Election Year Corporate Political Activity:
Legal Risks and Strategic Opportunities

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TODAY’S TOPICS

✓ Political Contributions
✓ Pay-to-Play Laws
✓ Candidate Advocacy
✓ Lobbying Rules
✓ Gift & Ethics Rules
✓ Compliance Considerations
BUT FIRST. . . REMEMBER

✓ The same political activity may involve federal, state & local laws
✓ Rules may differ significantly across jurisdictions & laws are changing rapidly
✓ The organization and individuals may have liability for violations
✓ Prosecutors & media love political law violations
✓ But. . . laws provide many opportunities for achieving corporate policy goals!
POLITICAL CONTRIBUTIONS
GENERAL RULES FOR CORPORATIONS

No federal corporate contributions
- To candidates, parties, or PACs
- But – direct and indirect *independent expenditures* permitted
  – *Citizens United v. FEC*

Corporate contribution rules vary by state
- A few states allow unlimited corporate contributions - AL, NE, VA, UT, OR
- Prohibited in about 20 states
- Others impose monetary limits
- 2017 – Mass corporate contribution ban upheld in state court
FEDERAL POLITICAL ACTION COMMITTEE

✓ Tax-exempt entity that makes political contributions to officeholders, candidates, other PACs
✓ Funded with voluntary contributions from qualified personnel, shareholders, members of the Board of Directors (in most cases), and family members (the “restricted class”)
✓ Company can pay for fundraising, solicitation and administrative support
✓ May host fundraising events
✓ Can contribute to state/local candidates in some states
✓ Separate state PAC may be needed in a few states
FEDERAL PAC CONTRIBUTION LIMITS

Multicandidate PAC

- $5,000 per candidate per election
- $15,000 per national party comm. per year
- $5,000 per state/local party or PAC per year
- $5000 per PAC per year

Three additional national party accounts

- Nominating convention, headquarters building, and recount/legal fees accounts
- Each can receive $45,000 per year from PAC (3x the national party limit)
WORKING WITH TRADE ASSOCIATION PACs

✓ Association PAC must get annual pre-approval to solicit corporate member’s restricted class

✓ A corporation can only authorize one of its trade association PACs to solicit its employees per year

✓ Association or its PAC cannot solicit from its corporate members’ PACs – but association PAC may accept voluntary contributions from members’ PACs
STATE CONTRIBUTION LAWS ARE CHANGING

✓ Many changes in past few years
✓ New flexibilities & new restrictions
✓ OH, TN & KY – limits revised upward in 2017
✓ Wisconsin & MI – now easier to use federal corporate PAC
✓ CA – campaign ads have to identify committee and its top 3 contributors
FOREIGN NATIONAL ISSUES
FOREIGN NATIONAL CONTRIBUTIONS PROHIBITED

• Foreign nationals (individuals and entities) are prohibited from making contributions or expenditures in connection with any election – federal, state or local!

• Individuals who may contribute to candidates, political parties, and PACs are:
  – U.S. citizens
  – Lawful permanent residents (i.e., green card holders)
ALSO PROHIBITED

✓ “Indirect” foreign national contributions through US intermediaries
✓ “Knowingly” soliciting or accepting foreign national contributions
✓ Providing substantial assistance in making or accepting foreign national contributions
✓ Contributions to political party entities and committees, and party building funds
VOLUNTEER ACTIVITY PERMITTED

General rule: foreign national *individual* may engage in uncompensated volunteer personal political activity - not treated as a “contribution”

Examples:
- ✓ Attend rallies, appearances and fundraisers
- ✓ Distribute literature, canvassing, telephone bank
- ✓ Solicit funds and give speeches for candidates
- ✓ Can even serve as paid campaign staff member
DOMESTIC SUBSIDIARY CONCERNS

U.S. domestic subsidiary may:

✓ Contribute in connection with a state or local elections (where legal) provided (1) activities are not financed by foreign parent and (2) foreign nationals do not participate in decision making

✓ Establish a PAC provided (1) the foreign parent does not finance PAC administration and (2) foreign nationals are not involved in PAC management
OTHER ISSUES TO CONSIDER
NO END RUNS ALLOWED

• Conduit contributions to hide the actual contributors thorough reimbursements and other arrangements

• DOJ/Office of Public Integrity has been actively prosecuting conduit schemes nationwide
EMPLOYEES CAN MAKE PERSONAL POLITICAL CONTRIBUTIONS

Individual Federal Contribution Limits

- $2,700 per candidate, per election*
- $5,000 per PAC, per year
- $10,000 per state/local party comm, per year
- $33,900 per national party comm, per year*
- $101,700 for each party convention, headquarters building, recount/legal fees account*

*readjusts every two years
USE OF CORPORATE FACILITIES = IN-KIND CONTRIBUTIONS

• Using corporate facilities or resources to assist with fundraising activities in support of officeholders or candidates
• Easy for employees to make missteps
• Result: reportable in-kind contribution
• If a federal candidate: illegal contribution
• Civil & criminal sanctions
PERMISSIBLE ON-SITE ACTIVITY

