Implementing the Federal Assets Sale and Transfer Act (FASTA), Maximizing Taxpayer Returns and Reducing Waste in Real Estate

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For several decades, I have taught and published books and articles on corporate and securities law as well as government ethics. Much of my work has focused on the problem of monitoring the role of fiduciaries – whether corporate executives or government officials -- in business transactions and avoidance of self-dealing. Unfortunately, self-dealing by officers and directors remains a fact of life in some business organizations. Self-dealing is an even greater risk in government where collective action by taxpayers is more difficult than in even the largest of corporations, securities laws and corporate fiduciary duty laws often do not apply, and self-dealing politicians can divert the public's attention with emotionally driven political issues and then accuse their critics of being politically motivated.

Government real estate is one of the most vulnerable areas for self-dealing. The federal government owns a vast amount of real estate, indeed far more than any state government or private real-estate owner. The Federal Assets Sale and Transfer Act (FASTA) sets forth procedures for the government to sell and lease that real estate to assure efficiency, honesty and fairness to taxpayers.

My testimony does not analyze the specific provisions of FASTA but instead discusses broader concepts of ethics in government that must be observed in the implementation of FASTA. I also point out specific risks of elected and unelected government officials abusing their power over our government's vast real estate holdings to cut sweetheart deals for themselves, their family, campaign contributors and friends. There are substantial risks from allowing such unethical conduct by government officials including waste of taxpayer funds and loss of public confidence in government.

A core principle underlying my analysis is that the private sector is inherently different from government because we expect people to enrich themselves in the private sector while adding value to the overall economy, but we do not expect, and indeed condemn self-enrichment in government. A government that allows its officials to enrich themselves from public service beyond the salary allotted to their office is kleptocracy (e.g. theft). Although kleptocracy may be a fact of life in many countries in the world, including some of the largest economies, Americans are not prepared to accept it here, and it is the duty of Congress to prevent it.

There are two fundamental ways of addressing conflicts of interest in business transactions. Imposing a flat prohibition on certain types of transactions by certain categories of fiduciaries is one approach. As I will discuss below this is often the more effective and simplest approach. Another more complex, and sometimes workable, approach is to allow a transaction with a fiduciary but impose rigorous mechanisms to monitor it for substantive and procedural fairness.

The first approach is incorporated into the law of trusts which often prohibits transactions between a trustee acting in his own self-interest and the trust. Although there are some exceptions, the general rule is that while a trustee is allowed to buy and sell real estate on behalf of the trust, the trustee is not allowed in his personal capacity to buy or sell real estate in a transaction with the trust. The trustee who wants to engage in such a transaction with the trust usually steps down and is succeeded by another trustee. A person thus must choose between being a trustee of the trust and personally transacting with the trust. The same person cannot have both roles. The trustee’s profits from the trust are limited to the designated compensation received by the trustee for his services – no more and no less.

The second approach is embodied in much of corporate law which allows interested director and officer transactions provided they are (i) approved by a majority of the disinterested directors, (ii) approved by a majority of the disinterested shareholders, and/or are (iii) determined by a court or other neutral decision maker to be fair to the corporation and its shareholders. Most corporations implement stringent procedures to assure that these standards are complied with. Shareholders who are not happy with a transaction can challenge it with shareholder derivative suits or direct actions under state corporate law. In addition, federal and state securities laws also impose civil and criminal liability on anyone who misrepresents material facts, or fails to disclose material facts, about transactions. Although self-dealing by fiduciaries is a serious problem in the private sector, collectively these and other controls deter most of it.

Unfortunately most of these controls are absent in government. There is no parallel to the shareholder derivative suit. Individual citizens are often denied standing in their capacity as taxpayers to sue government officials for waste or self-dealing in government property. Whereas corporate officers and directors who lie in connection with securities transactions get sued, and can even go to jail, politicians tell lies – sometimes sarcastically characterized as "alternative facts" – to the public and get away with it. A corporate CEO who used speeches, press releases or social media or any other platform to communicate falsehoods to investors would at a minimum be removed and likely would be sued and perhaps even be put in jail. A politician who does the same may very well get re-elected.

For these reasons, it is far preferable that transactions involving government real estate and other government property be subjected to the first approach – a flat prohibition on business transactions between the government and its own officials.

