Skadden

Political Law Compliance and Investigations Update

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2024 Post-Election Considerations for Inaugurations, Transitions, Special Elections and Personnel Entering or Leaving Government

Now that the 2024 election has passed, individuals and organizations must be mindful of special legal issues that arise from contributions made to, and expenses incurred for, federal, state or local inaugural or transition committees, as well as those pertaining to recounts and special elections. In addition, there are legal implications for those entering or leaving government, as well as the hiring of new consultants who plan to lobby the incoming presidential administration.

Inaugural Committee Contributions and Inaugural Events

Presidential Inaugural Committee: President-elect Donald Trump will designate a Presidential Inaugural Committee (PIC) to sponsor the official inaugural balls. Although foreign nationals are legally prohibited from giving to a PIC, there are no other prohibitions or limits. It is worth noting that for President Joe Biden's inaugural balls in 2020, his administration voluntarily banned lobbyists, foreign agents and fossil fuel companies, as well as their executives and PACs, from giving to his PIC. The Biden administration also limited contributions from other individuals to $500,000 and those received from corporations to $1 million. However, the incoming Trump administration has not yet announced any such voluntary restrictions.

The identity of donors and the amount of contributions to the PIC are disclosed to the Federal Election Commission no later than 90 days after the inauguration. Please note that contributions made to a PIC do not raise implications under the federal pay-to-play rules described below:

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

State and Local Inaugural Committees: Now that the election has passed, victorious candidates in state and local races will also begin to prepare and fundraise for inaugural events in celebration of taking office. While inaugural committees tend to be set up as distinct nonprofit organizations that are not subject to limits, there are jurisdictions that impose dollar limits on contributions to such inaugural committees, such as Kansas and Ohio. Additionally, inaugural committees are sometimes established as part of, or funded by, a campaign committee, political party or PAC, triggering campaign finance restrictions, including, but not limited to, foreign national bans.

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; FINRA Rule 2030 for broker-dealers that solicit investment advisory business; and SEC Rule 15Fh-6 for securities-based swap dealers), a contribution to an inaugural committee of a successful state

or local candidate for a covered office would trigger an automatic ban on business or compensation under those rules. In certain states, such as Michigan and New Jersey, inaugural committee contributions are also covered under pay-to play laws. Please note that these federal pay-to-play rules, and relevant certain state pay-to-play laws, also prohibit soliciting contributions to such inaugural committees.

Since rules vary regarding the permissibility of giving to inaugural committees under state and local campaign finance and pay-to-play laws, preclearance of such contributions is critical.

Federal, State and Local Inaugural Events: Whether they are hosted by an inaugural committee or another private organization, numerous inauguration-related events are expected in connection with the inauguration of the president and other elected officials (such as governors). These events may include inaugural balls, breakfasts and luncheons celebrating inaugurations, or events involving the viewing of an inauguration or an inaugural parade. Tickets or admission to these inaugural events are generally considered items of value and are subject to applicable gift laws to the extent they are provided to public officials. Purchases of tickets to an inaugural ball held by a designated inaugural committee also qualify as contributions to such inaugural committee, subject to applicable laws described above.

Must Comply With Gift Rules: To the extent such events involve government officials or employees, a company must ensure compliance with applicable gift and entertainment laws. Given that federal, state and local gift laws vary, preclearance is vital before one invites or provides admission to a public official.

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 representative's swearing-in or inauguration day reception. Private entities should also avoid paying for such events held by U.S. senators, since such payment could be deemed a private subsidy of an official event, which is prohibited under Senate rules. State and local laws vary regarding the permissibility of such payments.

Transition Committee Contributions and Transition-Related Activities

Presidential Transition Committee: According to public reports, President-elect Trump has established a 501(c)(4) nonprofit, the Trump Vance 2025 Transition, Inc., as his transition committee. Under the Presidential Transition Act, monetary contributions in support of a Presidential Transition Committee are limited to $5,000 and must be publicly disclosed by the committee. While in-kind contributions to such committees do not count toward this limit and are thus unlimited, federal law requires transition teams to disclose the sources of funding supporting each transition team member. Accordingly, the transition team could disclose a company as a source of funding if it allows an executive to work on the team during otherwise compensated working hours or to utilize company resources in connection with his or her transition efforts. However, the foregoing restrictions, limits and disclosure requirements only apply once a president-elect signs an agreement with the General Services Administration (GSA) for transition services, which President-elect Trump has not yet done as of the date of this mailing. Federal law requires that as part of the GSA agreement, the transition committee agree to implement a code of ethical conduct that transition team members must sign. Despite not having yet entered into the GSA agreement, media reports indicate that Trump Vance 2025 Transition, Inc. has implemented a code of ethics and an ethics pledge for its staff.

