ELECTION LAW NEWS

Developments in All Aspects of Political Law | November 2016

The Presidential Transition, the Inauguration and the New Congress: Contribution, Ethics, and Other Laws and Rules to Note

By Jan Witold Baran, Michael E. Toner, and Robert L. Walker

The transition from the Obama Administration to the Trump Administration has begun.

President-elect Trump's team, as of the date this article was written, has not yet publicly announced specific ethics policies or requirements that will apply to the Trump Transition or to officials in the Trump Administration to supplement the requirements already in place by law, rule, and regulation. On October 17, 2016, however, Donald Trump announced an Ethics Reform Plan "to drain the swamp and end political corruption in Washington, DC." The Plan included "five steps":

- A five-year ban on all Executive Branch employees lobbying the government after they leave government service, to be passed by Congress so that it cannot be lifted by Executive Order.
- A five-year ban, instituted by Congress, on lobbying by former Members of Congress and their staffs.

continued on page 2

FINRA Sets Effective Date for Pay-to-Play Rules

By D. Mark Renaud and Stephen J. Kenny

In late October, the Financial Industry Regulatory Authority (FINRA) announced that its new pay-to-play rules for broker dealers would become effective on August 20, 2017. The pay-to-play provisions are contained in FINRA Rules 2030 and 4580, and they generally track the rules of the U.S. Securities and Exchange Commission for investment advisers. FINRA's rules generally apply to persons soliciting government business for affiliated investment advisers.

For some organizations, FINRA's rules have the potential to capture far more individuals within its political restrictions. As a result, those organizations should begin planning now so that they are ready next August. Wiley Rein is uniquely situated to assist with such plans. ■

For more information, please contact:

D. Mark Renaud
202.719.7062
mrenaud@wileyrein.com

Stephen J. Kenny
202.719.7532
skenny@wileyrein.com

ALSO IN THIS ISSUE

3 D57˙UbX Political Operations: :]bUbW]U˙ and Process—Audit Now, 6fYUh\ Y Easier Later

3 FEC Proposal Takes Agency Rules From 'Horses and Bayonets' to Emojis

5 D.C. Circuit Denies Petition for Rehearing in *Van Hollen v. FEC*; Electioneering Communication Rules Defended with Assistance from Wiley Rein Intervention

6 Wiley Rein Files *Amicus* Brief in Colorado Campaign Finance Challenge

7 New York State Issues Draft Lobbying Regulations for Public Comment

9 Recap: Voters in Missouri and South Dakota Approve Campaign Finance Measures

9 FEC Post-General Reports Due December 8

10 Menendez Prosecution Continues Post-*McDonnell*

11 SEC Enforcement Director Emphasizes Continued Focus on Pay-to-Play Issues

12 Speeches/Upcoming Events

- Addressing so-called “shadow lobbying” by expanding the definition of “lobbyist” under the Lobbying Disclosure Act “to encompass former government officials labeling themselves otherwise … .”
- A lifetime ban on “senior Executive Branch officials” lobbying on behalf of a foreign government.
- Congressional passage of “campaign finance reform” to prevent “registered foreign lobbyists from raising money in American elections.”

No concrete proposals, however, have been put forward in this regard.

The discussion in the rest of this article summarizes the laws, rules, and regulations already in place covering contributions to the Presidential Inaugural Committee and to the Presidential Transition Organization and covering officials and employees as they go through the “revolving door,” either to join the government from the private sector or to leave government service.

Contributing to the Presidential Inauguration and the Presidential Transition

Inauguration. The Presidential Inaugural Committee (PIC) is responsible for organizing and financing most of the official inaugural events, including the parade and inaugural balls. U.S. corporations, citizens, and green card holders may contribute to the PIC without limit. By law, however, the inaugural committee must report publicly all contributions of $200 or greater that it receives. Registered federal lobbyists and their employers must list any donations to the PIC on their semi-annual LD-203 reports.

Transition. Separate from the PIC’s planning activities the presidential transition organization (PTO) is working to facilitate the transition of the day-to-day operations of government from the Obama Administration to the Trump Administration. Although the presidential transition receives some public funding and support for its activities, individuals and corporations may contribute up to $5,000 toward the transition. Such contributions are not reportable on the LD-203.

Conflict of Interest, Post-Employment, and Transition Ethics Laws and Rules

Government appointees and employees going through the revolving door to the private sector are subject to a wide range of overlapping laws, rules, and regulations restricting both how they seek employment and how they may interact with the government as former officials. Likewise, private sector personnel joining the government must also consider the potential for ethics issues arising from continuing financial interests, including, for example, interests in or payments received from their former employers. Interestingly – because their positions are excluded from the relevant statutory and regulatory definitions of “officer” and “employee,” the President and Vice President are not subject to the basic conflict of interest laws and regulations covering continuing financial interests.

The principal federal conflict of interest statutes—Sections 207, 208 and 209 of Title 18 of the United States Code—all carry potential felony criminal penalties. So ethics issues arising under these statutes can significantly impact the individual employee. And the private sector *employer* of a former government official—or of an employee going to the government—may face significant exposure, too, under some of these same conflict of interest provisions, for example, 18 U.S.C. Section 209 prohibiting private supplementation of government salary or, in the case of government contractors, the Procurement Integrity Act or other statutes.

