



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-804-7000

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Hatch Act Advisory Opinion Regarding Service on a Presidential Transition Team

The U.S. Office of Special Counsel (OSC) is issuing this Hatch Act advisory opinion in response to questions OSC has received from federal employees about whether they may serve on a Presidential Transition Team (PTT) and, if so, in what capacity.¹ As described below, (1) prior to the election the Hatch Act does not prohibit a federal employee from serving on a PTT in a personal capacity—but not an official capacity—so long as the employee is not “further restricted,” and (2) after the election the Hatch Act does not restrict any employee from serving on a PTT either in an official capacity or in a personal capacity.

In 1963 Congress passed the Presidential Transition Act (PTA) to “promote the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the inauguration of a new President.”² The PTA is a framework through which the executive branch prepares for a new President to assume office. That framework includes the executive branch coordinating with, and providing assistance to, certain candidates for President and Vice President. The PTA provides for each candidate to establish a separate legal entity that “shall be established and maintained in such manner as to qualify” as a tax-exempt organization under section 501(c)(4) of the Internal Revenue Code.³ OSC’s understanding is that presidential campaigns establish PTTs as 501(c)(4) organizations pursuant to the PTA.⁴

The PTA distinguishes between pre-election and post-election support. All “eligible candidates”⁵ are entitled to support prior to the election, whereas after the election only the “apparent successful candidates”⁶ are entitled to support. One key distinction between pre- and post-election support is that the PTA authorizes federal employees to be detailed to a PTT only after the election.⁷ OSC is not aware of any other law that would authorize a federal employee to be detailed to a PTT prior to the election.

¹ OSC is authorized by 5 U.S.C. § 1212(f) to issue advisory opinions interpreting the Hatch Act.

² Presidential Transition Act of 1963, Pub. L. No. 88-277, § 2, 78 Stat. 153 (1964), as amended (codified at 3 U.S.C. § 102, note).

³ *Id.* § 3(h)(3)(A).

⁴ For example, in 2016 then-candidate Donald Trump’s PTT was Trump for America, Inc., a 501(c)(4) organization, and in 2020 then-candidate Joe Biden’s PTT was PT Fund, Inc., also a 501(c)(4) organization.

⁵ *Id.* § 3(h)(4).

⁶ *Id.* § 3(a), (c)(1)(A).

⁷ The authorization for a federal employee detail to a PTT is in the section describing the assistance that the Administrator of General Services may provide to an apparent successful candidate. *See id.* § 3(a)(2). An apparent successful candidate can only be determined after the election. *See id.* § (c)(1)(A).

The Hatch Act governs the political activity of federal civilian executive branch employees.⁸ An employee detailed under the PTA to an apparent successful candidate after the election remains a federal employee, and therefore remains subject to the Hatch Act, during that detail.⁹ As relevant here, the Hatch Act prohibits an employee from engaging in political activity while on duty or in the federal workplace.¹⁰ “Political activity” is activity directed toward the success or failure of a political party, partisan political group, or candidate for partisan political office.¹¹ A “partisan political group” includes any “organization which is affiliated with a . . . candidate for public office in a partisan election.”¹² Additionally, certain employees are “further restricted” and may not take an active part in political management or campaigns, to include working for a partisan political group.¹³

Each PTT is a 501(c)(4) organization that is legally distinct from the campaign of the candidates for President and Vice President whose transition it assists. However, each PTT is also unquestionably “affiliated with” its associated candidates. The offices those candidates seek—President and Vice President—are partisan political offices. Therefore, because each PTT is affiliated with a candidate for partisan political office, prior to the election each PTT is also a “partisan political group” as that term is defined in the Hatch Act regulations.¹⁴

A. Prior to the election an employee may not be detailed to a PTT. However, the Hatch Act does not prohibit an employee from serving on a PTT in a personal capacity provided the employee is not further restricted.

A federal employee may not be detailed to a PTT prior to the election. This is because the Hatch Act prohibits an employee from engaging in political activity while the employee is on duty or in the federal workplace. An employee detailed to a PTT pursuant to the PTA remains subject to the Hatch Act during that detail. Pre-election work performed on behalf of a PTT is political activity because it is directed toward the success of that PTT, which is itself a partisan political group as defined in the Hatch Act regulations. Thus, the Hatch Act prohibits an employee from being detailed to a PTT prior to the election because the detail would necessarily involve the employee performing PTT-related work while on duty. This conclusion is not inconsistent with the PTA because the PTA only provides for a federal employee to be detailed to the PTT of an “apparent successful candidate,” and an individual cannot be deemed an “apparent successful candidate” until after the election.

⁸ See 5 U.S.C. §§ 7321-7326.

⁹ *Id.* § 3(a)(2) (“persons receiving compensation as members of office staffs [of a PTT] under this subsection, other than those detailed from agencies, shall not be held or considered to be employees of the Federal Government”) (emphasis added).

¹⁰ See 5 U.S.C. § 7324(a)(1)-(2).

¹¹ 5 C.F.R. § 734.101.

¹² *Id.*

¹³ See 5 U.S.C. § 7323(b)(2)(B)(i); 5 C.F.R. § 734.408.

¹⁴ As described in Part B, after the election each PTT will cease to be a partisan political group because it will no longer be affiliated with a current candidate for partisan political office.

However, the Hatch Act does not prohibit a less restricted employee from working for a PTT in the employee's personal capacity provided the employee otherwise complies with the Hatch Act. For example, a less restricted employee who volunteers for a PTT must not: perform any PTT-related work while on duty or in the federal workplace; solicit, accept, or receive contributions to the PTT; or use the employee's official title, authority, or influence in connection with PTT activities.¹⁵

A further restricted employee, by contrast, may not serve on a PTT prior to the election. This is because each PTT is a partisan political group, and the Hatch Act prohibits further restricted employees from taking an active part in the management, direction, or supervision of a partisan political group even when acting in a personal capacity.

B. After the election there are no Hatch Act concerns with any federal employee being detailed to, or working in a personal capacity for, a PTT.

Once an election has been held then the individuals who had been running in that election are no longer candidates for purposes of the Hatch Act. At that point each candidate's PTT will cease to be a partisan political group because it will no longer be affiliated with a candidate for partisan political office. Also after the election, the PTA will authorize a federal employee to be detailed to an apparent successful candidate's PTT to perform transition-related work. While such a detail would have raised Hatch Act concerns prior to the election—when the PTT was a partisan political group—those concerns are not present after the election because the PTT will have lost its status as a partisan political group. Thus, the Hatch Act does not prohibit a federal employee from being detailed to a PTT after the election.¹⁶

There are similarly no Hatch Act concerns with any federal employee, whether less restricted or further restricted, working for a PTT after the election in that employee's personal capacity. This, again, is because the PTT will no longer be a partisan political group after the election. Please note that this advisory opinion is limited to the Hatch Act and does not address any other laws, rules, or regulations that may apply.

¹⁵ See 5 U.S.C. § 7323(a)(1)-(2), (4); *id.* § 7324(a).

¹⁶ Any employee detailed to a PTT remains subject to the Hatch Act during the period of that detail. This means that the employee is prohibited from, for example, taking any actions directed toward the success or failure of a political party, partisan political group, or candidate for partisan political office while the employee is in the workplace or on duty performing work for the PTT. Because executive branch support to PTTs is intended to prepare an apparent elected candidate to assume their official duties, and not to advocate for or against a political party or candidate for partisan political office, OSC does not anticipate that an employee's PTT-related work will implicate the Hatch Act. That said, OSC recommends that any employee detailed to a PTT who has questions about whether their PTT-related might involve political activity contact OSC for an individual advisory opinion.