Public Affairs Council

Political Compliance Summit

April 30, 2024

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Program Agenda

9:30am - Managing Compliant Campaign Finance Programs

10:00am - Providing Effective Political Support

10:45am - Break

11:00am - Federal Lobbying Compliance, Grassroots and Gifts

Noon - Break

12:15pm - Multistate Political Activity

1:15pm - Break

1:30pm - State and local lobbying and gift laws

2:30pm - Adjourn

Managing Compliant Campaign Finance Programs

FEC Registration

- Federal Election Commission Form 1 (Statement of Organization)
  - Determine the type of PAC that will be formed: Connected vs. Nonconnected
  - Connected PACs must have the full name of the Connected Organization listed in the name of the PAC
  - Abbreviated name can be used; however, both the abbreviated name and the full name must be listed on the Statement of Organization
  - FEC has not objected to the use of PAC nicknames
  - Connected Organization may not be a partnership or LLC unless treated as a corporation for tax purposes
  - Connected Organization may pay the administrative expenses for Connected PACs
  - Connected PAC must be connected to a corporation, an LLC that files with the IRS as a corporation
  - Nonconnected PACs must pay their own administrative expenses
  - Statement of Organization must be filed within 10 days of a PAC being established and amendments must be filed within 10 days of a change

PAC Organizational Issues

- PAC Board is not required, but most PACs have a board
- Many banks request PAC bylaws or board resolutions along with the EIN to open a bank account
- Treasurer is the only required position but it is good practice to have other officers. An assistant treasurer is also advisable.
- Recommend against incorporating a Connected PAC
- A PAC must have its own EIN. It may not use a Connected Organization EIN.

Periodic PAC Reports

- Form 3X Reports
  - Election year: either monthly or quarterly
  - Non-election year: either monthly or semi-annually

PAC Receipts

- Report receipts on Schedule A
  - A person who collects contributions (including payroll deductions) must forward to the treasurer the receipt information within:
    - 30 days for contributions of $50 or less
    - 10 days for contributions greater than $50
  - Receipts must be deposited within 10 days of the treasurer receiving the contribution

Best Practices for Disbursements

- Report disbursements on Schedule B and describe purpose
- Disburse contribution checks to committees on a timely basis
- If a recipient has not deposited a check after 90 days, it has likely been lost or misplaced
- In deciding as to whom to contribute, be general in the description of the justification for a contribution
  - Best not to mention any particular past, present or future official action (e.g., a vote on particular legislation or other governmental decision). For example, a general reference to healthcare, energy, or tax legislation is okay.
  - Best not to characterize a contribution as helping to gain access to the candidate or a “seat at the table”
  - It is fine to state the leadership positions held by the candidate
  - It is fine to state the candidate/congressman represents the district where the company has a facility.

PAC Operations in Light of Impactful Events

- Expanded to include interest in diversity, equity and inclusion as a result of Black Lives Matter movement and responding to events of January 6, 2021
- Challenging environment for PACs after January 6
  - Donors
  - Media
  - Customers
  - Shareholders
  - Employees
  - Should a PAC balance contributions between Democrats and Republicans?
  - Where are over 3 years later?
- Should a PAC permit donors to restrict contributions through earmarking?
- Consider increasing diversity on PAC Board or PAC Advisory Committee
- Conform PAC bylaws to any changes in process or structure

Environmental, Social and Governance

- What is ESG?
- Does ESG come into play when making political contributions?
- What is CSR?
- Measuring ethics and sustainability vs. strategies to implement

Bank Reconciliation

- Bank reconciliations are critical
  - Reconcile the FEC report against bank statement
  - Identify outstanding checks
  - Deposits in transit
- Obtain access to the PAC’s bank account online

Document Retention

- Mandatory document retention
  - FEC: 3 years from the date the relevant information is reported
  - Payroll deduction authorizations must be kept for the entire period it is relied upon plus three years
- Must keep records of:
  - Copies of reports
  - Bank statements
  - Information of receipts and disbursements
  - If received contribution exceeds $50, a copy of the check
  - If disbursement exceeds $200, a receipt or cancelled check
  - Other records to substantiate information in reports
- To the extent PAC gives at the state level, must keep records under state law. State retention laws vary widely.