Transitioning to the Private Sector – Generally: Revolving Door Rules

Executive Branch rules on post-government employment and on seeking employment. Section 207 of Title 18, the principal federal post-employment statute, sets forth seven restrictions applicable to former employees of the Executive Branch who go to the private sector. Title 5 C.F.R. Section 2641 contains the federal regulations interpreting and implementing Section 207. In September 2016, the Executive Branch Office of Government Ethics (OGE) issued a legal advisory providing what it describes as a “plain language

continued on page 13

PAC and Political Operations: Financial and Process—Audit Now, Breathe Easier Later

By D. Mark Renaud and Andrew G. Woodson

Now that the two-year election cycle is over (not to mention the four-year Presidential cycle), PACs and political operations should begin preparing for an audit once their year-end reports are filed on January 31, 2017. We recommend that all PACs have a financial audit every two years—either by internal auditors, by their regular outside auditors, or by specialized outside auditors who will audit against the PACs' federal and state filings.

Corporations and trade associations also should consider a process audit or review in order to ensure that their procedures are in compliance with the Federal Election Commission's and any applicable state's rules, and to ensure that they are benchmarked against industry standards. Documents that are part of such reviews are the bylaws, the PAC handbooks, and PAC operating procedures. Among other processes, these reviews should cover how the PAC solicits contributions, how the PAC handles and reports the contributions that it receives, and how the PAC makes disbursements. Compliance with IRS rules also comes into play, as does compliance with pay-to-play rules applicable to current and prospective government contractors.

Many organizations also use this opportunity to audit the financials and processes related to corporate political expenditures—such as corporate contributions in the states. Other organizations also expand the reviews to focus in on their procedures related to lobbying at the federal, state, and local levels, and political activity such as communications with employees about candidates and visits by officeholders and candidates to business sites.

Whatever the scope of your review, Wiley Rein can help you get the audit and reviews finished and help you breathe easier going forward. We have decades of experience making sure that corporations, trade associations, and political organizations run their political and lobbying operations in a clear, transparent, and compliant manner. ■

For more information, please contact:

D. Mark Renaud
202.719.7062
mrenaud@wileyrein.com

Andrew G. Woodson
202.719.4683
awoodson@wileyrein.com

FEC Proposal Takes Agency Rules from 'Horses and Bayonets' to Emojis

By Andrew Woodson and Eric Wang

During the last presidential debate of the 2012 general election, one of the more memorable memes to emerge was President Obama's derision of Mitt Romney's military policy as harkening back to the days of "horses and bayonets." Whether fair or not in its original context, President Obama's stinging critique also could be applied to the Federal Election Commission's (FEC) regulations, which still refer to "telegrams," "typewriters," "audio tapes," and "facsimiles."

The FEC recently approved a Notice of Proposed Rulemaking (NPRM) to replace those outdated references, along with some more substantive rule changes to reflect technological advances. The agency also reopened an Advance Notice of Proposed Rulemaking (ANPRM) from 2011 inviting public comments on whether the FEC should initiate a rulemaking to revise its disclaimer requirements to address political communications disseminated over the Internet and mobile devices—an issue which has greatly confounded the agency.

Of relevance to federal PACs, political party committees, and campaign committees, the FEC's technological modernization NPRM proposes to

continued on page 4

explicitly acknowledge and provide for electronic means to satisfy many of the campaign finance recordkeeping requirements. At a general level, the definition of a "record" required to be kept would permit both paper and electronic records. Requirements to retain "a full size photocopy" of certain checks or other written instruments also would be replaced by the more flexible requirement simply to retain a "record" of an "image" of such forms of payment.

Certain notifications that are still technically required to be sent to the FEC and to contributors by "letter" or "mailings" also would be subject to the greater flexibility of using electronic means of notification. "Signature" requirements could similarly be satisfied by "electronic signatures." Curiously, the NPRM also envisions that "emojis" could be "used in lieu of text" in certain circumstances. It is not immediately clear how this would apply in practice. For example, could a contributor use emojis to indicate his or her occupation and name of employer where such information is required for a contribution? Could we start seeing emojis on FEC reports filed by committees?

The FEC proposal also seeks to clarify several technical requirements relating to the transmittal and receipt of contributions as they apply to electronic contributions. Specifically, several of the FEC's existing rules governing the reporting and deposit of contributions depend on when a contribution is considered to be "made" and "received." The NPRM would codify guidance the FEC previously has issued in the form of advisory opinions regarding these issues as they relate to electronic contributions. Under the proposal, payment processors also would be subject to the general deadlines for forwarding contributions to committees once they are "received," but would be exempt from other regulations that apply to "conduits" and "intermediaries" of contributions.

Addressing concerns that pre-paid debit cards may be used to circumvent the contribution limits and source prohibitions, the NPRM also would require federal political committees to treat contributions made by such means as cash contributions. The proposal seeks comment on whether committees are able to distinguish pre-paid debit card transactions from ordinary debit and credit card transactions. While the NPRM does not propose to definitively resolve the issue of Bitcoin contributions—another issue that has divided the FEC—public comments are also being sought regarding this form of payment and other "alternative mediums of exchange."

The NPRM also would allow greater flexibility for when committees are permitted to treat contributions as being "designated" to a primary or general election or "attributed" among joint contributors for the purposes of contribution limits. The proposal's provision for electronic evidence of contribution designations and attributions should be a welcome development, especially for candidate committees, which tend to struggle with the designation and attribution requirements.

