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Skadden

Political Law Alert

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Post-Election Issues (Inaugurations, Transitions, and Special Elections)

Now that the 2018 midterm elections are over, we must contend with legal issues that arise from activities related to federal, state and local inaugural and transition committees, as well as recounts and runoff elections. As this was not a presidential election year, the inaugural and transition committees will generally be at the state or local level.

Inaugural Committee Contributions and Inaugural Events

Making Contributions to Inaugural Committees: Successful candidates usually designate a separate nonprofit (either a Section 501(c)(3) or 501(c)(4)) to act as their inaugural committee. Although some state campaign finance laws, such as those in Kansas and Ohio, limit contributions to such inaugural committees,[1] a large majority of them do not regulate inaugural contributions. As a result, unless a company is subject to certain pay-to-play laws that specifically cover inaugural committees as described below, contributions by the company and its employees are unlimited in those states. Please note, however, that these jurisdictions may require an inaugural committee to disclose its donors. Moreover, if a successful candidate does not designate a separate nonprofit but uses his or her campaign committee, political party or PAC to pay for inaugural expenses, contributions would be subject to all of the restrictions and prohibitions of applicable campaign finance and pay-to-play laws. Given this dichotomy, it is important for donors to know the legal status of an inaugural committee before contributing to it. This includes not only monetary contributions (*e.g.*, via check) but also in-kind contributions, such as using company resources or paying for expenses to help with an inaugural event.

For financial institutions subject to a federal pay-to-play rule (MSRB Rule G-37 for broker-dealers that underwrite municipal securities and municipal advisors, SEC Rule 206(4)-5 for investment advisers, CFTC 23.451 for swap dealers, and FINRA Rule 2030 for broker-dealers that solicit investment advisory business), a contribution to an inaugural committee is directly covered under those rules and thus could trigger an automatic ban on business or compensation. Inaugural committee contributions also are covered under certain states pay-to-play laws, such as those in Michigan and New Jersey. Please note that these laws and rules also prohibit soliciting contributions to inaugural committees.

[1] In Kansas, contributions to inaugural committees are limited to $2,000 from any person. In Ohio, contributions to transition funds, which may be used to pay for inaugural celebrations, for the joint offices of governor and lieutenant governor are limited to $10,000 per donor, and for other statewide offices are limited to $2,500 per donor.

Inaugural Events and Swearing-In Ceremonies: Numerous inauguration-related events are expected to be held for successful candidates (such as a governor-elect). These may include inaugural balls, as well as breakfasts and luncheons celebrating inaugurations, or be related to viewing an inauguration or an inaugural parade. To the extent these events are held by inaugural committees (such as an official ball), paying admission to attend them would result in a contribution to the inaugural committee, subject to the considerations above. In contrast, if the events are held by third parties, such as a trade association or charity, paying for admission would not result in a contribution to the inaugural committee.

There are also the following considerations when it comes to these inaugural events:

Must Comply with Gift Rules: To the extent that such events involve government officials or employees, or tickets are provided to such official or employee, a company must ensure compliance with applicable gift and entertainment laws.

Special Ban on Paying for a Congressional Member's Swearing-In or Inauguration Day Receptions: House Ethics Committee guidance expressly states that lobbying firms and other private entities are prohibited from paying the costs of a member's swearing-in or inauguration day reception. Private entities also should avoid paying for such events held by U.S. senators. State and local laws vary regarding the permissibility of such payments.

Transition Committee Contributions and Transition-Related Activities

Contributing to Transitions: Similar to inaugural committees, the permissibility of making monetary or in-kind contributions to transition teams will depend on what type of entity the successful candidate uses to fund and organize the efforts. Transition teams are usually run out of a separately designated nonprofit (such as a 501(c)(4)) and, with a few exceptions, contributions to them are generally unlimited under state and local campaign finance laws. In contrast, to the extent that they are operated from campaign committees, party committees or PACs, they would implicate state and local campaign finance and pay-to-play laws. This includes not only monetary contributions (*e.g.*, via check), but also in-kind contributions, such as using company resources or paying expenses to help with the transition effort.