Federal Hard Money Rules

- Contribution Limits for Individuals and Non-Multicandidate PACs

	2023 - 2024 Limits
To Candidates –	$3,300* per election
To State Party Committees –	$10,000 per yr.
To PACs –	$5,000 per yr.
To National Party Committees –	$41,300* per yr. plus:

- An additional $123,900 per yr. for buildings

- An additional $123,900 per yr. for recounts and legal fees

- An additional $123,900 per yr. for conventions (only for national party committees, not senatorial or congressional national party committees)

- Aggregate contribution limit for all national party committees of a given party (Democratic or Republican): $991,200* per yr.

* These limits are indexed for inflation each election cycle

Federal Hard Money Rules

- Contribution Limits for Multicandidate PACs

	<u>2023 - 2024 Limits</u>
To Candidates –	$5,000 per election
To State Party Committees –	$5,000 per yr.
To PACs –	$5,000 per yr.
To National Party Committees –	$15,000 per yr. <u>plus</u>:

- An additional $45,000 per yr. for buildings
- An additional $45,000 per yr. for recounts and legal fees
- An additional $45,000 per yr. for conventions (only for national party committees, not senatorial or congressional national party committees)

- Aggregate contribution limit for all national party committees of a given party (Democratic or Republican): $360,000 per year
- PAC limits do not index for inflation

Timing of Contributions

- Maintain a record of the date a PAC makes a contribution, especially in an election year around primary and general election time
- Contributions are deemed to be made when one relinquishes control over the contribution check (e.g., mailbox rule)
- A PAC or individual may not contribute to a candidate after the date of their election, unless:
  - The campaign has net outstanding debt; and
  - The check is designated in writing for that election's "debt retirement"

Soliciting for PAC

- What is a solicitation?
  - Broadly interpreted
  - Pitching the benefits of a PAC is a solicitation
  - *See* FEC Advisory Opinion 1979-13 (Raymond International) stating that a description of the enthusiasm of employees participating is a solicitation
- What is <u>not</u> a solicitation?
  - Information about a PAC without pitching the PAC is <u>not</u> a solicitation
    - $[XX] was contributed to Republicans and Democrats
    - $[XX] was contributed to the PAC
    - [XX] number of employees contributed to the PAC
    - The PAC Board decides which candidates should receive contributions
    - It is okay to state "For information on eligibility or PAC activities, call [PAC official]." *See* FEC Advisory Opinion 2000-7 (Alcatel USA).

Suggested Format for PAC Solicitation Letter

- Describe legislative issues and their importance
- The need for our voices to be heard
- Support pro-industry and business candidates
- Support candidates who represent our employees
- In deciding whether to make a voluntary contribution to the PAC, please review the linked or included materials
  - On the linked/included materials, include the full legal disclaimers in clear type size

Legal Disclaimers

- All PAC solicitations must have necessary caveat language, *e.g.*, using a PAC contribution card stating:
  - I am contributing to the PAC as indicated below. Prior to contributing, I am aware:
    - That contributions to the PAC will be used in connection with federal elections and are subject to the prohibitions and limitations of the Federal Election Campaign Act [additional statement necessary if PAC gives at state or local level].
    - Of my right to refuse to contribute without reprisal.
    - That the guidelines for contributing are merely suggestions. I may contribute more or less than the guidelines suggest or nothing at all, and I will not be favored or disadvantaged by reason of the amount of my contribution or my decision not to contribute [only required if recommended level of contributing].
    - That contributions to the PAC are not deductible for federal income tax purposes.
    - That I must be a U.S. citizen or Permanent Resident Alien (*i.e.*, a Green Card holder residing in the U.S.) to make, or be solicited for, a contribution.

Legal Disclaimers

- Federal law requires the PAC to use its best efforts to collect and report the name, mailing address, occupation and name of employer for each individual whose contributions exceed $200 in a calendar year.