Related to the proposed rules on technological modernization, the FEC also reopened its 2011 ANPRM seeking public comment on whether the agency should initiate a rulemaking on disclaimer requirements for political communications made over the Internet. Over the years, the agency has been deeply divided over whether the general disclaimer requirements for political committees, political solicitations, and express advocacy independent expenditures apply to certain small Internet and mobile device ads.

In 2010, the FEC issued a tersely worded advisory opinion on whether the disclaimer requirements apply to Google "AdWords" ads. The lack of any legal analysis in the Google opinion caused Facebook to ask essentially the same question a year later, at which point substantive disagreements among the commissioners scuttled any opinion. A year after the Facebook request, the FEC again was unable to render an opinion in response to a request from Revolution Messaging about whether the disclaimer requirements apply to mobile ads. More recently, the commissioners were again divided in an enforcement proceeding regarding whether candidate and political party committees are required to include disclaimers on their social media profile pages.

The reopening of the ANPRM on Internet disclaimers continues to raise more questions than it does in providing any answers on a potential regulatory

continued on page 5

path forward. It is unclear whether the FEC commissioners are any closer now to agreement on the issues raised in the notice, or whether the notice is an attempt at catalyzing consensus.

Public comments on the Internet disclaimers ANPRM are due by December 19, 2016, and a hearing on that potential rulemaking is scheduled for February 1, 2017. Comments on the technological modernization NPRM are due December 2, 2016. ■

For more information, please contact:

Andrew G. Woodson
202.719.4683
awoodson@wileyrein.com

Eric Wang
202.719.4185
ewang@wileyrein.com

D.C. Circuit Denies Petition for Rehearing in *Van Hollen v. FEC*; Electioneering Communication Rules Defended with Assistance from Wiley Rein Intervention

By Caleb P. Burns and Stephen J. Kenny

On September 26, the D.C. Circuit denied Rep. Chris Van Hollen's (D-MD) petition to rehear *en banc* a panel's decision upholding a Federal Election Commission (FEC) regulation governing disclosure of donors to corporations and labor unions that make electioneering communications. The regulation at issue requires corporations and labor unions to disclose the identities of donors who contribute $1,000 or more "for the purpose of furthering electioneering communications." Rep. Van Hollen argued that this regulation was too restrictive and that the FEC should require disclosure of all donors who contributed $1,000 or more. Earlier this year, the D.C. Circuit held in *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016), that this regulation was based on a permissible interpretation of the Federal Election Campaign Act of 1971 (FECA), as amended. The rejection of the Congressman's petition for rehearing means that the FEC's regulation stands and is now in effect.

The FEC regulation has its roots in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2010), in which the Supreme Court held that the federal prohibition on electioneering communications made by corporations and labor unions was unconstitutional. In the wake of this decision, the FEC had to address how corporations and labor unions that make electioneering communications would report their funding sources. The Bipartisan Campaign Reform Act of 2002 (BCRA), which imposed restrictions for the first time on electioneering communications, did not contemplate corporations and labor unions having to report such funding sources since they could not make electioneering communications under the BCRA. The FEC, after soliciting comments and holding a hearing on how to address this issue, promulgated a regulation that required corporations and labor unions to disclose only those donors who contributed for the purpose of furthering electioneering communications.

Rep. Van Hollen sued the FEC in federal court, arguing that the regulation was too restrictive in not requiring disclosure of all contributors. He maintained that the regulation was based on an impermissible interpretation of FECA and that the FEC's rationale was arbitrary and capricious. The district court agreed with Rep. Van Hollen and held that the regulation was inconsistent with the statutory language of FECA. On appeal, the D.C. Circuit reversed the district court, holding that the text of FECA is not unambiguous and allows for a "purpose" element with respect to disclosure requirements. The court remanded the case for the district court for further proceedings.

continued on page 6

On remand, the district court again held that the regulation was unlawful. This time, the court held that the regulation was not a reasonable interpretation of federal law because it allegedly undermined BCRA's purpose of increasing disclosure. On appeal, the D.C. Circuit again reversed the district court, holding that the regulation was a reasonable balance of the public's interest in disclosure and the imposition of unduly burdensome reporting requirements on regulated parties. Accordingly, the court concluded that the regulation was permissible.

The recent rejection of Rep. Van Hollen's petition for rehearing means that the regulation is now fully effective. Although Rep. Van Hollen may seek Supreme Court review, his attorney indicated that he would not. Wiley Rein represented one of the appellants in this case, the Center for Individual Freedom. Because the FEC did not appeal either district court decision, intervention by private parties in the case was crucial to defending the legality of the regulation. Wiley Rein has extensive experience intervening in cases on behalf of private parties defending favorable actions of the FEC. ■

For more information, please contact:

Caleb P. Burns
202.719.4683
cburns@wileyrein.com

Stephen J. Kenny
202.719.4185
skenny@wileyrein.com

Wiley Rein Files *Amicus* Brief in Colorado Campaign Finance Challenge

By Robert L. Walker and Louisa Brooks

Wiley Rein recently filed a brief of *amici curiae* in the Colorado Supreme Court in a case that will determine whether pro bono and discounted legal services constitute a "contribution" within the meaning of Colorado's campaign finance law. The brief, filed on behalf of three individuals with firsthand experience attempting to navigate the state's campaign finance regime, argues that treating legal services as contributions will burden political speakers throughout the state.

