



Executive Branch Ethics and Financial Conflicts of Interest: Disclosure

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[Recent media reports](#) indicate that the 116th Congress may address government ethics reform, including conflicts of interest among executive branch officials. Federal officials have a basic duty not to allow private gain to influence their government service, which includes “not hold[ing] financial interests that conflict with the conscientious performance of duty.” [Federal statutes](#), as well as a [code of conduct](#) for executive branch employees, make this principle part of a federal regulatory scheme intended to prevent officials from benefitting personally from their offices. The current federal statutory scheme regulating conflicts between an official’s personal financial interests and his or her official duties has three prongs: disclosure, disqualification, and divestiture (i.e., a “3-D system”). This sidebar is the first in a three-part series examining conflicts of interest in the executive branch.

Current Scope of Disclosure Requirements

To make conflicts of interest between officials’ public duties and private financial interests transparent, Congress [enacted](#) mandatory disclosure requirements to “promote the integrity of public officials and institutions.” The [Ethics in Government Act](#) requires [high-level elected and appointed officials](#) to disclose a range of personal interests at various times, including upon entering public service, annually during such service, and upon departing their position. In 2012, Congress enacted the [STOCK Act](#), which amended the Ethics in Government Act to increase transparency, in part, through more frequent reporting requirements and broader availability of disclosure reports.

Under these statutes, financial disclosure reports [must be filed](#) at various stages of a covered official’s government service. An initial report, which must be filed upon entering government service, discloses information about that individual’s (1) income; (2) financial assets, (3) liabilities; (4) outside positions; and (5) agreements and continuing relationships with other employers. Following an individual’s appointment or election, he must file an annual report that includes three additional categories of information: gifts, financial transactions, and the cash value of any interest in a blind trust. In addition to annual reports, covered officials must file [periodic transaction reports](#) when they engage in certain financial transactions. Finally, officials must provide final reports covering all eight information categories when they leave a covered position.

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Prior to passage of the [STOCK Act](#) and its [subsequent amendments](#), mandatory financial disclosures were available for public inspection [only by request](#) to the official's employing agency. Although the STOCK Act originally required all disclosures to be posted to the internet for public inspection, the current provisions require internet disclosure for only the most senior officials in the executive branch—the President, Vice President, and appointees and nominees to positions classified at [Level 1](#) and [Level 2](#) of the Executive Service. Disclosures by officials in those positions are [available](#) on the Office of Government Ethics' website for immediate public access. Financial disclosure forms filed by other high-ranking employees who are subject to these rules are available [by request](#).

Constitutionality of Financial Disclosure Requirements

Generally

In addition to upholding the constitutionality of disclosure requirements in other [contexts](#) (e.g., [campaign finance](#)), the Supreme Court has let stand a lower court [decision](#) recognizing the constitutionality of financial disclosures by officials under ethics laws. In that case, the U.S. Court of Appeals for the Fifth Circuit considered a [challenge](#) brought by federal judges who alleged that their disclosure requirements violated several constitutional principles, including separation of powers and privacy. The court upheld the law, rejecting each claim challenging Congress's authority to require them to disclose their financial interests. Although that challenge concerned members of the judicial branch, the court's opinion appears to address the constitutional issues broadly.

Noting that Congress intended the disclosure requirements “to increase public confidence in all three branches of the federal government,” the court's opinion indicates that public officials, regardless of whether they are elected or appointed, can be subject to transparency standards. The court rejected the judges' assertion that Congress lacked authority to impose disclosure requirements because they were unelected officials in the judicial branch. Instead, it upheld the statute as “justified by the promotion of important objectives within the constitutional authority of Congress.” To that end, the court explained that even unelected officials like judges “are important governmental officers in whom the public at large has a substantial interest.”

Likewise, the court rejected the argument that mandatory disclosure would interfere with officials' personal right to privacy, citing its previous [agreement](#) with “the majority of courts considering the matter” when it held that disclosure requirements for elected officials was constitutional. It cited [precedent](#) acknowledging that disclosure of personal information, like any government action, may have some influence on the official's personal life but concluded that “any influence does not rise to the level of a constitutional problem.” The Fifth Circuit relied upon a balancing test, “weigh[ing] the injuries imposed by a legislative act against the governmental interests furthered by the act,” to conclude that the government's interest in deterring public officials from misusing their influence outweighed the burdens of disclosure on individual officials. The court expressly stated again in the context of the privacy claim that the governmental interests prevailed regardless of whether the officials subject to the disclosure requirements were elected or appointed to their posts.

