

Guidelines for Interacting with the Biden-Harris Transition and the Biden Inaugural Committee

November 9, 2020

Election and Political Law

With the election over, attention now turns to the transition and the upcoming inauguration of the new Biden-Harris Administration. In this alert, which will be of interest to chief compliance officers and many others across the country, Covington's Election and Political Law Practice Group provides insight into what promises to be a transition and inauguration like no other. Below we answer key compliance questions regarding the Biden-Harris Transition and the Biden Inaugural Committee.

Understanding the Biden-Harris Transition

What is the Presidential Transition?

Most active during the period between Election Day and Inauguration Day, the Presidential transition is the process by which the outgoing administration hands over federal authority to the President- and Vice President-elect. Serving as a bridge between the campaign and government, the transition enables the incoming administration to prepare to implement the new President's agenda soon after he or she is sworn into office. To do so, the transition transforms gauzy campaign promises into real-world policies, while working to identify and prepare the Presidential appointees who will be responsible for implementing those policies throughout the Executive Branch.

Under the Presidential Transition Act ("PTA"), each presidential candidate is permitted to establish and fund a 501(c)(4) tax-exempt entity to serve as the legal vehicle for their transition-related activities. The PTA sets out specified restrictions for funding such an entity, as well as the basic rules governing interactions between current government officials and their transition counterparts both before and after Election Day. Importantly, the transition is legally distinct from a candidate's campaign. Accordingly, while the campaign may remain active following Election Day, including through fundraising or other activities, interactions with and donations to the transition implicate distinct legal and compliance regimes and must be considered separately from any campaign-related activity.

Who is a Part of the Transition?

President-elect Biden has established the PT Fund, Inc. as the legal entity housing the Biden-Harris Transition (the "Transition"). In June, President-elect Biden [announced](#) that former Senator and long-time Biden Chief of Staff Ted Kaufman will serve as the head of the Transition. More recently, senior Biden campaign advisor Anita Dunn, Biden campaign co-chair

Representative Cedric Richmond, New Mexico Governor Michelle Lujan Grisham, and former Obama National Economic Council Director Jeffrey Zients have been [named](#) as Transition co-chairs. Similarly, while a number of key staff have been [in place](#) for months, look for the Transition to continue announcing new hires throughout the coming weeks.

In addition to providing funds to pay Transition staff and outside consultants, the PTA permits the Transition to draw on the assistance of detailees from federal agencies, Hill staff assigned by their employing offices to assist with transition-related activities, and volunteers. Meanwhile, under the PTA, each agency and department in the Trump Administration has designated employees responsible for coordinating with the Transition to facilitate the Transition's work. While the PTA also requires the General Services Administration ("GSA") to provide office space to the Transition near the White House, many Transition team members likely will work remotely throughout the transition period.

How is the Transition Funded?

To supplement funding provided through GSA, the Transition may receive contributions from private sources subject to the limits and disclosure requirements set out under the PTA. These transition-specific rules are distinct from the more familiar campaign contribution limits, source restrictions, and disclosure requirements, and the FEC has [expressly disclaimed](#) authority to regulate transition funds.

Under the PTA, as a condition of receiving GSA support, the Biden-Harris Transition may only accept donations of up to \$5,000 from individuals, corporations, or other entities. However, the Transition voluntarily has adopted the same restrictions on the source of donations that were imposed by the Biden-Harris campaign, which are more restrictive than the PTA. As such, the Transition will not accept donations from, among others, corporations or their PACs, federal government contractors, and those who are registered federal lobbyists under the Lobbying Disclosure Act ("LDA") or registered foreign agents under the Foreign Agents Registration Act ("FARA").

The PTA requires the date, source, and amount of all donations to be disclosed to GSA within 30 days after the inauguration. Unlike federal campaign contributions, there is no \$200 reporting threshold. All contributions to the Transition will be itemized and reported publicly. In addition, the Transition must disclose its expenditures, as well as the name, most recent employment, and source of funding for anyone working for the Transition. PTA disclosures are ultimately made public by GSA, with past disclosures drawing scrutiny from both the media and prominent [advocacy groups](#).

Interacting with the Biden-Harris Transition

Are Efforts to Influence the Transition "Lobbying?"