The underlying case is *Coloradans for a Better Future v. Campaign Integrity Watchdog*, in which the petitioner is challenging a Colorado Court of Appeals ruling that it violated Colorado's campaign finance laws by not disclosing the value of pro bono legal services as a "contribution." The lower court's decision could have far-reaching effects for political speakers in Colorado, many of whom are subject to contribution limits and donor disclosure obligations.

The three *amici* are present or former Colorado residents who became entangled in campaign finance lawsuits over the past decade after speaking publicly on matters of importance to them. Because of the complexity and broad reach of Colorado's campaign finance laws, they were either uncertain or wholly unaware that their actions were regulated by campaign finance laws. For example, one of the *amici* participated with several of her neighbors in an informal effort to oppose their neighborhood's annexation to a larger town. This group of neighbors was blindsided when the proponents of the annexation filed a campaign finance lawsuit against them – as permitted under Colorado's private enforcement system – for failing to register and report with the state as an "issue committee."

Through their experiences with Colorado's campaign finance regime, the *amici* illustrate the burdens

continued on page 7

and practical challenges ordinary citizens face when attempting to navigate the state's campaign finance laws. They also demonstrate the necessity of access to affordable legal counsel, both to assist in complying with the law and to defend against lawsuits brought under the state's private enforcement system. At some point in the *amici*'s respective cases, each relied on pro bono counsel to protect and vindicate her First Amendment rights.

The case is ongoing, and we expect to provide updates in future issues. If you have any questions about campaign finance activities in Colorado or around the country, we are available to discuss them with you. ■

Robert L. Walker
202.719.7585
rlwalker@wileyrein.com

Louisa Brooks
202.719.4185
lbrooks@wileyrein.com

New York State Issues Draft Lobbying Regulations for Public Comment

By Carol A. Laham and Eric Wang

The New York State Joint Commission on Public Ethics (JCOPE) recently issued almost 50 pages of proposed new rules to regulate the practice of lobbying in the state. The proposal would implement legislative changes enacted over the summer to New York's state lobbying law. ("New York State Passes Changes to Lobbying and Campaign Finance Laws," *Election Law News*, July 2016.) More importantly, the proposed rules also would codify principles articulated by JCOPE and its predecessor agencies in a hodgepodge of advisory opinions throughout the years. JCOPE is accepting written public comments on the proposed rules until November 21, and a public hearing on the proposal is scheduled for December 7.

According to JCOPE, the proposed regulations are meant to provide a "one-stop shop" that, for "the first time," consolidates in one place the substance of New York's lobbying statute as well as the agency's interpretation and implementation of the statute. A few noteworthy aspects of the proposal include its treatment of grassroots lobbying, the regulation of consultants who advise on grassroots lobbying, the use of social media in lobbying, and payments made to "pass-through coalitions."

So-called "grassroots lobbying" refers to attempts to influence government action indirectly by asking members of the public, or segments of the public, to contact government officials. For example, an environmental advocacy group may communicate directly with legislators through its lobbyists about a bill the group supports or opposes. In addition, the group may ask its members or the general public to contact their legislators about the bill. Although New York's lobbying law until now has not formally or explicitly addressed grassroots lobbying, the statutory definition of "lobbying" is broad enough that it could encompass the practice. Indeed, this has been the long-standing interpretation of JCOPE and its predecessor agencies.

JCOPE's proposed rules would formally define regulated "grassroots lobbying" as any "communication that: (1) References or otherwise implicates an action [otherwise defined as lobbying under the existing law]; (2) Takes a clear position on that action; and (3) Includes a ... solicitation, exhortation, or encouragement to the public, a segment of the public, or an individual to contact a Public Official."

Related to the regulation of grassroots lobbying is the proposal's treatment of any consultant who "participates in: (i) delivering a Grassroots Lobbying Communication on behalf of the Client; and (ii) shaping the substantive message expressed in the communication" as a potential lobbyist. Among other examples, the proposal specifically includes "[s]erving as a spokesperson" for a client. This

continued on page 8

doubles down on JCOPE's advisory opinion issued earlier this year, in which the agency took the position that even public relations consultants who contact reporters or editorial boards on behalf of clients regarding public policy issues could be regulated as lobbyists. That aspect of the opinion was quickly challenged in federal court by a group of PR consultants. ("New York State Expands Lobbying Law to Cover Consultants, PR consultants," *Election Law News*, March 2016.)

In a partial rebuke of JCOPE, the changes enacted to New York's lobbying laws over the summer by the state legislature specifically exempted contacts with the news media from the definition of lobbying. JCOPE's proposed regulations duly incorporate that legislative exemption. Relatedly, JCOPE has moved for dismissal of the PR consultants' lawsuit on the grounds that it is mooted by the amended law. However, as the plaintiffs in the litigation have noted in opposing the motion to dismiss, PR consultants are still subject to potential regulation as lobbyists if they represent their clients before persons other than journalists. Indeed, JCOPE's proposal confirms that this would be the agency's regulatory approach if the rules are enacted.