Solicitation Best Practices

- Script group presentations to employees
- Script follow-up communications
- Ensure written solicitations contain legal disclaimers including on follow-up solicitations
- Don’t solicit non-eligible
- Don’t forget the broad definition of “solicitation”
- Don’t treat PAC fundraising as a United Way drive
- Don’t use words suggesting that contributing is a condition of employment (*e.g.*, “must contribute” or “expected to contribute”)
- Don’t say PAC donations help get laws passed
- Don’t give the impression that contributing will affect opportunity to advance within the company (*e.g.*, do not discuss issues regarding promotions and contributing)
- Don’t use one-on-one oral solicitations, except scripted peer to peer

Increase PAC Participation

- Expanding your solicitation base
  - Soliciting board members
  - Soliciting eligible employees of affiliates
  - Soliciting shareholders who are otherwise ineligible individuals or retirees

PAC Incentives

- Most PACs use incentives such as gifts, live events with politicians, and special events with the CEO
- 2023 Public Affairs Council Corporate PAC Benchmarking Report
  - What one benefit is the most effective in your fundraising efforts?
    - PAC match (32%)
    - Event with CEO and/or senior executives (19%)
    - Annual gift (9%)
    - Live events with politician, celebrity or guest speaker (8%)
    - Special communications, such as newsletters (7%)
    - Raffles (5%)
  - Senior management buy-in
    - CEOs: 72% give the maximum (7% contribute below maximum amount)
      - 59% formally endorse
      - 46% sign solicitations
      - 11% sit on PAC Board

One-Third Rule

- One-third rule
  - Applies to fundraising with promotional items, prizes and entertainment paid for by the connected corporation or trade association
  - Note that food, drinks and facilities expenses are not subject to the one-third rule: FEC Advisory Opinion 1995-17 (National Association of Realtors), FEC Advisory Opinion 1999-31 (Oshkosh Truck Corporation)

PAC Match

- Charity PAC Match
  - Ensure 501(c)(3)
  - May not use company foundation
  - Non-deductible
  - Be mindful of state law
  - Consider combining a gift to a contributor with PAC Match for those giving a certain amount. *See* FEC Advisory Opinion 2003-33 (Anheuser-Busch)
- Online contributions: credit cards, PayPal, Venmo, Square, and Zelle. Check with your accounting department before allowing these alternative methods of contributing.

Trade Associations

- Trade associations are corporations and most rules are the same as for-profit corporations
- May solicit contributions to trade association PAC
  - PAC subject to same limits as a corporate PAC
- Approval required and a corporation may only authorize solicitation by one trade association per year
- Parent/subsidiary rules – 11 CFR § 114.8(f)
- What is a solicitation? Who may be solicited?
  - Issues regarding solicitation of directors?
- Soliciting partnerships – special rules
- Corporate members may pay overhead expenses of trade association PAC and donate gifts for PAC fundraising: FEC Advisory Opinion 1982-61 (Ass'n of Trial Lawyers of America)
- Cautionary notes:
  - Trade associations getting around the prior approval rules
  - Soliciting beyond the restricted class
  - Trade association PAC-to-PAC solicitation

Embezzlement Policy

- Embezzlement policy – safe harbor
  - Checks in excess of $1,000 are authorized in writing or signed by two people
  - All wire transfers require two authorizations
  - An individual who does not handle PAC accounting receives incoming checks and places a restrictive endorsement on them, i.e., “For Deposit Only”
  - Petty cash must have written log and the fund should not exceed $500
  - All PAC bank accounts are opened using the committee’s name and EIN
  - Bank reconciliations are done by someone other than a check signer

Providing Effective Political Support

Soliciting for PAC: Rules for Corporations and LLCs

- Corporate PAC may solicit company's Restricted Class (shareholders and executive and administrative personnel)
  - As a guideline, this generally includes employees who are exempt under FLSA. *See* FEC Advisory Opinions 2010-04 and 2012-02 (Wawa).
  - Includes spouses
  - FLSA exempt employees are still not solicitable if they are:
    - Hourly paid,
    - Unionized,
    - First-line supervisors of hourly-paid employees (unless they have some other exempt function), or
    - Possibly outside sales persons.
  - Such employees of affiliates, including parent, sister and subsidiaries more than 50% owned or controlled, are also included

