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To: Governor Bruce Rauner
Kristina Rasmussen, Chief of Staff

From: Dennis Murashko, General Counsel and Acting Chief Compliance Officer
Kenton Skarin, Deputy General Counsel
Christina McClernon, Associate General Counsel and Ethics Officer

Re: Interactions Between the Governor's Official and Political Offices

Date: August 21, 2017

You asked about best practices for interactions between employees of the Office of the Governor (including the Governor) (collectively, "Governor's Office employees") and members of the Governor's 2018 re-election campaign (including employees; any political consultants, paid or unpaid; and contributors, such as campaign finance committee members, regardless of whether they are formally affiliated with the campaign) (collectively, "Political Office"). This memorandum first addresses issues that must be considered regarding those interactions and then provides guidance for permissible and impermissible interactions under those principles. This guidance reflects best practices as derived from relevant Illinois law, conversations with individuals who have participated in re-election gubernatorial campaigns, materials from the National Governors Association, and the private attorney who served as Ethics Officer for the Rauner transition. Any proposed deviation from the guidance set forth in this memorandum must be approved by the Governor's General Counsel.

Key Legal Background

There are at least three areas of law that impact interactions between Governor's Office employees and the Political Office and thus inform our guidance:

First, the Illinois Ethics Act broadly prohibits political activity by state employees on state time using state resources. The General Counsel's Office has previously provided guidance on best

practices with regard to this topic.¹ In summary, state employees, including employees of the Governor's Office and the Governor, are prohibited from conducting political activity on state time and may not use state property or state resources "for the benefit of any campaign for elective office or any political organization."² The guidance also explains the State's statutory prohibition on constitutional officers or state supervisors requiring state employees to engage in political activity as part of employees' state duties, as a condition of employment, or on state time.³ State employees, of course, are free to voluntarily undertake political activities outside of state time and off state property, so long as they are not commanded to do so.⁴ These requirements reflect that state employees typically work on official state business during normal business hours and are paid to do so with taxpayer dollars.

The prohibitions of the Ethics Act are extremely broad, and it is instructive to summarize them here:

- Prohibited Activities during state-compensated time
 - Prepare, organize, or participate in a political meeting or event
 - Solicit, distribute, or receive contributions
 - Plan, conduct, or participate in polling activities, including voter turnout work
 - Assist at polls on election day
 - Petition work
 - Make a contribution
 - Prepare or review responses to candidate questionnaires
 - Distribute or prepare campaign literature
 - Campaign for public office
- Prohibited use of state property and resources
 - State-provided phones
 - Copiers
 - Computers
 - Emails
- Prohibited Locations
 - Any building or portion thereof owned or exclusively leased by the State
 - Does not apply to property rented or leased from the State by private entity
- Covered Individuals
 - Public officials

¹ See Office of the Governor, Best Practices for Compliance with Ethics Act's Ban on Prohibited Political Activity (July 10, 2017).

² 5 ILCS 430/5-15(a).

³ 5 ILCS 430/5-15(b).

⁴ 5 ILCS 430/5-15(e).

- State employees
 - Candidates
 - Lobbyists
 - Employees/officials of political parties
- Residences
 - Executive Mansion, except those areas specifically excepted as a private residence pursuant to the General Counsel's March 9, 2015, guidance, is a prohibited location
 - Private residences are not prohibited

Second, state law bars state officers and employees, including the Governor, from receiving gifts from so-called "prohibited sources,"⁵ subject to certain exceptions.⁶ Importantly for present purposes, a "prohibited source" includes "any person or entity who . . . is seeking official action" from an official or state employee,⁷ as well as any person or entity who "has interests that may be substantially affected by the performance or non-performance of the official duties of the member, officer, or employee."⁸ Another significant category includes people and entities "registered or required to be registered with the Secretary of State under the Lobbyist Registration Act."⁹ Actual registration status is irrelevant; all that is necessary is that a person or entity be required to register. And lobbying is defined expansively in the Lobbyist Registration Act to mean "any communication with an official of the executive . . . branch of State government . . . for the ultimate purpose of influencing any executive, legislative, or administrative action."¹⁰

However a person or an entity becomes a prohibited source, state officers and employees may not accept gifts from them. While a gift most commonly includes cash, food, entertainment, and similar items, the statutory definition is broader, including any "tangible or intangible item having monetary value."¹¹ In other words, state officials and employees may not receive even intangible items of value from prohibited sources.

⁵ 5 ILCS 430/10-10.

⁶ The exceptions include (1) goods or services offered on the same terms as to the general public, (2) goods or services for which an individual pays market value, (3) campaign contributions made pursuant to the Election Code, (4) educational materials, (5) travel reimbursement for state business, (6) gifts from relatives, (7) gifts from friends, unless the recipient believes the gift was due to his official position, (8) de minimis amounts of food, (9) food, lodging, and transportation for outside business, (10) gifts from other government employees, (11) inheritances, and (12) annual gifts with cumulative value under \$100. *See* 5 ILCS 430/10-15 and Executive Order 2015-09.

