes of our reporting objective.

To describe how the information and services provided for the Trump-Pence transition compare to the Obama-Biden transition, we interviewed OGE officials.

### **Funds for the Trump-Pence Presidential Transition**

In reviewing the funds for the presidential transition, we examined (1) how much federal funding was made available for the post-election Trump-Pence transition, (2) what were GSA's processes for managing the federal funding made available to the incoming administration during the Trump-Pence transition, (3) the types and amounts of reported expenditures made with the federal funding available to the incoming administration for the post-election Trump-Pence transition for the period ending on January 31, 2017, and (4) how much in private funds the Trump-Pence Transition Team reported collecting and spending.

The scope of our work was limited to the funds appropriated for post-election activities for the period ending on January 31, 2017, specifically those made available to the incoming administration during the Trump-Pence transition.<sup>71</sup>

#### Federal Funding Available for the Post-Election Presidential Transition

To describe how much federal funding was made available for the post-election presidential transition; we reviewed the Continuing Appropriations Act, 2017, as amended; the Consolidated Appropriations Act, 2017; the PTA, as amended; and the GSA fiscal year 2017 congressional justification.

#### GSA's Processes to Manage the Presidential Transition Funds

To describe GSA's processes to manage the federal funding made available to the incoming administration during the post-election presidential transition, we reviewed the memorandum of understanding (MOU) between GSA and President-elect Trump to understand the agreement established for processing funds for certain types of services and facilities (including goods). We also met with officials from GSA to discuss the processing of the different types of expenditures. Specifically, we discussed the manner in which GSA reviews, approves, and processes transition-related expenditures, including the recording and classification in its accounting system, and performed walk-throughs to obtain an understanding of the flow of information between GSA and the Transition Team.

#### Expenditures of Federal Funding Made Available to the Incoming Administration for the Post-Election Presidential Transition

To describe the types and amounts of expenditures made with the federal funding available to the incoming administration for the post-election presidential transition, we obtained the population of expenditures from GSA's accounting system covering the period of November 9, 2016, through January 31, 2017. To verify the completeness of the expenditure population for the period ending on January 31, 2017, we performed data reliability procedures by reconciling

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<sup>71</sup>Federal funding was made available for use beyond January 31, 2017. We followed up with GSA and obtained an update on the amount of expenditures made through the period ending on July 31, 2017. We did not perform any data reliability procedures to validate the information provided for that period.

the expenditure population to the Department of the Treasury's Government-Wide Accounting report for January 2017.

To identify our population for testing the expenditure classifications,<sup>72</sup> we obtained from GSA all expenditure transactions recorded for the post-election presidential transition for the period ending on January 31, 2017, and removed transactions for the outgoing administration, zero-dollar transactions, and transactions that canceled each other (offset transactions). After removing these transactions, the expenditure population for sampling contained 263 transactions totaling \$3,128,038.

We then used the object class codes<sup>73</sup> per GSA's accounting system and, for reporting purposes, categorized transactions as payroll, travel,<sup>74</sup> and other.<sup>75</sup> We selected 63 transactions across all expenditure categories totaling approximately \$3.09 million, almost 99 percent of the \$3.13 million in total expenditures for the period ending on January 31, 2017, to test for proper classification. These transactions were selected using different methodologies depending on the dollar value and volume of transactions within each expenditure category. Specifically, for each expenditure category, we either tested all transactions or selected a statistical or nonstatistical sample.<sup>76</sup> Table 6 describes the total count and dollar value of the transactions in the sample population and the transactions tested.

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<sup>72</sup>Our testing was limited to expenditure classifications to report on the types of expenditures made with federal funding. We did not test the dollar amounts within each expenditure category to provide any level of assurance that these were properly supported by documentation.

<sup>73</sup>The expenditure transactions were classified into three categories per the object class codes assigned by GSA based on the Office of Management and Budget (OMB), *Preparation, Submission, and Execution of the Budget*, OMB Circular No. A-11 (revised July 2016). Object classes are categories in a classification system that present obligations by the items or services purchased by the federal government.

<sup>74</sup>For testing purposes, we separated travel into two subcategories, charter and noncharter flights. We decided to do so because the sample population for charter flights consisted mainly of a few high-dollar value transactions while the sample population for noncharter flights consisted of a higher volume of low-dollar value transactions.

<sup>75</sup>Other expenditures consisted of payments made for supplies, equipment, shipping, and mail.

<sup>76</sup>A statistical sample is a representative sample of all transactions in the population, thus, the testing results can be projected to the greater population. For the portion of expenditures for which we selected a statistical sample, we planned our testing to be 95 percent confident with a tolerable error rate of 4.99 percent.