Soliciting for PAC: Rules for Corporations and LLCs

- Rules for most LLCs and partnerships
  - Attribution rules (including for contributions to super PACs following recent FEC guidance)
  - Most LLCs and partnerships may only sponsor a nonconnected PAC
  - Calculating administrative expenses for nonconnected PAC

Soliciting for Corporate PAC – Unions and Twice Yearly Rules

- Must provide union with same method for soliciting its members at the company, but union must pay for related costs
- PAC may solicit non-Restricted Class employees under very narrow circumstances
  - Must be limited to twice yearly;
  - Solicitation must be sent to their homes;
  - May not use payroll deduction; and
  - Independent custodian of the funds that ensures anonymity of certain contributions.
- Must grant union PACs ability to solicit non-unionized employees up to twice a year

Affiliated PACs, Mergers and Spin-offs

- PACs of affiliated companies share the same limit regarding the contributions that they make and the contributions that they receive
- Implications if there is a merger of companies and joint ventures
  - Prior to the merger, the PACs of the different companies do not share a contribution limit
  - If prior to the merger, the PACs' combined contributions to a candidate exceed their shared limit, then those PACs after the merger are considered to have already reached their shared contribution limit but not to have exceeded it
  - To transfer payroll deductions, one does not need to get re-authorization but merely a notice. *See* FEC Advisory Opinion 1994-23 (Northrup Grumman).
  - Spin-off: create new PAC before spin-off if PAC members are going to new company

Ban on Corporate Contributions

- Federal law prohibits corporations from making monetary contributions, as well as in-kind contributions such as the use of corporate facilities or personnel, for campaign purposes
- Super PACs – federal contractor ban
- 501(c)(4)s and 501(c)(6)s: corporate independent expenditures
  - CREW v. FEC struck down a longstanding FEC rule that limited the duty of 501(c)(4) and 501(c)(6) non-profits that make federal independent expenditures to publicly disclose donors
  - Currently 501(c)(4)s and 501(c)(6)s must disclose the identity of donors whose donations are for the purpose of furthering independent expenditures

Ban on Corporate Contributions

- National Party Committees – Ban on soft money.
- Republican and Democratic governors' associations are not federal national party committees. Thus, corporate funds are permissible.
- State Party Committees – federal account and state account distribution
- KYC: Know Your Committee
  - Campaign committees
  - Leadership PACs
  - Joint fundraising committees
  - IE committees (super PACs)
  - PACs
  - 501(c)(4)s
  - 501(c)(6)s

Fundraising at the Office

- Internal communication and fundraising—only solicitable class (*i.e.*, shareholders and executive or administrative personnel). *See* FEC Advisory Opinion 1984-13 (Nat'l Ass'n of Manufacturers).
- External communication and fundraising—persons outside solicitable class
  - Advance payment
- Live event costs to be calculated
  - Food
  - Value of the use of the room
  - Use of any corporate facilities (*e.g.*, for printing invitations)
  - Use of corporate personnel in handling RSVPs or organizing the event, including directed time
- Certain LLCs and partnerships cannot take advantage of these exemptions

Fundraising at Residence

- Special rules for home fundraisers
  - If married, the host may spend $2,000 for food, beverage, and invitations without it counting against any limit. Unlike the office space, a home does not have to be part of the value of the in-kind donation. Event must take place at residence of host(s). If not married, the exempt limit is $1,000.
  - If a joint fundraiser with the party committee, an individual may spend $3,000 without it counting against any limit, and $6,000 if married

Bundling Under FECA

- Corporation cannot facilitate contributions
- Bundling and providing stamped or addressed envelopes
- Westar case: FEC MUR 5573 (2005)
- Freddie Mac case: FEC MUR 5390 (2006)
  - $3.8M civil penalty -- implications for corporations
- Bundling may be permitted if a campaign issues a fundraising authorization to an individual and appoints that individual to a special position with the campaign
  - Attestations required in a bundling letter
    - Authorized fundraiser
    - Special position with campaign
- Best to have checks sent directly to campaign or credit card with a designation noting solicitor

