

Political Law Update

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2020 Election Year Issues: Joint Fundraising Committees

With the 2020 election campaign in full swing despite the COVID-19 pandemic, companies are facing both typical and unique challenges regarding political law compliance. This is the first in a series of mailings discussing political law issues that take on greater importance during a presidential election year.

Over the last several election cycles, there has been an increase in the use of joint fundraising committees (JFCs) in connection with federal elections. JFCs allow multiple federal candidate campaigns, political committees, and national or (federal accounts of) state party committees to fundraise together.

Examples of JFCs

Both presumptive major party nominees for the 2020 presidential election are making extensive use of JFCs to raise funds in excess of the \$2,800/election limit for a campaign committee. President Donald Trump participates in several JFCs, including the Trump Make America Great Again Committee (MAGA Committee), which raises contributions to the Trump campaign and the Republican National Committee (RNC), and Trump Victory, which allocates contributions to the Trump-Pence campaign, the RNC and several dozen state party committees. President Trump also participates in other JFCs with congressional candidates.

On May 16, 2020, the Biden Victory Fund, which is utilized by presumptive Democratic nominee Joe Biden and previously only included Biden for President and the Democratic National Committee (DNC), added 26 state parties. Additionally, on May 20, 2020, the Biden Action Fund, a JFC including only Biden for President and the DNC, registered with the Federal Election Commission.

It also has become increasingly common for members of Congress to have their own JFCs that include their campaign committees, leadership PACs, and either a national party committee or their home state party committee. Both the Democratic and Republican parties also have JFCs for multiple candidates' campaign committees.

Compliance Considerations

If a donor writes a single check to a JFC, he or she is deemed to be contributing directly to the participating campaigns and committees that ultimately receive those funds. As a result, to ensure that one does not exceed applicable limits to such participants, it is important that a donor accompany JFC contributions with written instructions as to

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how the contribution should be divided among the participant campaigns and committees. Please note that a donor is not required to allocate his or her JFC contribution to all of its participants, but may select just one or more of the participants, subject to applicable limits. If such written instructions are not included, the JFC will allocate the contribution among its participants based on a predetermined formula.

JFCs also may present a particular compliance challenge for financial institutions subject to federal pay-to-play rules (*i.e.*, SEC Rule 206(4)-5 for investment advisers, FINRA Rule 2030 for broker-dealers, MSRB Rule G-37 for municipal bond underwriters and municipal advisors, and CFTC Rule 23.451 for swap dealers) when covered officials, state or local party committees, or certain PACs participate in a JFC. For example, to the extent a covered employee's contribution to a JFC is allocated to the campaign of a state or local official running for federal office (*e.g.*, a governor running for U.S. Senate), it may directly trigger a ban under the foregoing rules.

Moreover, if a JFC contribution is allocated to a state party committee or a PAC that makes state or local contributions, it raises the risk of indirectly triggering such a ban. Thus, before a covered employee contributes to a JFC, one should carefully review the participants and take steps to ensure that the contribution goes only to those that do not present a pay-to-play concern. Please note if Mr. Biden selects a state or local official (such as a sitting governor) to be his running mate, contributions made to his campaign after selecting such a vice presidential nominee will be treated as contributions to that official as well, thereby potentially triggering a ban under the rules.

The pay-to-play rules also prohibit a covered employee from soliciting contributions on behalf of a covered state or local official (including one running for federal office) or a state or local party committee in a jurisdiction where the employee's firm is either engaged in, or seeking to engage in, covered business. As a result, a covered employee generally should not solicit funds for a JFC that include a covered state or local official or a state or local political party unless certain mitigating actions are taken. For example, a covered employee may solicit on behalf of the MAGA Committee and the Biden Action Fund, which include only the presidential campaigns and national party committees, but generally should avoid soliciting on behalf of either the Trump or Biden Victory Fund, which also include state political parties. It is important to note that the definition of "soliciting" a contribution is broadly interpreted under the rules and could include merely forwarding — or being listed on — an invitation to a JFC-sponsored fundraiser.

Compliance with these rules can be particularly challenging as individual contributors may not be aware of what JFCs are or how they allocate contributions, and therefore may not understand to whom they are ultimately contributing. This is one reason why many companies subject to federal pay-to-play rules implement a policy requiring preclearance of all federal contributions, rather than limiting the preclearance program only to contributions to candidates who are sitting state or local officials. Moreover, it is not sufficient for an employee to request preclearance by saying they are giving to "Trump" or "Biden" or their senator — it is essential to know the name of the legal entity to which they are contributing so the JFC can be properly vetted.

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