**Table 6: GSA's Post-Election Presidential Transition Expenditure Transactions for the Incoming Administration Tested by GAO**

Expenditure category	Total number of transactions in the sample population <sup>a</sup>	Total dollar value of transactions in the sample population <sup>a</sup>	Total number of transactions tested	Total dollar value of transactions tested
Payroll	21	\$1,884,421	21	\$1,884,421
Travel <sup>b</sup>				
Charter flights	7	\$1,165,447	7	\$1,165,447
Noncharter flights <sup>c</sup>	126	\$30,478	30	\$8,030
Other <sup>d</sup>	109	\$47,692	5	\$30,638
<b>Total</b>	<b>263</b>	<b>\$3,128,038</b>	<b>63</b>	<b>\$3,088,536</b>

Source: GAO analysis based on data provided by the GSA for the period ending on January 31, 2017. | GAO-17-615R

<sup>a</sup>The total dollar value and number of transactions in the sample population reflect amounts after the removal of transactions for the outgoing administration, zero-dollar transactions, and offset transactions.

<sup>b</sup>For testing purposes, we separated travel into two subcategories, charter and noncharter flights, because the sample population for charter flights consisted mainly of a few high-dollar value transactions while the sample population for noncharter flights consisted of a higher volume of low-dollar value transactions.

<sup>c</sup>For noncharter flights expenditures, we selected a statistical sample due to the nature of the population (see note b) and planned our testing to be 95 percent confident with a tolerable error rate of 4.99 percent.

<sup>d</sup>Other expenditures consisted of payments made for supplies, equipment, shipping, and mail. For this expenditure category, we selected a nonstatistical sample because we combined several subcategories for which expenditure amounts varied widely.

For each transaction selected for testing, we reviewed supporting documentation, such as vendor invoices and payment records, to ensure the transaction was properly classified.

We also compared the types of expenditures per GSA's data to the types of expenditures permissible under the PTA, as amended, and the MOU between GSA and the Trump-Pence Transition Team to ensure consistency.

#### Private Funds Reported by the Trump-Pence Transition Team

To describe the amount of private funds the Trump-Pence Transition Team reported collecting and spending for the presidential transition, we obtained the contribution report the Transition Team submitted to GSA on February 19, 2017, which included contributions through February 15, 2017, pursuant to Section 6(a) of the PTA, as amended.<sup>77</sup> The report also included the amounts spent through February 15, 2017, by expense type. We did not perform any data reliability procedures to validate this information.

#### **State's Information and Services Related to Communication with Foreign Leaders**

To identify the information and services the Department of State (State) made available to the President-elect and Vice President-elect and Transition Team for communicating with foreign leaders, we reviewed State logs that tracked the documents provided to the Trump-Pence

<sup>77</sup>The PTA, as amended, requires the report on private funding to be submitted to GSA within 30 days after the inauguration. There are no additional reporting requirements beyond this.

Transition Team. We also met with officials in the Office of the Executive Secretariat to understand how information was prepared and provided to the Trump-Pence Transition Team.

To describe processes and services State makes available for communicating with foreign leaders, we met with officials from the State Department's Operations Center and the Office of the Chief of Protocol. We reviewed a consolidated list documenting the calls State connected between Vice President-elect Pence and foreign governments during the Trump-Pence transition and calls State connected between President-elect Obama and Vice President-elect Biden during the Obama-Biden transition. To develop a list of calls State conducted three separate searches replicating the search pattern to ensure accuracy. For the Obama-Biden transition, State used the following search parameters: November 1, 2008-January 20, 2009, search terms: -elect, Biden, Obama, Clinton, Vice President-elect, President-elect, and Secretary-designate. For the Trump-Pence transition, State used the following search parameters: November 1, 2016-January 20, 2017, search terms: -elect, Pence, Trump, Tillerson, Vice President-elect, President-elect, and Secretary-designate.

To compile the calls the President-elect and Vice President-elect made to foreign governments between the election and the inauguration, we analyzed press releases on the Trump-Pence Transition Team website that listed their phone calls with foreign leaders.

To determine the role of the Department of Defense and the Department of Homeland Security in providing information and services related to communications between foreign governments and the Trump-Pence Transition Team, we met with officials from both agencies. They indicated that their agency did not have a role.

