Political Law Potpourri—The Consolidated Appropriations Act of 2018

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While the din over a possible government shutdown dominated the headlines, political law played a supporting role in the recently enacted Consolidated Appropriations Act (Pub. L. No. 115-141). The content and omissions of the so-called “Omnibus” spending bill will be of interest to political actors in all sectors, but particularly those operating nonprofit entities engaged in political activity. The Act also continues to prohibit government agencies from requiring corporate political activity disclosure, including from government contractors. Below, we summarize these and other political law provisions.

Tax-exempt Organizations

First, the Act takes particular aim at the Internal Revenue Service (“IRS”), attempting to, at least rhetorically, reign in review of certain organizations that some believe were unfairly targeted in the past. As a result, the Act prohibits the IRS from using appropriated funds: (1) “to target citizens of the United States for exercising any right guaranteed under the First Amendment to the Constitution of the United States,” § 107; (2) “to target groups for regulatory scrutiny based on their ideological beliefs,” § 108; or (3) “to issue, revise, or finalize any regulation, revenue ruling, or other guidance not limited to a particular taxpayer relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of section 501(c)(4),” § 125.

Despite their sweeping rhetoric, none of these provisions limits the IRS’s current authority to oversee tax-exempt organizations, including its authority to take enforcement action against 501(c)(4) organizations that engage primarily in political activity. Moreover, existing guidance issued by the IRS concerning the political activity of exempt organizations remains fully intact.

Equally interesting is what political law provisions were omitted from the Act. For example, the bill did not include a repeal of the so-called Johnson Amendment, which prohibits 501(c)(3) nonprofit organizations from engaging in partisan political activity. A repeal, which was opposed by the National Council of Nonprofits, would have permitted charitable organizations, including churches and foundations, to engage in partisan politics without endangering their tax-exempt status.

Efforts to repeal the Johnson Amendment have a long history, including an Executive Order by President Trump last May instructing the Treasury Department “to the greatest extent practicable” not to take adverse action against religious organizations for speech on “political issues.” While concerns about the rise of “educational” entities with large political operations did not result in new restrictions in this legislation, this issue is likely to re-emerge and remain a focus for campaign finance reform lobbyists and others.

Corporate Political Disclosure

In welcome news for corporations and trade associations, Section 631 of the Act prohibits the Securities and Exchange Commission (“SEC”) from using any appropriated funds “to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax-exempt organizations, or dues paid to trade associations.”

We have previously reported on efforts to require more disclosure of corporate political activities. The SEC
formally dropped corporate political disclosure as one of its regulatory priorities in 2014 and appropriations bills have continued to formally deny the SEC funds to adopt and enforce political disclosure rules, effectively prohibiting the agency from changing its mind. While over the past few years activist shareholders have been successful in extracting additional disclosure from public companies, recent data suggests that momentum for additional disclosure has waned. By preventing the SEC from taking action in this space, Congress continues to ensure that the SEC will not force companies to disclose their political activities.

The Act also enacts into law language from previous appropriations bills prohibiting the SEC from requiring disclosure of trade association dues. Corporations remain free to join trade associations without disclosing to the public the value of their dues payments, including the portion that may be spent on trade association lobbying efforts.

The Act limits the government’s authority to require disclosure of political activity by federal contractors. Section 735 of the Act prohibits any appropriated funds from being used to “recommend or require” any potential federal contractor to disclose any political contributions, expenditures (including independent expenditures), or disbursements for electioneering communications made by the entity, its officers or directors, or any of its affiliates or subsidiaries, with respect to a federal office. This provision also goes one step further, and also prohibits the use of appropriated funds for the purpose of requiring disclosure of any other disbursement of funds made “with the intent or reasonable expectation” that the person receiving the payment will use the funds to make a contribution or expenditure. These provisions together ensure that federal contracting agencies cannot, as a condition of awarding a contract, require disclosure of the political activities of the contractor or its officers or directors.

**Campaign Finance—The Things Not Seen**

Although other proposed appropriations bills have contained language relaxing rules on coordinated spending between candidates and political parties, or prohibiting the Federal Election Commission from enforcing rules on trade association PAC fundraising, none of these provisions were enacted into law.

However, the Act does contain a provision that requires the national political party committee of the incumbent president to maintain a $25,000 deposit for the cost of reimbursable political events held at the White House. The statute also requires all other persons who sponsor a reimbursable political event at the White House to pay the estimated cost of the event in advance of the White House incurring the expenses.

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While the omnibus ultimately did not include sweeping changes to tax-exempt organization and campaign finance law, these issues will remain the subject of future policy discussions, and could reemerge as riders on future bills.

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