⁷ 5 ILCS 430/1-5 (definition of "Prohibited source").

⁸ *Id.*

⁹ *Id.*

¹⁰ 25 ILCS 170/2(e).

¹¹ 5 ILCS 430/1-5 (definition of "Gift").

Finally, the federal Hobbs Act¹² makes it unlawful for any person acting “under color of official right” to affect commerce by extortion, which the United States Supreme Court has interpreted to include *quid pro quo* corruption, like the direct exchange of an official act for a campaign contribution.¹³ Most recently, the Supreme Court addressed the Hobbs Act (as well as the similar honest services fraud statute) in overturning the bribery conviction of former Virginia Governor Bob McDonnell.¹⁴ The Court defined an “official act” for purposes of *quid pro quo* bribery as “a decision or action on a ‘question, matter, cause, suit, proceeding or controversy’” that involves “a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.”¹⁵ Further, the Supreme Court noted that “a public official is not required to actually make a decision or take an action” to constitute official action; “it is enough that the official agree to do so.”¹⁶ If a governmental official agrees to take such action, that can be enough to violate the Hobbs Act or to commit honest services fraud.¹⁷

Guidelines for Interactions Between Governor’s Office Employees and the Political Office

Based on the above legal consideration, the following guidelines should be observed by Governor’s Office employees in their interactions with the Political Office:

1. Prohibition on Direction of Governor’s Office by the Political Office

- a. Members of the Political Office shall not direct, explicitly or implicitly, any Governor’s Office decision or actions of any kind regarding official state business
 - i. Official state business includes any decisions or actions on questions, matters, causes, suits, proceedings or controversies that involve formal exercise of governmental power
 - ii. Members of the Political Office must not direct official state business because such direction could be interpreted as providing something of value (primarily expert advice and direction, especially when, as here, the

¹² 18 U.S.C. § 1951.

¹³ *McCormick v. U.S.*, 500 U.S. 257, 273 (1991) (“The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.”).

¹⁴ See *McDonnell v. U.S.*, 136 S. Ct. 2355 (2016). Technically, *McDonnell* interprets the federal bribery statute, 18 U.S.C. § 201, because the parties agreed to use the definition of federal bribery to define the honest services fraud and Hobbs Act extortion theories under which Governor McDonnell was prosecuted. See *id.* at 2364-65.

¹⁵ *Id.* at 2371.

¹⁶ *Id.* at 2370-71.

¹⁷ In Governor McDonnell’s case, there was no agreement to commit an “official act,” because the most the record showed was that McDonnell set up meetings and talked to government officials on behalf of a benefactor, not that he had actually *agreed* to do so as a condition of receiving gifts. See *Id.* at 2375 (“it is also possible that the jury convicted Governor McDonnell without finding that he agreed to make a decision or take an action on a properly defined ‘question, matter, cause, suit, proceeding or controversy’”).

advice is funded in whole or in part by political contributions) to state officials or employees in return for a preferred policy outcome

- b. The ultimate decision-making authority on all questions of official state business lies with the Governor in his capacity as the Chief Executive of the State
 - i. Decision-making authority on questions of official state business may be delegated by the Governor to his Chief of Staff and other members of the Governor's Office as may be necessary and appropriate
 - ii. Decision-making authority on questions of official state business may not be delegated, explicitly or implicitly, to members of the Political Office; included in this prohibition is a bar on Political Office staff directing Governor's Office employees on preferred outcomes on policy issues or any executive actions or decisions

2. Prohibition on Sharing of Internal Documents

- a. Governor's Office internal documents and information
 - i. Documents created by the Governor's Office or other offices of state government are official state records created with official state resources (time, equipment, property, etc.)
 - ii. State employees are prohibited from "misappropriat[ing] any State property or resources . . . for the benefit of any campaign for elective office"¹⁸
 - iii. State employees are also prohibited from "intentionally perform[ing] any prohibited political activity during any compensated time"¹⁹
 - iv. Internal state documents may not be shared or transferred to the Political Office, either in printed or electronic form
 - 1. Printing of documents created by the Governor's Office or any other offices of the state for purposes of providing copies to the Political Office constitutes misappropriation of state resources (paper and ink); there is no *de minimus* exception
 - 2. Printing of such documents also constitutes intentional performance of prohibited political activity during compensated time
 - v. Existing Governor's Office policies prohibit employee use of personal email to conduct state business; Governor's Office employees should not share or transfer internal state documents using personal email or any other email not owned or maintained by the State of Illinois
 - vi. No political activities of any kind should ever be conducted using any official State of Illinois email address
 - vii. Nothing prohibits the Political Office from receiving publicly-released documents once they are made generally available by the Governor's Office or by any other lawful means

¹⁸ 5 ILCS 430/5-15(a).