Because several leaders of the Trump-Pence Transition Team moved to the Executive Office of the President following the inauguration, we contacted the White House Counsel to solicit the perspective of the Trump-Pence Transition Team on information and services made available and provided to them during the transition and obtain additional information on the transition. They did not respond to requests for an interview. We contacted the Office of the Vice President because Vice President Pence also served as the Chairman of the Trump-Pence Transition Team. The Office of the Vice President did not respond to our request to discuss this work. We also contacted the Executive Director and Chief Financial Officer of the Trump-Pence Transition Team. The Transition Team declined our request for an interview and stated that several areas of our report—related to the legal structure for a Presidential transition, funding for the Trump-Pence transition, and OGE's information and services—could be addressed by meeting with GSA and OGE officials. They declined to discuss the last area related to communications with foreign leaders due to pending investigations.

We conducted this performance audit from January 2017 to September 2017 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

## Enclosure II: Application of Ethics Provisions to the President and Vice President

The President and Vice President are subject to some, but not all, of the ethics provisions applicable to employees in the executive branch, as discussed below. While our discussion focuses exclusively on application of ethics rules to the executive branch, some provisions apply across the branches of government. To address what ethics provisions apply to the President and Vice President, we consulted an Office of Government Ethics compilation of ethics statutes, among other things. For further details on our scope and methodology, see enclosure I.

### Bribery and Illegal Gratuities Provisions

The President and Vice President are covered by the prohibitions on accepting or soliciting bribes or illegal gratuities under the criminal provisions of 18 U.S.C. § 201.

### Criminal Conflict-of-Interest Statutes

The President and Vice President are generally not covered by the principal criminal conflict of interest provisions that apply to officers and employees of the Executive Branch. Unless otherwise noted, the President and the Vice President have been specifically exempted from the following statutory criminal provisions.<sup>78</sup>

- 18 U.S.C. § 203, which prohibits receipt of compensation for representational services involving particular matters in which the United States is a party or has a direct and substantial interest, including when those services are provided either personally or by another.
- 18 U.S.C. § 205, which prohibits personally representing another (with or without compensation) before any court, federal agency, or another federal entity in connection with any particular matter in which the United States is a party or has a direct and substantial interest.
- 18 U.S.C. § 207, the “revolving door” statute, which generally prohibits former federal employees from engaging in certain representational activities after leaving government service.
  - The Vice President is subject to some of the prohibitions in section 207. Specifically, the Vice President is prohibited for two years after leaving government service, from knowingly communicating or appearing before (with the intent to influence) certain officials on behalf of others seeking official action by an executive branch officer or employee.<sup>79</sup> The Vice President is also prohibited for one year after leaving government service, from knowingly representing or aiding or advising a foreign entity<sup>80</sup> with the intent to influence a decision of an officer or employee of the United States.<sup>81</sup>

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<sup>78</sup>18 U.S.C. § 202(c).

<sup>79</sup>18 U.S.C. § 207(d).

<sup>80</sup>A foreign entity means the government of a foreign country or a foreign political party. See 18 U.S.C. § 207(f)(3).

<sup>81</sup>18 U.S.C. § 207(f).

- 18 U.S.C. § 208, which prohibits personal and substantial participation in a particular government matter that will affect the individual's own financial interests or the financial interests of those imputed to the individual (including spouse, minor child, outside organization in which the employee serves as an officer, director, trustee, general partner, or employee, or a person with whom the employee is negotiating for, or has an arrangement concerning, prospective employment).
- 18 U.S.C. § 209, which prohibits employees from receiving supplementation of their government salary. No source other than the government can pay an employee for performing government service.<sup>82</sup>

### Public Financial Disclosure Provisions

The President, Vice President, and senior officers and employees in the Executive Branch are required by the Ethics in Government Act (EIGA) of 1978, as amended, to file public reports of their financial interests. Generally, public financial disclosure reports must be filed within 30 days of assuming a position (new entrants), annually (by May 15<sup>th</sup> each year and covering the financial interests held in the preceding calendar year), and within 30 days after termination of service.<sup>83</sup>

The President and Vice President are not required to file a disclosure report upon assuming office as they were both required to file a report as candidates for office.<sup>84</sup> The President and Vice President are not required to file an annual financial disclosure report until the second year of their first term in office, as they would not have served during the period covered by the report to be filed in the first year.<sup>85</sup> For example, President Trump's and Vice President Pence's first annual disclosure report filed as President and Vice President will be due in May of 2018.<sup>86</sup>

Generally, an annual public disclosure report<sup>87</sup> includes the following:

- positions held by filer outside the government;
- filer's assets and income relating to nonfederal employment (income and retirement accounts, partnership shares, assets related to filer's business);
- filer's employment agreements and arrangements;

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<sup>82</sup>The Domestic Emoluments clause of the U.S. Constitution, however, prohibits the President from receiving additional compensation.

