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Skadden

Political Law Alert

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Post-Election Issues Regarding Inauguration, Transition, Special Elections, and Personnel Entering or Leaving Government

Now that the 2020 elections are over, special legal issues arise from contributions made to, and expenses incurred for, federal, state or local inaugural or transition committees, as well as recounts and special elections. As well, legal implications of personnel entering or leaving government, and of hiring new consultants to lobby a new administration, must be considered.

Inaugural Committee Contributions and Inaugural Events

Presidential Inaugural Committee: President-elect Joe Biden will designate a presidential inaugural committee to sponsor the official inaugural balls (or whatever virtual events will take place this cycle). For his two inaugurations, former President Barack Obama's administration voluntarily prohibited inaugural contributions from corporations and lobbyists, and restricted other contributions to $50,000, however, the Biden transition team has not yet announced any such voluntary restrictions. As such, in the absence of these restrictions, contributions from individuals and corporations are unlimited. Additionally, there is a legal prohibition on foreign nationals' contributions to a presidential inaugural committee, though this restriction does not extend to U.S. subsidiaries of foreign corporations. Contributions to the Biden-Harris inaugural committee do not raise issues under the federal pay-to-play rules discussed below.

Lobbying (LD-203 Reports): For entities registered under the Lobbying Disclosure Act of 1995 (LDA) and the individual lobbyists they list, contributions to the Presidential Inaugural Committee are reportable on Form LD-203.

State and Local Inaugural Committees: Victorious candidates in state and local races usually designate a separate nonprofit (either a Section 501(c)(3) or 501(c)(4)) to act as his or her 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,

[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 are limited to $2,500 per donor for other statewide offices.

however, that these jurisdictions may require an inaugural committee to disclose its donors. Moreover, if a successful candidate does not designate a separate nonprofit and instead 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 the applicable campaign finance and pay-to-play laws. Given this dichotomy, it is important for donors to know the legal status of the 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 expenses to help with the 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 state 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.

Federal, State and Local Inaugural Events: In an ordinary inaugural year, numerous inauguration-related events would be expected to be held for the president and other successful candidates (such as a governor-elect). These events would typically include inaugural balls, as well as breakfasts and luncheons celebrating inaugurations or related to viewing an inauguration and/or an inaugural parade. It is likely that many of these events will be scaled-down or held virtually this year due to the COVID-19 pandemic. However, the considerations outlined here will still generally apply. 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 stated 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. Additional considerations regarding these events include:

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

Presidential Transition Committee: Under federal law, monetary contributions in support of a presidential transition committee are limited to $5,000 from an entity or individual. The Biden transition fund, PT Fund, Inc., has announced that it is not accepting contributions from corporations, PACs, federal contractors, national banks, unions, fossil fuel executives, lobbyists and foreign agents. Contributions to the Biden-Harris transition, however, do not raise issues under the federal pay-to-play rules. Unlike a presidential inaugural committee, contributions to a presidential transition committee are not reportable on the LDA's Form LD-203.

State and Local Transition Teams: 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, if they are instead operated out of 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 a 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: Individuals working with presidential transition teams do not become subject to the federal conflicts of interest and ethics laws applicable to government officials. However, the Biden-Harris transition has promulgated a code of conduct that, among other provisions, prohibits a person who has been a lobbyist or foreign agent in the last 12 months from serving. The code of conduct also includes conflict of interest provisions, such as a prohibition on working on a transition matter if the person lobbied that matter in the last 12 months or expects to lobby on it in the next 12 months (even for non-lobbyists). These provisions may be waived under certain circumstances.

In addition, other provisions may apply, such as Federal Acquisition Regulations intended to prevent a contractor from obtaining an unfair competitive advantage by assisting in the preparation of specifications of a government contract for which the contractor will be bidding. Also, if a corporate executive's federal 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 federal lobby law.

A corporate executive serving on a state or local transition team (such as for 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 or locality's conflict of interest laws.
>
> ***Campaign Finance and 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.
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> ***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 the volunteer helps or advises the transition on RFPs or the bidding process, 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 lobby law.

Contributions to Recount Committees

Corporate contributions to federal recount committees are prohibited. For PACs and individuals, a separate per-election limit applies ($2,800 for individuals, $5,000 for federal multicandidate PACs) to an individual candidate's recount committee. A separate limit ($106,500 per year for an individual and $45,000 per year for a federal multicandidate PAC) 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 ($2,800 for individuals, $5,000 for federal multicandidate 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 state or local runoff elections may have different contribution limits under campaign finance law than 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 numerous federal and state laws that apply to employees leaving the private sector and entering government service. Executives accepting senior government positions will likely need assistance regarding the vetting process, personal financial disclosure and divestiture requirements, and related tax issues. This process also can present complex challenges for the firm the executive is

leaving. In particular, navigating these rules may be challenging for the firm if they require the departing executive to unwind illiquid assets, including LP or GP interests in private funds or in their carried interest vehicles. In addition, severance payments and any arrangements that create an ongoing connection to the firm, such as deferred compensation agreements, will need to be examined closely and potentially amended to ensure compliance with applicable conflict rules.

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

Engaging New Lobbyists and Consultants for an Administration Change

Often, when there is an administration change or a change in the party that controls a federal or state legislative body, companies consider engaging new lobbyists or government affairs consultants. Given the unique legal issues (such as post-employment restrictions and lobbying laws) and reputational concerns 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 postemployment/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 and guide those looking to hire such employment candidates accordingly.

Please contact us with any questions.

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