Unlike PICs, contributions to a Presidential Transition Committee are not reportable on the Lobbying Disclosure Act's Form LD-203.

State and Local Transition Teams: Similar to inaugural committees, the permissibility of contributions made 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 such nonprofits are generally unlimited under state and local campaign finance laws. However, the making and soliciting of transition committee contributions are expressly covered under federal (and certain state) pay-to-play rules. If they are instead operated out of campaign committees, party committees or PACs, they would also implicate state and local campaign finance 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.

Given that such state and local laws vary, preclearance of such contributions is critical.

Corporate Executives Serving on Presidential Transition Teams: A corporate executive who serves on a presidential transition team raises several legal considerations:

- **Conflict of Interest Implications:** Individuals working on presidential transition teams do not become subject to the federal conflicts of interest and ethics laws applicable to government officials. However, President-elect Trump's transition committee code of ethical conduct prohibits,

among other things, a person from working on a transition matter if the person lobbied that matter in the last 12 months. The code also prohibits a person from representing or aiding a foreign government or political party during his or her service on the transition team. Finally, the code prohibits a person's involvement in a transition matter that may directly conflict with a financial interest of that person or his or her spouse, child or other individual with which they have a close business or personal relationship. The Trump transition committee has also promulgated a conflict of interest policy that requires officers and directors of the transition team to disclose actual or possible conflicts of interest.

- **Campaign Finance Implications:** As noted above, in-kind contributions to presidential transition committees are not subject to any limit. However, employees should preclear the use of corporate resources or volunteering during working hours for a presidential transition committee, in case their employer wants to avoid making such in-kind contributions.
- **Possible Procurement Ethics Implications:** To the extent an individual works on procurement processes while serving on a transition team, there may be implications under the Federal Acquisition Regulation intended to prevent a contractor from obtaining an unfair competitive advantage by assisting in the preparation of specifications of a government contract on which the contractor will be bidding. To avoid implications, an employee should avoid participating in any transition activities that may result in the preparation of specifications of a contract on which their employer may bid.
- **Possible Lobbying Implications:** If a corporate executive's federal transition-related activities include communications with covered federal officials and the communications are for the purpose of influencing federal decisions on behalf of his or her employer, there may be registration and/or reporting implications under federal lobby law. Also, under the Trump transition team's code of ethical conduct, a transition team member is prohibited, during his or her service with the transition and for six months after service is completed, from communicating with or appearing before, for compensation, a federal department or agency to seek official action on behalf of his or her employer or another entity with respect to a matter over which he or she has direct and substantially responsibility as part of the transition.

Corporate Executives Serving on State or Local Transition Teams: A corporate executive who serves on a state or local transition team (such as for a governor-elect) raises several legal considerations:

- **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 implications as 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 a request for proposals (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, there may be registration and/or reporting implications under state or local lobby 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.*, $3,300 for individuals, $5,000 for federal PACs) to an individual candidate's recount committee. A separate limit ($123,900 per year for an individual and $45,000 per year for a federal PAC) applies to a national party committee's legal recount committee. The contributions are reportable by the recount committee.

Contributions to state or local recount committees are subject to state or local law and possibly federal or state pay-to-play rules.

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 ($3,300 for individuals, $5,000 for federal multi-candidate 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 laws and 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.

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Political Contribution Reviews

Companies subject to pay-to-play rules may want to use the post-election period to review public campaign finance databases for any contributions made by covered employees that were not precleared. Many companies use vendors to perform this service. Regardless, companies should review this information promptly so they can seek to use the limited cure periods available under certain rules or begin the process for seeking a discretionary waiver.

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 who accept senior government positions will likely need assistance regarding the vetting process, personal financial disclosures and divestiture requirements, if applicable, and related tax issues. This process also can present complex challenges for the business the executive is leaving. In particular, navigating these rules may be challenging for the business 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 business, 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 who are leaving government service. Such employees often carry post-employment restrictions that impact the services they may be able to provide to 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 a Change in Administration

Often when there is a change in administration 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 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 is also important to have written contracts with robust representations and warranties. We have established protocols for the above vetting process and a model consulting agreement.

Please contact us with any questions.

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