<sup>83</sup>5 U.S.C. app. § 101.

<sup>84</sup>Candidates for President and Vice President are required to file "candidate reports" under the EIGA. 5 U.S.C. app. § 101(a) and (c). Disclosure reports of candidates which are to be filed at least 30 days before election are filed with the Federal Election Commission (FEC). 5 U.S.C. app. § 103(e). FEC is to review and send copies of these reports to OGE for its review. 5 C.F.R. § 2634.602(e).

<sup>85</sup>An annual financial disclosure report is not required where the individual did not perform services for more than 60 days during the covered period (i.e., calendar year 2016). 5 U.S.C. app. § 101(d).

<sup>86</sup>Consistent with tradition, President Trump and Vice President Pence filed their individual financial disclosure report in June and May of 2017, respectively, that covers calendar year 2016.

<sup>87</sup>Unlike annual reports, new entrant and nominee reports are required to include the filer's sources of compensation exceeding \$5,000 a year.

- spouse's assets and income relating to nonfederal employment;
- other assets and income;
- transactions;
- liabilities; and
- gifts and travel reimbursements.

Generally, public disclosure reports are filed with the designated agency ethics official (DAEO) or his delegate at the agency where the filer is employed.<sup>88</sup> The DAEO reviews for compliance with reporting requirements and to determine whether any interest or position disclosed violates or appears to violate, among other things, any applicable conflict of interest provision. If the report is complete and the interests and positions reported do not indicate any apparent violations of applicable laws, rules, or regulations, the DAEO certifies the report accordingly.<sup>89</sup> Additionally, copies of reports of presidential appointees in (and nominees to) positions which are subject to Senate confirmation (other than members of the uniformed services) are also to be forwarded to OGE for review and certification.<sup>90</sup>

Public disclosure reports of the President and Vice President are filed with OGE.<sup>91</sup> According to OGE officials, prior to OGE's review of these reports, the DAEO for the White House Office reviews and certifies the President's report and the DAEO for the Office of the Vice President reviews and certifies the Vice President's report. OGE reviews and certifies the President's and Vice President's reports for compliance with filing and reporting requirements, but OGE officials told us that it does not review for financial conflicts of interest in the same manner as it would for the reports from other filers for whom OGE has review responsibility, because neither the President nor Vice President are covered under most of the criminal conflict of interest statutes or standards of ethical conduct for employees of the executive branch.<sup>92</sup>

Additionally, under the Stop Trading on Congressional Knowledge Act (STOCK Act), senior executive branch employees, including the President and Vice President, are required to file periodic transaction reports no later than 45 days after the sale, purchase, or exchange of stocks, bonds, and certain other assets.<sup>93</sup>

Generally, public disclosure reports are made available to the public by the filer's agency.<sup>94</sup> OGE is required to provide online access to the reports of certain officials whose reports are

<sup>88</sup>5 U.S.C. app. § 103(a); 5 C.F.R. § 2634.602(a).

<sup>89</sup>5 U.S.C. app. § 106(b)(1); 5 C.F.R. § 2634.605(b).

<sup>90</sup>5 U.S.C. app. §§ 103(c) and 106(b)(1). 5 C.F.R. § 2634.602(c)(1)(vi). DAEOs are to review reports prior to transmitting to OGE. 5 C.F.R. § 2634.602(c)(2). See 5 C.F.R. § 2634.605(c) for the expedited procedure used in the case of reports to be filed by individuals nominated by the President for positions subject to Senate confirmation.

<sup>91</sup>5 U.S.C. app. § 103(b). 5 C.F.R. § 2634.602(b).

<sup>92</sup>18 U.S.C. § 202(c); 5 C.F.R. § 2635.102(h).

<sup>93</sup>Pub. L. No. 112-105, 126 Stat. 291 (April 4, 2012). Section 2(3) of Pub. L. No. 112-105 defines "executive branch employee" as including the President and Vice President. 5 U.S.C. app. § 103(l). The requirement to file periodic transaction reports begins immediately upon commencing service.