When federal government property is sold, it should not be sold to a federal government official or to an entity in which a government official has a substantial financial interest. At a minimum the property should not be sold to a high ranking official – a Member of Congress or a cabinet officer or a member of the senior executive service -- who is in any way in a position directly or indirectly to influence the terms of the transaction. When federal property is leased, it should not be leased to a federal official or to an entity in which the official has a substantial financial interest. None of the profits from operation of the property should be shared by the lessor with a federal official. If they are the lease should be terminated. This is the simplest, the most cost effective, and the easiest way to prevent self-dealing by federal officials in government property.

In sum, the government official, like the trustee of a trust, should be required to choose. He can either assume a fiduciary role in government bestowed upon him by election or appointment, or he can transact with the government and profit from contracts with the government. He cannot do both. He cannot stand on both sides of the transaction.

Although the law does not always impose such a rule, it is the better rule for protecting the interests of taxpayers. Government agencies, such as the General Services Administration (GSA) may choose to restrict who they contract with by imposing such a restriction in the sale or lease of real property. GSA and other agencies thus may insert in a contract of sale, lease or other contract a provision that prevents an interest in the property, or in the profits from operating the property from going to a federal government official. And in those instances where GSA or another agency has wisely chosen to protect taxpayers in this manner the contractual provision should be strictly enforced.[ii]

Attempts by government officials to weasel around such conflict of interest provisions in sales agreements, leases and other contracts – for example by diverting profits from operation of leased federal real estate to a trust of which the government official is a beneficiary – must be soundly rejected by GSA and by Congress in its oversight role over GSA. Contracts in government property are no place for setting up Enron style special purpose entities to receive monies that government officials are not themselves contractually entitled to receive.

Of course there are limits to this first approach – imposing a flat prohibition on contracting between the government and certain persons or corporations, trusts and other entities set up to benefit those persons. This approach works in the case of government officials themselves but such a prohibition is probably too broad if it were also to bar contracts with extended family members of government officials, friends and campaign contributors. The government should be allowed to contract with such persons, including conveying an interest in real property to such persons, but procedural and substantive measures should be implemented to assure that the taxpayers are receiving not only a good bargain, but the best possible bargain they can get.

And it is here that strict compliance with both the spirit and letter of FASTA and other applicable law is critically important. FASTA aims to reduce the inventory of federal property through sales and other transfers. It should not, however, become an excuse for federal officials to sell, lease or otherwise dispose of federal property at suboptimal times or at suboptimal prices in order to benefit private interests. Sweetheart deals for private interests, which may also be connected with friends or campaign contributors of federal officials, betray the taxpayers whose funds were used to acquire and maintain the federal properties in the first place (because the federal government has been running a deficit in almost every year for the past several decades, today's taxpayers are in effect still paying for expenditures that were made for government real estate many years ago).

It furthermore is crucial that laws be enforced, including the financial conflict of interest statute for federal employees, 18 U.S.C. 208, the

Office of Government Ethics impartiality rule, 5 CFR 2635.502, and the Emoluments Clause of the United States Constitution (prohibiting federal officials from receiving profits and benefits from dealings with foreign governments and entities controlled by foreign governments). Breach of any one of these critically important conflict of interest provisions by a federal official in connection with a sale, lease or other transfer or federal property should result in review of the contract itself for compliance with federal law and fairness to taxpayers, and in the case of larger contracts or contracts involving high ranking government officials, a thorough investigation by Congress.

In sum, federal officials charged with entering into, implementing and enforcing the terms of contract for the sale, lease or other disposition of federal property have a single overriding responsibility, which is to the federal government and the taxpayers who support it. It is the job of Congress to make sure that responsibility is carried out.

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[i] The opinions expressed in this testimony are my own and I am not testifying on behalf of any other person or organization.

[ii] There is considerable controversy over the GSA's lease for the Old Post Office building which, at the time the lease was entered into, was for the benefit of a private company owned by a private citizen, Donald. J. Trump. Mr. Trump's election to the presidency has raised significant issues under the lease and other applicable federal law. I am happy to provide my opinions on various aspects of this lease if requested by members of this Committee in questions after my testimony.