For financial institutions subject to a federal pay-to-play rule (MSRB Rule G-37 for broker-dealers that underwrite municipal securities and municipal advisors, SEC Rule 206(4)-5 for investment advisers, CFTC 23.451 for swap dealers, and FINRA Rule 2030 for broker-dealers that solicit investment advisory business), incurring transition expenses for an successful state or local candidate is directly covered under those rules and thus could trigger an automatic ban on business or compensation. Such transition expenses also are covered under certain state pay-to-play laws. Please note that these laws and rules also prohibit soliciting such transition expenses.

Corporate Executives Serving on Transition Teams: A corporate executive serving on a state or local transition team (such as for a governor-elect) raises several legal considerations, as described below:

Conflict of Interest Implications: Depending on the jurisdiction, a transition team member may be treated as a public official and as a matter of law or policy become subject to some or all of that state's or locality's conflict of interest laws.

Campaign Finance & Pay-to-Play Implications: Use of corporate resources, volunteering during working hours or the executive personally paying for expenses related to his or her volunteer activity may result in an in-kind contribution to the committee with the implications described above.

Possible Procurement Ethics Implications: Conflict of interest provisions in many state or local procurement laws prohibit a company from obtaining an unfair advantage by assisting in the preparation of the terms or specifications of an RFP and then bidding on that RFP. To the extent that the volunteer helps or advises the transition on RFPs or bidding processes, this conflicts issue may arise.

Possible Lobbying Implications: If a corporate executive's transition-related activities include communications with covered officials, and the communications are for the purpose of influencing covered decisions on behalf of his or her employer, then there may be registration and/or reporting implications under state or local lobbying laws.

Contributions to Recount Committees

Corporate contributions to federal recount committees are prohibited. For PACs and individuals, a separate per-election limit applies (*e.g.*, $2,700 for individuals, $5,000 for federal PACs) to a particular federal candidate's recount committee. A separate limit ($101,700 per year for individuals and $45,000 per year for federal PACs) applies to a national party committee's recount committee. The contributions are reportable by the recount committee.

Contributions to state or local recount committees are subject to state or local campaign finance law. They also may be subject to federal or state pay-to-play rules because recounts are typically paid for by campaign or party committees.

Contributions for Federal Special and Runoff Elections

Corporate contributions for federal special and runoff elections are prohibited. Such elections are treated as separate elections for limit purposes and a separate per-election limit applies ($2,700 for individuals, $5,000 for federal PACs). The contributions are reportable by the recipient committee.

Contributions to state or local special and runoff election committees are subject to state or local law and, of course, pay-to-play rules. Please note that state or local runoff elections may have different contribution limits under campaign finance law than previous primary and general elections.

Employees Considering Government Service and Post-Employment Restrictions on Those Leaving the Government

As one administration ends and another begins, many individuals will transition out of or into government roles. There are several federal and state rules that apply to employees leaving the private sector and entering government service. Bonus and separation agreements of those leaving the company to go into government service should be reviewed. Indeed, companies with an executive going into a senior level of government frequently obtain counsel to advise on the vetting process, personal financial disclosure requirements and related tax issues.

In contrast, some companies may seek to hire individuals leaving government service. Those employees often carry post-employment restrictions that impact the services they may provide their new employer. Moreover, in many cases there are rules as to if and when a company may discuss future employment with such government official or employee.

Engaging New Lobbyists and Consultants for a Change in Administrations

When there is a change in administration or a change in the party that controls a federal or state legislative body, companies will often consider engaging new lobbyists or government affairs consultants. Given the unique legal (such as post-employment restrictions and lobbying laws) and reputational issues that come with hiring a new lobbyist or government consultant, companies are increasingly establishing formal vetting procedures for such new hires. These procedures should vet relevant areas, including, but not limited to, the consultant's current and former government positions (which may implicate post-employment/conflict of interest laws) and the nature of their relationship with certain officials. It also is important to have written contracts with robust representations and warranties.

We have established protocols for the above vetting process and a model consulting agreement.

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