JCOPE's proposal also addresses social media communications, and treats tweets or messages containing lobbying messages on a public official's social media page as direct lobbying. Posts containing lobbying messages on a person's or organization's own social media page that "tag" a public official also would be considered lobbying. On the other hand, posts on one's own social media page that merely refer to a public official but do not tag the official would not be considered lobbying. However, if a post on one's social media page includes a "call to action" for readers or visitors to contact the public official, the post presumably would be considered grassroots lobbying, even if the official is not tagged.

JCOPE's proposed rules also would crack down on avoidance of donor disclosure by so-called "pass-through coalitions." The proposal defines a pass-through coalition as a group that spends more than 90% of its expenditures on lobbying in New York. Any contribution to a pass-through coalition would be considered compensation for lobbying, and may require the contributor to report as a lobbyist principal, and also may trigger donor disclosure for the contributor in certain circumstances. ■

For more information, please contact:

Carol A. Laham
202.719.7301
claham@wileyrein.com

Eric Wang
202.719.4185
ewang@wileyrein.com

Recap: Voters in Missouri and South Dakota Approve Campaign Finance Measures

By Carol A. Laham and Stephen J. Kenny

Following up on what we reported in September, voters in several states went to the polls on Tuesday, November 8, to vote on campaign finance ballot measures. (http://www.wileyrein.com/newsroom-newsletters-item-Campaign_Finance_Reform_on_the_Ballot_in_Several_States_This_November_Missouri_South_Dakota_Washington.html.) Voters in Missouri overwhelmingly approved Constitutional Amendment 2, imposing limits on political contributions for the first time since their repeal in 2008. Meanwhile, South Dakota voters narrowly approved an overhaul of the state's campaign finance laws. Initiated Measure 22 decreases contribution limits and imposes far-reaching disclosure requirements on political advertising. Washington state voters, however, rejected I-1464, which would have sharply decreased contribution limits on government contractors and would have imposed a broad presumption of coordination for ostensibly independent expenditures in certain circumstances. ■

For more information, please contact:

Carol A. Laham
202.719.7301
claham@wileyrein.com

Stephen J. Kenny
202.719.7532
skenny@wileyrein.com

FEC Post-General Reports Due December 8

All federally registered PACs and party committees and all federal campaign committees for candidates participating in the 2016 general election are required to file Post-General Reports with the FEC by midnight eastern on Thursday, December 8.

The Post-General Report will cover activity between October 1 and November 28 for PACs and party committees that were not required to file a Pre-General Report. The report will cover activity between October 20 and November 28 for PACs and party committees that were required to file a Pre-General Report and federal campaign committees for candidates participating in the 2016 general election.

Menendez Prosecution Continues Post-*McDonnell*

By Robert L. Walker

On October 6, 2016, a federal grand jury in New Jersey returned a superseding indictment in the U.S. Department of Justice's prosecution of U.S. Senator Robert Menendez (D-NJ) and Florida ophthalmologist Salomon Melgen. The new indictment cures defects in the original 22-count, 68-page indictment, returned on April 1, 2015, which led to U.S. District Judge William H. Walls' dismissal of four counts charging federal bribery based on contributions by Melgen to The Fund to Uphold the Constitution. The cured indictment restores two of the four dismissed bribery allegations to the indictment.

Sen. Menendez and Salomon Melgen are charged in a bribery scheme in which, as alleged in the indictment, Sen. Menendez, in exchange for official actions, solicited and accepted from Melgen "domestic and international flights on private jets, first-class domestic airfare, use of a Caribbean villa, access to an exclusive Dominican resort, a stay at a luxury hotel in Paris, expensive meals, golf outings, and tens of thousands of dollars in contributions to a legal defense fund." On September 28, 2015, Judge Walls dismissed the four counts in the original indictment charging bribery based on Melgen's contributions to The Fund to Uphold the Constitution. Two of the dismissed counts related to a $20,000 payment to The Fund made on May 16, 2012, and two related to a payment to The Fund made on September 21, 2011. As reasoned by Judge Walls in the Opinion accompanying his order dismissing the four counts, because contributions to The Fund to Uphold the Constitution—a legal defense trust fund that benefitted Sen. Menendez—were campaign contributions, any bribery charge based on contributions to that fund would have to meet the strict evidentiary burden imposed by controlling rulings by the Supreme Court in two pivotal public corruption cases from the early 1990s. The Court's rulings in *McCormick v. United States*, 500 U.S. 257 (1991) and *Evans v. United States*, 504 U.S. 255 (1992), require an explicit (not just an implied) *quid pro quo* agreement when a bribery charge is predicated on a campaign contribution. In his ruling dismissing the four counts from the original Menendez indictment, Judge Walls stated that the counts could not stand because they failed to specify that the payments to The Fund were "made in return for an explicit promise or undertaking ... to perform or not perform an official act."

In the superseding indictment, the charging language relating to the payment to The Fund to Uphold the Constitution on May 16, 2012, now tracks the language of other bribery-related counts left undisturbed by Judge Walls previous dismissal order. The allegations relating to this payment to The Fund are now incorporated in the two counts in the indictment also relating to a May 16, 2012 payment of $40,000 by Melgen to the New Jersey Democratic State Committee Victory Federal Account. One of these two counts specifically alleges the payments were made "in return for Menendez's advocacy to the State Department on behalf of Melgen in his contract dispute with the Government of the Dominican Republic"; the other count specifically alleges payments made "in return for Menendez's advocacy at the highest levels of CMS and HHS on behalf of Melgen in his Medicare billing dispute." The superseding indictment does not reference Melgen's September 21, 2011, payment to The Fund.