As the President-elect's "government in waiting," the Transition presents an early opportunity to inform and shape the incoming administration's policies, priorities, and personnel. As previously noted, however, the Biden-Harris Transition may accept assistance from current federal employees of both Congress and the executive branch. With this in mind, parties interacting with the Transition should take care to ensure that they understand whether these contacts constitute "lobbying" under the LDA. Under the PTA, Transition team members who are private sector employees, and are otherwise not employed by the federal government, do not become government employees or officials for LDA purposes simply by working for the Transition.

However, transition-related communications with federal employees, including efforts to influence current Members of Congress or congressional staff, as well as officials and employees currently serving in the executive branch who are assigned to the Transition, may qualify as lobbying under the LDA and should be reviewed closely to ensure compliance with the statute. Likewise, it is possible in some limited circumstances that transition-related communications with state or local officials working on the Transition could trigger registration under state or local lobbying disclosures statutes.

What Other Restrictions Apply to Lobbyists' Interactions with the Transition?

In late September, the Transition [announced](#) the release of the [Biden-Harris Transition Team Code of Ethical Conduct](#), which all Transition team members must sign. Among other provisions, the Code strictly limits the ability of federal lobbyists and foreign agents to assist on Transition-related matters. In particular, in addition to the ban on lobbyist and foreign agent contributions mentioned above, those registered as lobbyists or foreign agents within the last 12 months may only serve as members of the Transition team with advance approval of the Transition's General Counsel. Where they are permitted to join the Transition, lobbyists and foreign agents must cease all registrable activity for the duration of their Transition service. Similarly, without advance approval, even those who have not registered under the LDA must disqualify themselves from any Transition matters on which they lobbied in the previous 12 months or on which they plan to lobby in the subsequent 12 months. Corporations and firms whose employees volunteer to work on the transition should keep in mind the impact of these restrictions once those employees return to their regular jobs.

Can I Give Gifts to Transition Team Members?

The application of federal gift rules to Transition team members turns on whether a team member is currently a federal government employee. Current congressional or executive branch officials and employees assisting the Transition, including Vice President-elect Harris so long as she remains a Senator, are bound by their respective gift restrictions. In particular, Members of Congress and their staff are generally prohibited from accepting gifts valued at \$50 or more per source (or \$100 or more per source per year, in the aggregate), with gifts from lobbyists generally barred entirely. (There are various exceptions to these broad rules.) Similar restrictions apply to federal executive branch employees and officials, with different dollar thresholds and exceptions. Much the same, state or local government officials and employees may continue to be covered by state or local gift restrictions, depending on the jurisdiction.

Transition staff and volunteers who are not otherwise public employees are not governed by federal or state gift rules. However, the Transition's Code of Ethical Conduct bars them from accepting "any money or thing of value as an inducement, reward or thank you to influence in any way the Biden-Harris Transition Team's operations or decisions." This prohibition encompasses gifts from, among others, individuals nominated or seeking a federal job or appointment and parties that conduct activities regulated by, or with a pending matter before, an agency or department within the recipient's responsibilities for the Transition.

What Restrictions Apply to Confidential Transition-Related Information?

Under the Biden-Harris Transition's Code of Ethical Conduct, Transition employees are required to safeguard non-public information covered by the PTA and "other information that is not readily available to the public." In particular, Transition team members are required to maintain the confidentiality of such information and use it exclusively for Transition purposes, with the use of such information for personal or private gain specifically prohibited. Again, corporations

or firms whose employees volunteer for the Transition should keep these restrictions in mind, if those employees return to their regular jobs.

The Transition's Code of Ethical Conduct also bars Transition employees from buying or selling individual stocks during their service with the Transition, absent the specific approval of the Transition's General Counsel. Furthermore, because Transition team members have a duty not to disclose confidential information, securities trading based on material non-public information received from the Transition raises potential risk under insider trading laws. Under the Stop Trading on Congressional Knowledge Act ("STOCK Act"), federal government officials owe a duty to the public with respect to material, nonpublic information they receive through their official duties. As a result, trading based on such information—whether by a federal official or by another party who receives the information from such an official—could give rise to an insider trading case. This risk is most pronounced where the relevant information ultimately derived from a government source.

Understanding the Presidential Inaugural Committee

What is the Presidential Inaugural Committee and How is it Funded?