<sup>94</sup>5 U.S.C. app. § 105; 5 C.F.R. § 2634.603.

reviewed by OGE, including the President and Vice President and high-level presidential appointees subject to Senate confirmation.<sup>95</sup>

### Prohibitions under the Stop Trading on Congressional Knowledge Act

Under the STOCK Act, the President and Vice President are subject to a variety of ethics provisions that apply to executive branch employees. All executive branch employees, including the President and Vice President, are prohibited from

- using nonpublic information derived from their official positions for private profit;<sup>96</sup>
- engaging in insider trading;<sup>97</sup> or
- intentionally influencing an employment decision or practice of a private entity solely on the basis of partisan political affiliation.<sup>98</sup>

Executive branch employees subject to public financial disclosure requirements, including the President and Vice President, are also prohibited from participating in an initial public security offering.<sup>99</sup> Additionally, these employees are covered under requirements pertaining to negotiating for future employment. If an employee commences negotiating for or enters into an agreement with a nonfederal entity for future employment or compensation, he or she is required to

- file a statement notifying the employee's supervising ethics office of such negotiations (including the name of the nonfederal entity) within 3 days after commencing such negotiations, and
- file notice of his or her recusal.<sup>100</sup> An employee is required to recuse him or herself from official duties whenever there is a conflict of interest, or appearance of a conflict of interest, with respect to any nonfederal entity identified in the notification statement.<sup>101</sup>

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<sup>95</sup>5 U.S.C. app. § 105 and § 11(b) of the Stock Act, as amended, set forth in notes to section 105.

<sup>96</sup>Section 9(a) of Pub. L. No. 112-105.

<sup>97</sup>Section 9(b) of Pub. L. No. 112-105. This provision was intended to affirm that the insider trading prohibitions arising under the securities laws apply to executive branch employees (as defined to include the President and Vice President). See 15 U.S.C. § 78u-1(h). The U.S. Securities and Exchange Commission is responsible for investigating and seeking civil penalties for violations of this and related prohibitions.

<sup>98</sup>Section 18 of Pub. L. No. 112-105, *codified at* 18 U.S.C. § 227. Prior to the STOCK Act, this criminal provision only applied to Senators, Representatives, and employees of either House of Congress.

<sup>99</sup>Section 12 of Pub. L. No. 112-105. See 15 U.S.C. § 78u-1(i).

<sup>100</sup>Section 17 of Pub. L. No. 112-105. The supervising ethics office for executive branch employees is typically OGE. 5 U.S.C. app. § 109(18)(D). However, for purposes of these STOCK Act requirements, OGE has determined that the supervisory ethics office should be the employing agency's DAEO. See OGE Advisory LA-12-01 (2012). Consistent with this legal advisory, the supervising ethics office for the President is the ethics office for the White House Office and the supervising ethics office for the Vice President is the ethics office for the Office of the Vice President.

<sup>101</sup>Section 17 of Pub. L. No. 112-105. While this is not a criminal provision, it is similar to the recusal requirement under 18 U.S.C. § 208 which attributes to an employee the financial interests of an entity with which the employee is negotiating or has an arrangement concerning prospective employment. As such, an employee may not participate personally and substantially in a particular matter that has a direct and predictable effect on the financial interests of any person with whom he has, or is negotiating for, an agreement for future employment or compensation. See OGE Advisories LA-12-01 (2012), LA-13-06 (2013), and LA-16-10 (2016).



## Standards of Conduct and Statutes Prohibiting Gifts

The President and Vice President are subject only to a portion of the executive branch standards of ethical conduct regulations.<sup>102</sup> The portions of the regulations that address conflicting financial interests, impartiality in performing official duties, seeking other employment, misuse of position, and outside activities do not apply to the President or Vice President.<sup>103</sup>

The President and Vice President are covered under the portion of the standards of conduct regulations that implement the civil statute prohibiting gifts to federal employees, 5 U.S.C. § 7353.<sup>104</sup> This statute generally prohibits, among other things, the solicitation or receipt of gifts from those whose interests may be substantially affected by the performance of the employee's official duties. However, the President and Vice President are permitted to accept gifts under circumstances ordinarily prohibited because of considerations such as protocol and etiquette relating to the conduct of the President and Vice President's offices.<sup>105</sup> Accordingly, the President and Vice President are only prohibited from accepting any gift on his or her own behalf, or on behalf of any family member, where

- such acceptance would violate the criminal provisions on bribery or illegal gratuities under 18 U.S.C. § 201;
- such acceptance would violate the U.S. Constitution;
- such acceptance was in return for being influenced in the performance of an official act; or
- the offer of the gift was solicited or coerced through the use of (or permission to use) the President's or Vice President's position or authority.<sup>106</sup>

Another portion of the regulations implement the civil statute which prohibits gifts among employees, 5 U.S.C. § 7351. This statute generally prohibits superiors from accepting gifts from subordinates and subordinates from giving such gifts.<sup>107</sup> While the President and Vice President are not covered under this statute, OGE notes that a President or Vice President would be prohibited from accepting a gift from an employee to the extent it constituted a violation of the

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<sup>102</sup>5 C.F.R. § 2635.102(h). OGE's standards of conduct regulations implement the principles of ethical conduct established under Executive Order No. 12674, *Principles of Ethical Conduct for Government Officers and Employees*, 54 Fed. Reg. 15159 (Apr. 12, 1989) as amended, Exec. Order No. 12731, 55 Fed. Reg. 42547 (Oct. 17, 1990). The President and Vice President are not subject to the standards of ethical conduct imposed by the executive order.