In September 2016, the U.S. Court of Appeals for the Third Circuit rejected a request by Sen. Menendez's legal team, headed by Abbe Lowell, for an *en banc* rehearing of the claim that the federal charges against the Senator implicate his immunity under the Speech or Debate Clause of the U.S. Constitution and should be dismissed. A three-judge panel of the Court of Appeals had rejected these Speech or Debate Clause arguments in July 2016. The case is now pending the filing on behalf of Sen. Menendez of a petition for certiorari to the Supreme Court on these constitutional claims. ■

For more information, please contact:

Robert L. Walker
202.719.7585
rlwalker@wileyrein.com

SEC Enforcement Director Emphasizes Continued Focus on Pay-to-Play Issues

By Kevin B. Muhlendorf and D. Mark Renaud

On October 13, 2016, U.S. Securities and Exchange Commission (SEC) Enforcement Director Andrew Ceresney gave the keynote address at the Securities Enforcement Forum in Washington, DC. This year, Director Ceresney highlighted the SEC's work in the public finance arena, both through the Enforcement Division's Public Finance Abuse Unit and the SEC's Office of Municipal Securities. The municipal securities market consists of securities valued at over $3.7 trillion, while public pensions hold over $3.8 trillion in assets. As a result of the huge sums at stake, and the corresponding incentives to cheat to obtain that business, Director Ceresney's remarks focused on the Division's increased enforcement of the SEC's pay-to-play rules. The SEC's investigations and enforcement actions related to public finance have grown dramatically, resulting in civil and, in some cases in conjunction with federal prosecutors, criminal charges being levied against municipalities, entities, and individuals. Included in that speech was a nod to a notable case the SEC brought earlier this year, which expanded the traditional pay-to-play allegations outside the context of those participants regulated as investment advisers.

According to the SEC's complaint, in 2010, State Street Bank and Trust Company (State Street) was among the banks flocking to bid on subcustodian business for four Ohio state pension funds. State Street's vice president in charge of that business is alleged to have engaged in a scheme to funnel money to an Ohio Deputy Treasurer in exchange for his awarding the contracts to State Street. In addition to receiving certain kickbacks, the Deputy Treasurer was concerned that the State Treasurer was not raising enough money for his reelection, and demanded that State Street make contributions to the Treasurer's election campaign fund to obtain the business. In response, State Street hired Robert Crowe (Crowe), who was the co-chair of a national law firm's government relations practice, to facilitate the campaign contributions. Crowe is then alleged to have set out to illegally raise money for the Treasurer's campaign by exceeding individual campaign donations, creating fake invoices, and helping to hide State Street's conflict of interest. Ultimately, the state Treasurer lost his campaign, the scheme was uncovered, and on January 14, 2016, State Street agreed to pay $4 million in disgorgement and an $8 million penalty to resolve the SEC's allegations.

Crowe was sued the same day by the SEC. Unlike traditional pay-to-pay cases, however, this one was not brought under the Investment Adviser Act rules, but instead as a standard securities fraud suit under Sections 10(b) of the Securities and Exchange Act and 17(a) of the Securities Act. Crowe cried foul, and in his motion to dismiss argued that the SEC had no jurisdiction over his activities because, among other things, his activities did not fall under the Adviser's Act Rule 206(4)-5, the SEC's issued pay-to-play regulations. Exactly one week after Director Ceresney's speech, the district court issued an order denying Crowe's motion to dismiss. In its ruling, the court found that the fact that the pay-to-play rules did not apply to Crowe was irrelevant to the SEC's allegations because it did not charge him with a violation of those rules. Moreover, and perhaps most importantly for the SEC's case and others going forward, the court noted that "'pay to play' is not a term of art in federal securities laws, nor does the term appear in Rule 206(4)-5. Rather, 'pay to play' is a shorthand way to describe certain conduct," which can be regulated under Sections 10(b) and 17(a) against "any person," including those unaffiliated with a regulated entity. Thus, any individual or entity engaging in pay-to-play conduct has securities law exposure, regardless of whether they are an investment adviser or otherwise covered by the traditional pay-to-play rules.

In the SEC's press release at the time it filed its complaint against Crowe and settled the action against State Street, the SEC stated "[p]ay-to-play schemes are intolerable, and lobbyists and their clients should understand that the SEC will be aggressive in holding participants accountable."

continued on page 12

 continued from page 11

Despite the fact that State Street was not acting as an investment adviser, the SEC was able to utilize the general anti-fraud provisions of the securities laws to address this conduct, resulting in a substantial fine. Given Director Ceresney's decision to highlight this case and the additional activity this focus portends, any financial entity, regardless of whether the SEC's investment adviser pay-to-pay rules apply, would do well to take note and evaluate how it gets business from public entities and who it uses to facilitate that process.