¹⁹ *Id.*

- viii. Information contained in an internal state document should never be shared by any Governor's Office personnel with the Political Office; thus, orally transmitting or otherwise sharing information to the Political Office is the equivalent (and thus equally improper) of sharing with or transmitting to the Political Office the actual document that contains that information

b. Political Office documents

- i. Documents drafted by the Political Office will typically be created for one or more "Prohibited political activities;"²⁰ as noted above, the definition includes, among other things, activities like conducting public opinion polls or surveys in connection with a campaign, soliciting votes on behalf of a candidate, preparing campaign literature or materials, making or soliciting contributions, managing or working on a campaign, and campaigning for any elective office generally
- ii. State employees, including Governor's Office employees, are prohibited from engaging in "Prohibited political activity" while on state time and property
- iii. As a result, documents created by the Political Office should not be shared with Governor's Office employees in their official capacities
- iv. If a Governor's Office employee receives anything from the Political Office at a State of Illinois email address, the Governor's Office employee may respond to the email only with the following statement: *"You have sent a communication of a political nature to an account operated and maintained by the State of Illinois. Your political communication has been deleted, will not be reviewed, and your intended recipient will not respond. Please refrain from sending such communications in the future to any email account operated or maintained by the State of Illinois. If you wish to contact me on a topic of a political nature, you may do so at [non-state email address]."*; of course, if the same email is then properly resent to the employee's personal account, the employee should take no further action with regard to the email during compensated time and while on state property

3. Communication Between Governor's Office Employees and Political Office Employees

- a. Governor's Office employees may voluntarily participate in conversations with members of the Political Office using non-state resources while off state time and off state property
- b. Governor's Office employees may not:
 - i. Be compelled to participate in conversations with members of the Political Office
 - ii. Be directed to volunteer to hold conversations with members of the Political Office

²⁰ 5 ILCS 430/1-5 (definition of "Prohibited political activity").

- iii. Participate in conversations while on state time
 - iv. Participate in conversations using state resources (such as state phones or computers for email communications)
 - v. Participate in conversations while on state property (whether owned or leased, including any part of the state capitol, the JRTC, including the JRTC plaza or public spaces, or state-owned parking facilities)
- c. Voluntary actions should not interfere with Governor's Office employees' duty to perform official state business during normal business hours
- i. Voluntary communications should occur before or after normal business hours, during break time (for instance, lunch), or during properly-taken personal time off (such as vacation)
 - ii. If a Governor's Office employee would be unable to take personal time during regular business hours because doing so would conflict with assigned official state business, the employee should not take personal time to volunteer for political activity during the same time period
 - iii. Governor's Office employees must also avoid real or apparent conflicts of interest in their work; a conflict may arise where, for example, an employee's non-official activities interfere with the performance of the employee's official duties
 - iv. The Governor's Office takes a conservative approach to any question regarding conflicts, and thus, whenever even an appearance of a conflict arises, the employee should immediately consult with the Governor's Office Ethics Officer before taking any further action

4. Communications Necessary to Coordinate Official State Business

- a. Scheduling
 - i. Maintaining an accurate schedule of the Governor's time is inherently a part of official state business, and it is necessary to avoid double-booking the Governor's official schedule with political events
 - ii. Individuals in the Governor's Office responsible for maintaining the Governor's official schedule may communicate during normal business hours and using state property and resources with individuals in the Political Office responsible for the Governor's political schedule for the purpose of coordinating schedules but not for any substantive policy matters
 - iii. Best practice is to block out periods of time during which the Governor will be engaged in political activity and then guarantee those times to the Political Office; the Political Office can then schedule specific events during those times rather than coordinating individual activities
 - iv. One-off and emergency situations inevitably will arise; communication between Governor's Office and Political Office schedulers to resolve these conflicts as they occur is permitted
- b. Communications staff

- i. Interactions between Governor's Office communications staff and Political Office communications staff are permitted for purposes of determining which office should handle particular press inquiries
 - 1. Communications staff should limit their conversations to determinations regarding responsibility for responding to inquiries rather than any substantive discussions regarding policy issues
 - 2. Governor's Office communications staff should not draft, prepare, or comment on press materials for the Political Office, *see* Point 2.a, above
 - 3. Political Office communications staff should not draft, prepare, or comment on press materials for the Governor's Office, *see* Point 2.b, above
- ii. Nothing prohibits Political Office communications staff from receiving publicly-released statements from the Governor's Office once they are made generally available, *see* Point 2.a.vi, above