<sup>103</sup>The definition of "employee" in the standards of conduct excludes the President or Vice President, except for purposes of subparts B and C (pertaining to gifts). 5 C.F.R. § 2635.102(h).

<sup>104</sup>This prohibition covers the President and Vice President as they hold elective positions in the executive branch. 5 U.S.C. § 7353(d)(2).

<sup>105</sup>5 C.F.R. § 2635.204(j). An additional consideration is that the President and Vice President are required to report gifts in their public disclosure reports which OGE observes could provide restraint on their acceptance of gifts. See *Standards of Ethical Conduct for Employees of the Executive Branch*, 56 Fed. Reg. 33778, 33782-83 (July 23, 1991).

<sup>106</sup>5 C.F.R. § 2635.204(j); 5 C.F.R. § 2635.205(a) and (b).

<sup>107</sup>5 U.S.C. § 7351; 5 C.F.R. part 2635, subpart C.

restrictions noted above, such as accepting a gift in return for being influenced in the performance of an official act.<sup>108</sup>

### Outside Earned Income and Employment Limits on Certain Noncareer Employees

The President and Vice President are not subject to limitations on outside earned income and employment under the EIGA applicable to certain noncareer employees.<sup>109</sup> Under this law, covered noncareer employees such as senior-level presidential appointees<sup>110</sup> and other senior level political appointees are prohibited from

- receiving outside earned income in any calendar year (attributable to that calendar year) in excess of 15 percent of the annual rate of basic pay for level II of the Executive Schedule;<sup>111</sup>
- receiving compensation for practicing a profession involving a fiduciary relationship (or being affiliated with or employed to perform professional duties by an entity which provides services involving a fiduciary duty), or allowing the use of his or her name by such an entity;
- receiving compensation for serving as an officer or board member of any association, corporation, or other entity; and
- receiving compensation for teaching without first having obtained advance authorization.<sup>112</sup>

### Executive Order No. 13770

President Trump issued an order which requires noncareer appointees in executive agencies to sign an ethics pledge under which they are contractually bound to adhere to specified restrictions.<sup>113</sup> This executive order covers full-time, noncareer Presidential or Vice Presidential appointees, noncareer Senior Executive Service appointees, and other appointees in positions with confidential or policy-making responsibilities.<sup>114</sup> The order does not cover the President or Vice President.

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<sup>108</sup>The President and Vice President are excluded from the definition of official supervisor. 5 C.F.R. § 2635.302(b).

<sup>109</sup>5 U.S.C. app. § 505(2); 5 C.F.R. § 2636.102(c). However, the Domestic and Foreign Emoluments clauses discussed below provide limitations on the President's and Vice President's receipt of outside compensation.

<sup>110</sup>Covered senior-level presidential appointees do not include positions within the uniformed or Foreign Service.

<sup>111</sup>The annual rate of basic pay for level II in 2017 is \$187,000.

<sup>112</sup>5 U.S.C. app. §§ 501-02. Employees appointed by the President to certain full-time noncareer positions are banned from receiving any outside earned income during the individual's presidential appointment. Section 102(a) of Executive Order No. 12674, *Principles of Ethical Conduct for Government Officers and Employees*. 54 Fed. Reg. 15159 (Apr. 12, 1989) as amended, Exec. Order No. 12731, 55 Fed. Reg. 42547 (Oct. 17, 1990).

<sup>113</sup>Exec. Order No. 13770, *Ethics Commitments by Executive Branch Appointees*, 82 Fed. Reg. 9333 (Jan. 28, 2017). Executive agency for this purpose includes the Executive Office of the President.

<sup>114</sup>The order does not cover any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer. Section 2(b) of Executive Order No. 13770.