Our team regularly counsels financial institutions on compliance with the various state and federal pay-to-play regulations. We also defend SEC, CFTC, and criminal investigations involving allegations of wrongdoing in the public finance sector. ■

For more information, please contact:

Kevin B. Muhlendorf
202.719.7052
kmuhlendorf@wileyrein.com

D. Mark Renaud
202.719.7062
mrenaud@wileyrein.com

SPEECHES/UPCOMING EVENTS

2016 NABPAC Biennial Post Election Conference
Jan Witold Baran, Speaker
November 16-18, 2016 | Palm Beach, FL

2016 NABPAC Biennial Post Election Conference
Caleb P. Burns, Speaker
November 16-18, 2016 | Palm Beach, FL

Shining a Light on Money & Influence: The Power of Data Visualization
D. Mark Renaud, Panelist
38th Annual Council on Governmental Ethics Laws (COGEL) Conference
December 12, 2016 | New Orleans, LA

discussion" (hope springs eternal) of the primary post-employment restrictions applicable to former Executive Branch employees. In a 23 question-and-answer format, this recent OGE advisory provides definitions, discussion, and examples delineating the terms and scope of the Section 207 post-employment restrictions, and the exceptions thereto, including:

- The lifetime ban applicable to all former Executive Branch employees on representation in connection with a particular matter involving specific parties in which the former employee participated personally and substantially as a government official.
- The two-year ban applicable to all former Executive Branch employees on representation in connection with a particular matter involving specific parties which was pending under the former employee's official responsibility.
- The one-year cooling off restriction, applicable to all former senior Executive Branch employees, on seeking official actions from their former employing department or agency.
    - By Executive Order, this restriction was doubled to two years for Obama Administration appointees subject to the Ethics Pledge; but the details of whether and, if so, exactly how this term of the Pledge might apply during the Trump Administration to former Obama Administration appointees remains to be seen. Also under the Obama Pledge, appointees agreed not to lobby covered Executive Branch officials (as defined by the Lobbying Disclosure Act) and non-career Senior Executive Service appointees "for the remainder of the Administration." That "remainder" period would appear to end on January 20, 2017.
- The two-year cooling off restriction on former very senior employees (including, for example, the Vice President, Cabinet-level appointees, and others) from seeking official action from certain departments, agencies, and officers.
- The one-year restrictions on certain former government officials and employees who participated in trade or treaty negotiations and on very senior and senior Executive Branch personnel in connection with representing, aiding, or advising a foreign government or political party.

Under some of these restrictions, background advising of the client may be permissible.

Section 207 does not impose direct criminal liability on the private sector employers of covered former government officials who engage in contacts prohibited under the statute. But, to avoid concerns as to potential derivative legal exposure as well as simply to assure that former government officials may engage in the work they have been hired to do, the prospective private sector employer of a former government official ought always to ask for and obtain a copy of the written ethics/post-employment guidance given to that official in connection with his or her departure from the government.

Transitioning Executive Branch employees may also face restrictions—including recusal and notification requirements—as they search for jobs in the private sector. Earlier this year, OGE published a final rule amending the provisions of the Standards of Ethical Conduct for Employees of the Executive Branch (at 5 C.F.R. Section 2635, Subpart F) that govern "seeking other employment." The amendment brought the rule into the 21st century by providing examples of when and how the use of social media in a job search could be considered "seeking other employment." Prospective private employers should be aware of the ethics and legal restrictions applicable during the job search process and should assure that prospective government hires have followed all applicable requirements.

Congressional rules. Transition is also happening on Capitol Hill. Members, officers, and employees of both the United States Senate and House of Representatives also face restrictions on their post-congressional employment. Under Section 207 of Title 18, Members of the Senate, for two years after they leave office, may not attempt to influence action by current Members, officers, or employees of

continued on page 14

either house of Congress by communicating directly with them (strictly background advising of a client is generally permissible). The post-employment restriction on former Members of the House is identical in scope but not in duration: The ban applies to House Members for only one year after leaving office. The post-employment restrictions on communications applicable to former elected officers of Congress is also for one year but covers only contacts by the former officer with individuals and offices in his or her former employing house of Congress.

For former highly compensated staff of the Senate, there is a one-year ban under Section 207 on attempting to influence any Senator or any officer or employee of the Senate by communicating directly with them. Under Senate rule, former Senate staff paid below this "highly-compensated" level face a one-year restriction on lobbying their former employing office, committee, or leadership staff. For former highly compensated staff of the House, there is also a one-year communication ban under Section 207, but the scope of the ban depends on whether the former staff worked in a Member's personal office, on a committee staff, or on leadership staff.

As with Executive Branch personnel, Section 207 sets forth a number of exceptions for post-employment communications by Members, officers, and employees of Congress. Also applicable to members, officers, and certain employees of Congress are the one-year restriction in Section 207 based on their official participation in trade or treaty negotiations, and the one-year restriction on representing, aiding, or advising a foreign government or political party.

Transitioning to the Private Sector – Government Contractors

Where the private employer is a government contractor, an understanding of the post-employment restrictions applicable to a prospective hire from the government is of essential importance. As a general matter, for example, the Procurement Integrity Act, at 41 U.S.C. Section 2103, imposes restrictions on procurement officials engaged in a search for post-government employment; Section 2104 covers the acceptance of compensation from federal contractors by procurement officials. With respect to employers, the Procurement Integrity Act, at 41 U.S.C. Section 423(d)(4), subjects a "contractor who provides compensation to a former official knowing that such compensation is accepted by the former official in violation of" the post-employment provisions of the Act to significant financial penalties and administrative action, including cancellation of the procurement and/or initiation of suspension or debarment proceedings.