- **Permitted**: Occasional, isolated or incidental use of company facilities or resources
- **Safe Harbor**: 1 hour per week or 4 hours per month
- **Internet Safe Harbor**: Federal law permits unlimited use of work computers & Internet access
- **Corporate policies**: can limit or restrict such activity
STATE & LOCAL PAY-TO-PLAY LAWS

✓ Prohibit or restrict political contributions by state and local contractors and bidders
✓ Laws may apply to contributions by the company, its PAC, officers, directors, senior managers & even spouses and children
✓ Registration &/or reporting – may also apply
✓ Potential sanctions: bids disqualified and contracts voided, barred from future bidding, fines, sometimes criminal sanctions
PAY-TO-PLAY LAWS

STATE LAWS
• California
• Connecticut
• Florida
• Georgia (licensees)
• Hawaii
• Indiana (lottery contracts)
• Illinois
• Kentucky
• Louisiana (hurricane contracts)
• Maryland
• Missouri
• Nebraska
• New Jersey
• New Mexico
• Ohio
• Pennsylvania
• Rhode Island
• South Carolina
• Vermont
• Virginia
• West Virginia

LOCAL LAWS
• Oakland, City and County of L.A., Culver City, San Francisco, County of San Diego, plus Cal State Teachers Retirement System, and Cal Public Employees Retirement System
• Chicago & Cook County
• Dallas, Houston & San Antonio, plus Teacher Retirement System of TX
• Denver
• Fort Lauderdale & Orange County
• New Jersey – in over 260 cities & towns
• New York City
• Philadelphia
PAY-TO-PLAY LAWS CAN HAVE BROAD APPLICATION

- Always consider pay-to-play rules when making state/local contributions.
- Some pay-to-play laws prohibit political contributions and gift giving to covered officials (e.g., VA, RI, NM).
- CT law restricts contributions by corporate Presidents, VPs, and Treasurers regardless of residence.
- In 2017 – NJ law upheld; Fort Wayne, IN adopts pay-to-play law.
IN-KIND CONTRIBUTIONS = PAY-TO-PAY VIOLATIONS

- Product donations
- Allowing campaign to use company’s facilities/equipment
- Sale of item or service at less than usual charge
- Home fundraising events by covered company employees
CONTRIBUTIONS: PRACTICE POINTERS

✓ Have you established procedures for vetting corporate & PAC contributions to comply with limits & prohibitions?
✓ Are all contributors to PAC citizens or legal residents (i.e., green card holders)?
✓ Established internal controls for PAC?
✓ If a public contractor, have you determined scope of pay-to-play risks? Implemented compliance program?
✓ Have you educated employees regarding permissible and prohibited conduct regarding political contributions? Policies?
CANDIDATE ADVOCACY: INDEPENDENT EXPENDITURES
✓ Most corporate IE spending is through tax-exempt intermediaries – associations, advocacy groups, etc.
✓ Intermediary must report the cost of its communications
✓ Great variety in federal & state rules on disclosure of persons/groups making payments to the intermediaries
✓ Many states are requiring disclosure of ultimate donors – e.g., California, New York, Minnesota
✓ New Mexico adopted new disclosure rule in 2017
✓ GMA’s $18M fine in Washington State in 2016
CANDIDATE ADVOCACY: PRACTICE POINTERS

✓ Does your corporation have a policy regarding whether it will support IEs directly or indirectly thorough intermediaries?
✓ Is the policy publicly available?
✓ Have you instructed associations on the use of your dues payments?
✓ Do you confirm disclosure rules in advance of supporting independent expenditures?
LOBBYING LAWS
KEY LOBBYING TRENDS

✓ Expansion in definition of “lobbying”
✓ More disclosure about lobbying activities – expenditures, gifts, political contributions
✓ More political contribution and gift restrictions
✓ Stricter penalties for violations
✓ Mandatory ethics training
✓ Sexual harassment training – IL, NM
✓ Since 2016: new laws/rules in VA, KS, NV, NY, TX, RI, AK, CA
WHO IS A FEDERAL LOBBYIST?

Under federal law, entity must register if an employee satisfies (1) & (2), and organization satisfies (3):

1) Employee makes two or more “lobbying contacts” with a covered legislative or executive official

2) 20% or more of employee’s time for company is spent on “lobbying activity” within any three month period

3) Entity’s salary, overhead, and other expenses for lobbying activity expected to exceed $13,000 in a calendar quarter

Each “lobbyist” listed in the registration or subsequent quarterly reports
FEDERAL LOBBYIST OBLIGATIONS

✓ Ban on gifts from lobbyists and lobbyist employers to Members of Congress and staff (many exceptions available)
✓ Quarterly reports (LD-2) on lobbying activities & expenses
✓ Semiannual contribution reports (LD-203)
✓ **Important:** Random GAO audits, up to $200,000 fine per violation & knowing and willful violations are felonies!
✓ **DOJ enforcement activity** – several prosecutions and settlements since 2010!
Issues: Identify bills, policies, other matters that are subject of executive branch or Congressional lobbying activities

Costs: “Good faith estimate” of lobbying activity expenses:
✓ Lobbying contacts and activities by lobbyists and support personnel
✓ Outside lobbyist & consultant fees
✓ Percentage of association dues
✓ Other costs – travel, overhead, etc.