These restrictions include, among other things, a 2-year ban on participating in any particular matter involving specific parties that is directly and substantially related to the appointee's former employer or former clients. The executive order also prohibits a former appointee, for five years after terminating employment with an executive agency, from engaging in lobbying activities with respect to that agency.<sup>115</sup> A waiver of any of the restrictions contained in the order may be granted by the President or his designee. This order revokes and supersedes a similar order issued by President Obama.<sup>116</sup>

### Emoluments Clauses under the U.S. Constitution

Two clauses in the U.S. Constitution were designed to protect the independence of government officials and the President.<sup>117</sup> The Foreign Emoluments clause prohibits U.S. government officials, including the President and Vice President, from receiving gifts, a title, an office, or an emolument from a foreign government without the consent of Congress.<sup>118</sup> The Domestic Emoluments clause prohibits the President, during his term, from receiving additional compensation from the U.S. government and from receiving any other emolument from the U.S. government or a state.<sup>119</sup>

The Department of Justice, through its Office of Legal Counsel, noted in an opinion that emolument has been defined as any "profit or gain arising from station, office, or employment; reward, remuneration, salary." The Department of Justice has also stated that the history of these clauses suggests that the term emolument in this context has a strong connotation of payments which have a potential of influencing or corrupting the integrity of the

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<sup>115</sup>The obligations under this order are enforceable by the United States through available means, including but not limited to civil judicial proceedings for declaratory, injunctive, or monetary relief.

<sup>116</sup>Executive Order No. 13490, *Ethics Commitments by Executive Branch Personnel*, 74 Fed. Reg. 4673 (Jan. 21, 2009). OGE issued guidance on President Trump's order which, among other things, identifies parts of its prior guidance on President Obama's order that is applicable to the current order. See OGE Advisory LA-17-02 (2017) and LA-17-03 (2017).

<sup>117</sup>5 Op. Off. Legal Counsel 187, 188 (1981).

<sup>118</sup>The Foreign Emoluments clause states, "No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state." U.S. Const., art. I, § 9, cl. 8. "[P]resent" under the Foreign Emoluments clause is equated to gift. See 11 Op. Off. Legal Counsel 89, 90 (1987).

Congress has given its consent to the receipt of certain gifts under the Foreign Gifts and Decorations Act of 1966, as amended, which applies to the President and Vice President. The act permits the receipt and retention of gifts of minimal value offered and received as a souvenir or mark of courtesy, among other things. Gifts of more than minimal value may be accepted, in part, when to refuse would cause offense, embarrassment, or adversely affect foreign relations of the United States. However, these gifts are accepted on behalf of, and become the property of, the United States. 5 U.S.C. § 7342.

<sup>119</sup>The Domestic Emoluments clause states: "The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them." U.S. Const. art. 2, § 1, cl. 7.

recipient.<sup>120</sup> While both emolument clauses have been referenced in federal court cases, we did not identify any that meaningfully defined the scope of the term emolument for purpose of these clauses.<sup>121</sup>

#### Miscellaneous Criminal and Civil Provisions Applicable to the President and Vice President

- The President and Vice President are covered under the civil ‘nepotism’ statute, 5 U.S.C. § 3110. This provision prohibits a public official from appointing a relative to a civilian position in an agency over which the official exercises jurisdiction or control. The Office of Legal Counsel, DOJ, has concluded, however, that the White House Office is not an agency for this purpose.<sup>122</sup>
- The President and Vice President are subject to the criminal statute, 18 U.S.C. § 219, which prohibits a public official from engaging in conduct that would require an individual to register as an agent or lobbyist for a foreign government.
- The President and Vice President are subject to the criminal statute, 18 U.S.C. § 607, which prohibits soliciting or receiving political donations while in official duty workspace.

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<sup>120</sup>5 Op. Off. Legal Counsel 187, 188 (1981) (discusses application of the Domestic clause and explains the history and purpose of that clause as well as the Foreign Emoluments clause). See also 25 Op. Off. Legal Counsel 113 (2001) (in discussing the Foreign Emoluments clause, states the term emolument was intended to cover compensation of any sort arising out of an employment relationship, including contractual employment relationships).

<sup>121</sup>See, e.g., *United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 410 (D.C. Cir. 2006), *cert. denied*, 550 U.S. 903 (2007) (in case involving appeal of U.S. serviceman’s court martial for violating an order to add United Nations insignia to his uniform, appeals court affirms summary dismissal of claim that the requirement to wear the United Nations’ insignia (a patch and cap) violated the Foreign Emoluments clause) and *Griffin v. United States*, 935 F. Supp. 1, 6-9, 14-15 (D.D.C. 1995) (court stated that the portion of the Domestic Emoluments clause at issue addressed the Framers’ concern that the President should not have the ability to convert his or her office for profit but concluded that the clause would not be violated if former President Nixon’s estate was awarded compensation for the taking of his presidential papers. The court reasoned that the clause was not triggered because the papers were private property taken after Mr. Nixon left office and any compensation would be awarded after, not during, his term of office).