The Presidential Inaugural Committee ("PIC") is a distinct legal entity that operates in parallel to the Transition team and President-elect Biden's campaign. Under normal circumstances, the Presidential Inaugural Committee ("PIC") plans and finances the parade, balls, galas, and official inaugural events other than the inauguration itself. While the PIC is barred by statute from accepting contributions from foreign nationals, it may accept contributions from U.S. citizens, lawful permanent residents ("green card" holders), and U.S. corporations, all of whom may contribute unlimited amounts to the Committee. This permissive statutory regime notwithstanding, some Presidents-elect have voluntarily limited the source and amount of contributions to their PICs.

The PIC must publicly disclose all of its donors' names and addresses, along with the amount of each donation, within 90 days after Inauguration Day. Where they are not barred by a President-elect from contributing, organizations registered under the LDA and their registered lobbyists must disclose any contributions to the PIC on their semi-annual Form LD-203 contribution reports. These reports are due February 1, 2021 (covering contributions made in the latter half of 2020) and July 30, 2021 (covering contributions made in the first half of 2021).

What Rules Apply to Providing Tickets to Official Inaugural Events to Government Officials?

Traditionally, the new President's inauguration is the centerpiece of a week of official inaugural balls, official parties, and other inauguration-related festivities hosted by the PIC. While it remains to be seen whether and how these events will proceed in the midst of the ongoing COVID-19 pandemic, hosts and attendees of such events should remain aware of potential ethics and compliance issues these events present.

For example, corporations and individuals with tickets to inauguration-related events should be aware that some incoming Biden Administration appointees will become government officials on Inauguration Day and will thereafter be covered by the federal ethics and gift rules. While other prospective nominees and appointees may not yet have entered their new roles, these individuals may be covered by the Transition gift policy or other state or federal gift policies applicable to their current positions.

For this reason, we recommend caution in providing tickets to PIC-hosted events to current federal, state, or local government officials. While exceptions may apply—in particular, exceptions permitting covered officials to attend certain widely attended gatherings—the application of these exceptions is highly fact-dependent. As such, we recommend seeking more specific guidance before offering any current public official or employee gifts in connection with inaugural events. Further, as explained above, employees and officials of state and local governments may also be prohibited from accepting tickets pursuant to state and local law, and, in some states, liability for providing prohibited gifts runs to both the gift-giver and the recipient.

Who May Host or Attend Privately-Sponsored Inaugural Events?

In addition to official PIC-hosted events, the days and nights surrounding Inauguration Day are usually filled with a variety of other unofficial policy-based, social, and political events, with different rules applying depending on the event host or hosts. For example, a federal political party, joint fundraising committee, PAC, or candidate committee is free to host an event, and campaign finance laws apply to requests for contributions to support such events. Generally speaking, only personal funds or PAC funds may be contributed to support such events.

Other organizations—such as 501(c)(3) charities, 501(c)(4) social welfare organizations, and 501(c)(6) trade associations—may also host policy conferences or fundraising events in conjunction with the inauguration. In general, unlimited corporate funds may be used for these events, although such contributions should be vetted for compliance with tax and campaign finance laws. Some of these contributions might also need to be disclosed on the corporation's website, depending on the corporation's voluntary political disclosure policies. Moreover, donors to these events should be aware that many states and localities place restrictions on the making of political contributions by state and local government contractors.

Finally, the SEC also regulates contributions by certain financial services professionals to non-federal officials with authority over certain investments. Government contractors, financial services firms, and their employees should therefore make sure that contributions to these entities will not, in turn, be used for political contributions that would be prohibited under the SEC pay to-play rules or applicable state or local pay-to-play laws and policies.

Again, it is likely that due to the pandemic and weather conditions in January, there will be far fewer such events than normal, and many may not occur at all.

* * *

Covington's Election and Political Law Practice Group includes a multi-disciplinary and bipartisan group of lawyers specializing in campaign finance, lobbying and government ethics law. Firm lawyers have been actively involved in the transition process in prior administrations.

For more information on any of the topics raised above, please contact any of the following attorneys:

<u>Robert Kelner</u>	+1 202 662 5503	rkelner@cov.com
<u>Zack Parks</u>	+1 202 662 5208	zparks@cov.com
<u>Brendan Parets</u>	+1 202 662 5134	bparets@cov.com
<u>Alexandra Langton</u>	+1 202 662 5915	alangton@cov.com
<u>Elizabeth Upton</u>	+1 202 662 5872	eupton@cov.com
<u>Jasmine Jennings</u>	+1 202 662 5714	jjennings@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.