More recently, a [federal district court](#) in Maryland recognized some limits to federal disclosure requirements based on employee rights to privacy. In a challenge to public posting requirements initially enacted under the STOCK Act, the court recognized that the governmental interest in disclosure, though compelling, “is not insurmountable.” The STOCK Act, in part, requires public posting of financial disclosures on the internet, as well as creation of an online database to allow the public to search, sort, and download the posted information. Considering a challenge brought by senior executive employees (excluding the President, Vice President, cabinet secretaries, and other presidentially appointed positions requiring Senate confirmation), the district court held that the government's compelling interests in

detering corruption and conflicts of interests “fail to outweigh [the claimant officials’] privacy and security interests.” The court contrasted making the disclosure forms publicly available via the internet with the traditional method by which the public could request disclosures from the employing agency. The court described a “unique confluence of circumstances” in the case, including the degree of disclosure because of “unfettered Internet access” to the disclosed information and the security concerns associated with posting “complete personal financial information of all senior officials on the internet.” Consistent with the court’s decision, Congress amended the STOCK Act to require posting for public access of only the most senior government officials’ disclosures on the internet (i.e., the President, Vice President, and positions classified at [Level 1](#) and [Level 2](#) of the Executive Service).

Applicability of Disclosure Requirements to Senior Executive Officials

Disclosure is the only prong of the 3-D system governing conflicts of interest that applies to the President and Vice President. Congress expressly exempted both positions from disqualification requirements and neither position is subject to agency specific divestiture rules, which may apply to other executive branch officials. Thus, disclosure is the principal mechanism regulating potential conflicts between a President or Vice President’s financial interests and public office. Accordingly, the current regulatory scheme appears to rely on the electorate addressing any potential conflicts through the ballot box.

To that end, [candidates](#) for President and Vice President must file initial financial disclosure forms after declaring their candidacy and annually thereafter for “each successive year an individual continues to be a candidate,” as well as reports that are required if the candidate is elected. Additionally, federal campaign finance law requires disclosure of campaign contributions received and spent. Under the [Federal Election Campaign Act \(FECA\)](#), candidate campaign committees must [register](#) with the [Federal Election Commission \(FEC\)](#) and comply with periodic [disclosure requirements](#). Thus, candidates must file reports that show the total amount of all [contributions](#) received, including those from individuals, political action committees (PACs), and parties, and the identity of any person who contributes more than \$200 during a calendar year. There are no additional requirements for disclosure of other financial information, e.g., tax returns, by candidates, although candidates may [release](#) their returns or related data voluntarily.

Similarly, the Ethics in Government Act also [requires](#) nominees for appointment to positions that require Senate confirmation to file an initial financial disclosure report within five days of the President’s transmittal of the nomination to the Senate. The nominee must provide updated information no later than the date of the first hearing to consider the nomination, and the statute expressly allows the committee considering the nomination to request “as a condition of confirmation, any additional financial information from any Presidential nominee.” Because these officials are not elected, authority to request additional information to identify potential conflicts of interest before exercising the constitutional power to consent to the nomination provides an additional safeguard against conflicts of interest in the highest executive branch positions.

While disclosure requirements’ applicability to the most senior executive branch officials has not been subject to a direct legal challenge, the judicial opinions discussed suggest that such a challenge likely would not be successful. The Fifth Circuit [emphasized](#) the significance of the government’s interest in accountability of government officials across all branches of government and particularly those whose official actions “have dramatic impact upon the lives of every citizen in this country.” The [federal district court](#) in Maryland expressly noted that it was not ruling the internet publication requirements as facially unconstitutional, specifically citing their continued applicability to these most senior government officials. Furthermore, disclosure requirements do not appear to interfere with the President’s or Vice

President's constitutional duties because they do not bar the President or Vice President from carrying out any executive actions, but instead only require the individual to report financial interests.

Conclusion

Should Congress consider legislation addressing financial conflicts of interests for executive branch officials, it may revisit disclosure requirements. Disclosure requirements provide transparency so that the electorate, the Senate, and employing agencies are aware of potential conflicts of interest that presidential candidates, executive branch nominees, and other high-ranking executive officials may have. Existing precedent has consistently upheld disclosure requirements, although public access to such information over the internet may be limited in some instances.

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