<sup>122</sup>41 Op. Off. Legal Counsel 1 (2017).

Enclosure III:

Comments from the Office of Government Ethics

UNITED STATES OFFICE OF  
GOVERNMENT ETHICS



August 18, 2017

J. Christopher Mihm  
Managing Director, Strategic Issues  
U.S. Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

RE: Draft Report GAO-17-615R, "Presidential Transition: Information on Ethics, Funding, and Agency Services."

Dear Mr. Mihm:

Thank you for the opportunity to comment on the U.S. Government Accountability Office's (GAO) draft report, "Presidential Transition: Information on Ethics, Funding, and Agency Services." The Office of Government Ethics (OGE) appreciates GAO's work on this report, in particular the extensive acknowledgement of OGE's significant efforts and accomplishments with regard to recent Presidential transitions.

OGE has a vital role in the Presidential transition. OGE supports the President's constitutional duty to nominate and appoint officers to the executive branch by working to identify and resolve the potential conflicts of interest of incoming leaders, so that top leadership positions can be filled quickly. This work is especially critical during a Presidential transition when, due to vacancies in most senior leadership positions, the nation is particularly vulnerable to national security and other risks.

As reflected in this report, OGE takes these responsibilities very seriously and invested tremendous effort to fully prepare its staff, stakeholders, and ethics officials across government to ensure the ethics aspects of transition was a smooth part of the transfer of power. In advance of the election, as well as in the post-election period, OGE actively participated as a statutory member of the Agency Transition Directors Council and worked extensively with non-governmental organizations, Congress, and executive branch service provider agencies such as DOJ, GSA, OPM, and NARA to prepare and implement an effective and efficient Presidential transition. OGE worked directly with both major party candidates' campaigns to assist them with the applicable government ethics requirements and offered the incoming transition team extensive services and resources, as accurately described in this report. While OGE cannot control an Administration's pace or process of announcing nominations, OGE ensured that the agency and broader ethics program was prepared to play its part when asked.

To assist the campaigns, transition team, and incoming Administration based on its extensive experience, OGE strongly and repeatedly recommended and continues to recommend that: (1) Presidential campaigns receive in-depth briefings and training by OGE prior to the election; (2) the Presidential transition team and the incoming Administration have a government ethics expert in place



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J. Christopher Mihm  
Page 2

immediately after the election to begin mitigating ethical risk for the incoming Administration and coordinating with OGE to identify and resolve the potential conflicts of interest of incoming Administration leaders; (3) the Presidential transition team be prepared to begin submitting completed financial disclosure packages to OGE for preclearance immediately following the election, including taking advantage of OGE's offer of additional training, resources, and expertise, including early consultation on prospective nominees with potentially conflicting financial holdings; (4) the Presidential transition team and, post inauguration, the new Administration not announce nominees until OGE has precleared their financial disclosure reports; (5) the President and Vice-President establish a qualified trust or limit their investments to non-conflicting assets; (6) the incoming Administration work with OGE on any executive branchwide ethics initiatives; and (7) the incoming Administration emphasize the importance of ethical leadership to all incoming leaders.

OGE's experience in this most recent transition served to reinforce, in particular, the importance of the Presidential transition team and the incoming Administration having a dedicated government ethics expert and using the preclearance process for nominee financial disclosures. Employing a full-time government ethics expert ensures that the transition team and the incoming Administration has a knowledgeable individual who focuses on reducing ethical risk for the incoming Administration and coordinating with OGE on the nominee financial disclosure process. In addition, OGE continues to strongly recommend using the preclearance process, which is vital to a smooth nomination process for the incoming Administration. Preclearance is the pivotal point in the nominee process when the incoming Administration receives staff-level assurance from OGE that a nominee's financial disclosure report is ready to be certified. OGE developed this process decades ago to ensure that ethics issues are resolved before a Presidential nomination is announced. This process protects both the President, in exercising the constitutional authority to nominate officers to executive branch positions, and the privacy of citizens who may choose to withdraw from consideration before being publicly nominated.

Finally, OGE takes this opportunity to reiterate that, with regard to a successful transition from an ethics perspective, tone from the top matters. At the highest levels of the executive branch, incoming leaders must strongly signal the importance of high ethical standards. These leaders have a responsibility to promote a strong ethical culture and demonstrate support for the executive branch ethics program, so that the nation's citizen can have confidence in the impartiality of the decision making of their government.

Sincerely,



David J. Apol  
Acting Director



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