April 20
July 20
October 20
January 20
SEMIANNUAL REPORTS

Who submits:
✓ Registered entity & individual lobbyists

Contributions:
✓ Political contributions to federal candidates, parties, leadership PACs
✓ Payments related to federal officials

Certification:
✓ Entity/lobbyist certify familiarity & compliance with the Congressional ethics rules

Due Dates
July 30
January 30
STATE LOBBYING LAWS

✓ State lobbying laws can differ greatly from federal law
✓ One contact to influence legislation or executive action may trigger registration and reporting
✓ Broad definitions of lobbying
EXPANDED DEFINITIONS

**Goodwill lobbying:**
• Meet with public officials to build relationships, even if there is no attempt to influence a particular matter – “relationship building.”

**Procurement lobbying:**
• Attempts to influence purchasing or procurement decisions by government agencies. More than 26 states and many municipalities.

**Economic development efforts:**
• Interactions with state economic development agencies may be regulated as lobbying.
ACTIVITIES BY COMPANY EXECUTIVES ON STATE & LOCAL ISSUES

✓ Visits by non-lobbyists may trigger lobbying laws
✓ Confirm lobbying rules in advance
✓ Registration may be required in advance of meetings
✓ Some exceptions for certain types of activities, such as providing testimony or comments on the record
✓ Some exceptions for persons who are not government relations professionals
✓ Note: CA revoked “ride along” exception in 2016 – only available for “subject matter expert”
RELATED FEDERAL TAX ISSUES

✓ Lobbying and political expenditures are not deductible as a business expense

✓ Association must provide members with a “reasonable estimate” of the portion of dues related to lobbying or pay “proxy tax”

✓ Tax-exempts must provide a nondeductibility notice
LOBBYING: PRACTICE POINTERS

✓ Procedures for determining applicable lobbying laws?
✓ Procedures for collecting relevant data?
✓ Use of LDA or IRC definitions for federal report?
✓ Are you educating non-lobbyists of possible compliance requirements for meetings with public officials?
GIFTS TO GOVERNMENT OFFICIALS

- Highly regulated – federal, state & local
- Rules cover gifts to elected and appointed legislative & executive branch officials, and career employees
- Many states impose special gift restrictions on lobbyists and government contractors
- “Gift” may be anything of value – review applicable gift/ethics laws carefully
- Gift exceptions – highly specific, but often allow wide range of permissible giving – Plan in advance!
- Many recent changes: VA, HI, MD
FEDERAL GIFT RULES

House & Senate Gift Rules
• No gifts from lobbyists or organizations that employ or retain them unless exception applies – many exceptions available
• Separate House & Senate rules and exceptions

All Executive Branch Employees (OGE Rules)
• No gifts from “prohibited source” unless a specific exception applies
• Revised rules effective January 1, 2017!

Trump Ethics Executive Order
• Political appointees cannot accept gifts from lobbyists or their employers – very few exceptions
• No exception for gifts of nominal value
• Signed January 28, 2017
REVISED OGE GIFT RULES

✓ Written agency approval for invitation to a WAG and social invitation from a non-prohibited source
✓ De minimis gift exception kept at $20.00
✓ Event speakers can attend a separate “speakers dinner”
✓ New “informational materials” gift exception; agency approval required if over $100/year
✓ Effective January 1, 2017
PRESIDENT TRUMP’S ETHICS EXECUTIVE ORDER

- Limits gifts that appointee can accept from lobbyists
- Directs OGE to adopt rules to apply these gift restrictions to all government employees
- Appointee prohibited from engaging in “lobbying activities” with respect to his former agency for 5 years after leaving service
- Appointees have a lifetime ban on accepting work representing foreign governments or foreign political parties
- Signed January 28, 2017
COMMON GIFT RULE EXCEPTIONS

- Personal friendship and hospitality
- Widely-attended industry gatherings, site visits, and receptions
- Invitations to charitable fundraising events
- Promotional items of minimal value
- Caps, plaques, commemorative items
- Informational materials
- Items of nominal value
Do you have procedures for vetting gifts?
Can you identify your “at risk” employees – GR team, sales team, executive team?
Do you have education and training for those key groups?
Procedures if improper gifts are identified?
Is gift giving addressed in company policies?
COMPLIANCE TIPS

✓ **Training** – educate key groups about the rules, especially if activity will trigger registration/reporting or ethics/gift rules

✓ **Advance Planning** – many opportunities for engagement, but need to work within the rules

✓ **Review** – periodically review scope of GA efforts to assess risks and compliance

✓ **Put Someone in Charge** – employees should know where to direct compliance questions in the organization

✓ “**Ask First**” **Culture** – encourage employees to get advice before acting
QUESTIONS?

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