Transitioning to the Government: Conflicts of Interest

What potential ethics concerns await through the reverse revolving door? Individuals entering on Executive Branch employment from the private sector—and the former employers of such individuals—need to be aware of the potential for ethics issues to arise under both statute and rule in a number of areas, including in connection with:

- *Continuing financial interest.* Executive Branch officials and employees may have stock or stock options in a former private employer or may participate in a pension plan or other type of deferred compensation or benefit plan. Such continuing financial interests in a former employer may create a conflict—under Section 208 of Title 18 and under 5 C.F.R. Section 2635—and, under certain circumstances, may require recusal from a matter or even divestment of the financial interest.
- *Appearance of impartiality.* Under Executive Branch ethics standards, an employee must not work for one year after leaving their former private employer on any contract or other particular matter in which the former employer is a party or represents a party if the employee or relevant agency ethics official determines that a reasonable person would question the employee's impartiality.
- *Payments from former employer.* Section 209 of Title 18, for example, prohibits private payment or supplementation of an Executive Branch employee's government salary. According to OGE guidance, "Section 209 may apply

continued on page 15

if a former employer makes a payment to a government employee and there is an indication that the payment is intended to compensate the employee for doing his government job, rather than to compensate the person for past services to the former employer ... ." Section 209, and the potential civil and criminal penalties for violations thereof, apply directly not just to the individual employee receiving prohibited payments but also to the "individual, partnership, association, corporation, or other organization" making the payment.

Transitioning to the Transition

Current Executive Branch employees who are detailed to President-elect Trump's transition team remain subject to Executive Branch ethics laws, rules, and regulations but do not violate applicable standards by making agency contacts on behalf of the transition. Similarly, a congressional employee who is working in connection with the transition remains subject to all relevant congressional ethics standards.

Members of the transition team who are not already government employees generally are not subject to federal ethics laws and regulations. Presidents-elect in recent history, however, have promulgated their own codes of ethical conduct that members of the transition team were required to sign and follow. The Trump-Pence transition team has not yet publicly released information as to any such restrictions.

And More Transition ...

This survey covers some, but by no means all, of the ethics issues and concerns that may arise in connection with the presidential transition. Among areas not discussed here are: specific bar rules and other standards applicable to attorneys, supplemental ethics regulations applicable to specific governmental departments and agencies and to specific departmental components, and public financial disclosure requirements for presidential appointees. Regarding the subject of presidential appointee financial disclosure, and transition issues more generally, OGE has a number of guides and resources available at https://www.oge.gov/web/oge.nsf/Resources/PRESIDENTIAL+TRANSITION. For the federal government's official Presidential Transition Directory, go to https://presidentialtransition,usa.gov. The Center for Presidential Transition, of the Partnership for Public Service, has published a range of presidential transition resources at presidentialtransition.org.

Whatever one's role in the transition from one Administration, or one Congress, to the next, understanding how all the legal standards apply to your specific situation can seem daunting. During past transitions, Wiley Rein's Election Law and Government Ethics Group has assisted officials and employees entering the government, officials and employees leaving the government for the private sector, and their private sector employers in understanding and safely navigating the laws, regulations, and rules of the transition road. ■

For more information, please contact:

Jan Witold Baran
202.719.7330
jbaran@wileyrein.com

Michael E. Toner
202.719.7545
mtoner@wileyrein.com

Robert L. Walker
202.719.7585
rlwalker@wileyrein.com

Election Law Professionals

Jan Witold Baran	202.719.7330	jbaran@wileyrein.com
Michael E. Toner	202.719.7545	mtoner@wileyrein.com
Carol A. Laham	202.719.7301	claham@wileyrein.com
Thomas W. Kirby	202.719.7062	tkirby@wileyrein.com
D. Mark Renaud	202.719.7405	mrenaud@wileyrein.com
Caleb P. Burns	202.719.7451	cburns@wileyrein.com
Andrew G. Woodson	202.719.4683	awoodson@wileyrein.com
Robert D. Benton	202.719.7142	rbenton@wileyrein.com
Claire J. Evans	202.719.7022	cevans@wileyrein.com
Robert L. Walker	202.719.7585	rlwalker@wileyrein.com
Ralph J. Caccia	202.719.7242	rcaccia@wileyrein.com
Roderick L. Thomas	202.719.7035	rthomas@wileyrein.com
Bruce L. McDonald	202.719.7014	bmcdonald@wileyrein.com
Jason P. Cronic	202.719.7175	jcronic@wileyrein.com
Thomas W. Antonucci	202.719.7558	tantonucci@wileyrein.com
Daniel B. Pickard	202.719.7285	dpickard@wileyrein.com
Eric Wang	202.719.4185	ewang@wileyrein.com
Stephen J. Kenny	202.719.7532	skenny@wileyrein.com
Louisa Brooks*	202.719.4187	lbrooks@wileyrein.com
Karen E. Trainer, Senior Reporting Specialist	202.719.4078	ktrainer@wileyrein.com

*Not admitted to the DC bar. Supervised by the principals of the firm.

To update your contact information or to cancel your subscription to this newsletter, visit: www.wileyrein.com/newsroom-signup.html

This is a publication of Wiley Rein LLP, intended to provide general news about recent legal developments and should not be construed as providing legal advice or legal opinions. You should consult an attorney for any specific legal questions.

Some of the content in this publication may be considered attorney advertising under applicable state laws. Prior results do not guarantee a similar outcome.