Post-election headaches having nothing to do with who won

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After the general elections, one can usually hear the collective sigh of relief from government affairs and compliance professionals as they book well-deserved vacations and look forward to getting some sleep. However, there is no rest for the weary. Now is the time to shift focus to the raft of post-election legal risks created by inaugural events, transition efforts, and personnel entering or leaving government service.

Inaugural committees and events

Although 2022 was not a presidential cycle, there were 36 gubernatorial and countless mayoral races this cycle. The successful candidates in those races will be feted in a host of inauguration-related events, such as inaugural balls, ceremonies, breakfasts, luncheons, and other events celebrating the candidate-elect taking office.

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When such events are held by inaugural committees (such as the official inaugural ball), paying to attend those events results in a contribution to the inaugural committee, while events held by third parties, such as a trade association, do not. The general rule is that buying tickets to an event results in a contribution to the organization holding the event.

Successful candidates usually designate a separate non-profit (either a 501(c)(3) or 501(c)(4) organization) to act as an inaugural committee. Although some state campaign finance laws, like those in Kansas and Ohio, place dollar limits on contributions to such inaugural committees, a large majority do not. As a result, unless a company is subject to pay-to-play laws that separately cover inaugural committees, as discussed below, contributions by the company and its employees are for the most part unlimited. 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 non-profit, but uses his or her campaign committee or a political party or PAC to pay for inaugural expenses, contributions are subject to all of the restrictions and prohibitions of the applicable campaign finance law.

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 or buying tickets to the inaugural ball) but also "in-kind" contributions, such as using company resources or paying expenses to support an inaugural event.

For financial institutions subject to a federal pay-to-play rule, such as SEC Rule 206(4)-5 for investment advisers, contributions to inaugural committees are covered and can trigger an automatic ban on business with the affected government in question. Inaugural committee contributions are also covered under certain state pay-to play laws, such as those in Michigan and New Jersey.

These events can also raise issues under applicable federal, state, or local gift rules. This is particularly important for companies that are sponsoring or hosting an event of their own. For example, at the federal level, House Ethics Committee guidance expressly prohibits private entities from paying the costs of a member's swearing-in or inauguration day reception.

Supporting transition efforts

Similar to inaugural committees, the permissibility of contributing to transition teams will depend on the type of entity used to fund the effort. Transition teams are usually run out of a non-profit (such as a 501(c)(4) organization), and with a few exceptions, contributions to them are unlimited under state and local laws.

In contrast, to the extent they are operated from campaign or party committees, or PACs, contributions to them would be subject to the restrictions under applicable campaign finance laws. Moreover, for companies subject to one or more of the federal, state or pay-to-play rules noted above, incurring transition expenses for a successful state or local candidate is separately covered and can trigger an automatic ban on state or local government business.

It is not uncommon for candidates to ask corporate executives to volunteer on a transition team. Indeed, this allows executives to

share their expertise and experience while forging connections and gaining insight into the needs and operations of the incoming administration. However, contributions to the transition team can result not only from monetary contributions but also "in-kind" contributions by using company resources. For example, if the executive is viewed as volunteering during otherwise compensated time or otherwise uses company resources (e.g., providing white papers or other studies or seconding employees) to help with the transition, then the company is deemed to have made a contribution. This volunteer work could also raise the following legal issues:

Conflict of Interest Implications: In some jurisdictions, a transition team member may, as a matter of law or policy, be treated as a public official subject to the jurisdiction's conflict of interest laws. For example, Kentucky recently passed a law requiring members of a state transition team to disclose certain financial interests, including those businesses by which they or their spouse are employed or in which they hold a 5% interest, and requiring them to recuse themselves from decisions impacting those interests.

Moreover, transition team members and their spouses are prohibited from seeking contracts with a Kentucky state agency during the entirety of the administration if the member receives nonpublic information about that agency.

Procurement Ethics Implications: Many state or local procurement laws prohibit a company from obtaining an unfair advantage by assisting in the preparation of the terms of an RFP and then bidding on that RFP. For example, a recently enacted procurement regulation in Rhode Island prohibits a company from bidding on an RFP if it was consulted by the government on the RFP's requirements, technical aspects, or any other part of its formulation. As a result, companies should exercise caution before permitting an executive to advise a transition on procurement-related matters.

Employees considering government service and post-employment restrictions on those leaving the government

Finally, as administrations end and new ones begin, many individuals will transition out of or into the government. Numerous federal, state, and local laws apply to employees leaving the private sector and entering government service. Counsel will be needed to guide executives accepting senior government positions through the legal issues involved in the government's vetting process, personal financial disclosure and divestiture requirements, and related tax issues.

Navigating these rules may be challenging for the company if they require the departing executive to unwind illiquid assets, including interests in private funds or their carried interest vehicles. In addition, separation packages need to be scrutinized. For example, if the package is too generous, the company could be viewed as front-loading or subsidizing the departing executive's future compensation from the government, not to mention potential claims of improper influence. Also, arrangements creating 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.

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Conversely, now is also the time when companies frequently hire individuals leaving government service. Some jurisdictions prohibit regulators or inspectors from being employed for a certain number of years by companies that are subject to their oversight, while others have restrictions or outright prohibitions on any official having prospective employment discussions while still in the government.

For example, New York allows a company to have employment discussions with an official only if it has not had a matter pending before the official during the prior 30 days. Once employed by the company, former government employees are often subject to post-employment restrictions ("cooling-off" periods) impacting their ability to communicate with, or work on matters before, their former agency. It is essential to understand how these restrictions apply to the role the company seeks to fill before an offer is made.

There are numerous traps for the unwary lurking in what may otherwise appear to be a lull in between election storms. However, vigilance must be maintained even during calm seas.

The opinions expressed in this article are those of the author(s) and do not necessarily reflect the views of Skadden or its clients.

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