Bundling Under HLOGA

- Bundling Disclosure by Candidates – HLOGA amended FECA to require candidates' campaigns, leadership PACs and political party committees ("Covered Recipients") to disclose for each reporting period the name, address and employer of each lobbyist, lobbying firm or lobbyist employer that it has acknowledged or recognized as having raised contributions totaling over $21,800 (and the specific amount bundled) during that period.
- FEC Form 3L

Corporate Political Activity

- Use of corporate aircraft (first-class airfare vs. charter rate)
- Sending corporate executives to political events
  - Boeing decision
- Corporate endorsements
- Providing registration information and absentee ballots if state law permits
- Registration and get-out-the-vote drives
- Voter guides

Reimbursed and Foreign Contributions: Big No-Nos

- Making a contribution in the name of another – reimbursing or compensating someone for his or her contribution. Possible criminal implications.
- Foreign nationals
  - Federal law applies to federal, state and local contributions
  - Checking I-9 forms

FECA Enforcement - Civil and Criminal

- Civil penalties
- Criminal penalties
  - Maximum jail time for lesser violations (involving less than $25,000) is 2 years
  - Maximum jail time for greater violations (involving $25,000 or more) is 5 years
  - Violations subject to Federal Sentencing Guidelines

National Party Conventions

- This summer, both major parties will hold their nominating conventions:
  - RNC 2024 – Milwaukee: July 15-18th
  - DNC 2024: Chicago: August 19-22nd
- Conventions primarily funded through:
  - National party committees' "**convention accounts**":
    - Contribution limit is $123,900 per calendar year
    - Subject to same source prohibitions as federal political committees—corporations, labor unions, and foreign nationals are prohibited from contributing
    - GOP: *Committee on Arrangements for the 2024 Republican National Convention*; Democrats: *2024 Democratic National Convention Committee*
  - **Host committees:**
    - Often organized as 501(c)(3) entities – verify tax status to take advantage of tax deduction
    - May accept unlimited donations, including from corporations and labor unions, to defray the costs of holding convention
    - GOP: *MKE 2024 Host Committee*; Democrats: *Chicago 2024 Host Committee*
- Donations to convention accounts and host committees are publicly disclosed (host committees file with FEC within 60 days after convention ends)

Activist Shareholders

- Activist shareholders have been introducing proxy proposals requiring public disclosure of company's and PAC's political activities
- Some of the more notable activist shareholders introducing proxy:
  - Center for Political Accountability
    - CPA-Zicklin index – 2023 index is available
  - Trillium Asset Management
  - New York State Retirement System
  - New York City Employees Retirement System
  - Domini Social Investments
  - Walden Asset Management
  - Sisters of Mercy Reg. Community of Detroit Charitable Trust

Activist Shareholders

- Proxy proposals have requested disclosure of one or more of the following:
  - Role of Board of Directors
  - Corporate and PAC contributions to any candidate, party committee, political committee, 527 political organization, or non-profit (501(c) organization)
  - Policy and reasons for making political contributions
  - Identity of those involved in decisions to make contributions
  - Lobbying expenses
    - ➢ Trend toward seeking more lobbying information

Activist Shareholders – What to Do?

- Typically not useful to seek a No Action Letter (see outcome of Boeing and Home Depot requests) unless duplicative requests
- Consider negotiating a settlement for withdrawal of proxy
- Compromising vs. hard line. Are we “feeding the squirrels”?

Federal Lobbying Compliance, Grassroots and Gift Rules

Federal Lobbying Law

- Lobbying Disclosure Act of 1995 (“LDA”)
- Honest Leadership and Open Government Act of 2007 (“HLOGA”)
- Three forms:
  - LD-1 Registration
  - LD-2 Reports
  - LD-203 Semi-annual disclosures

Registration

- LD-1 Form – Due 45 days from initiating lobbying
- What triggers registration?
  - In-house registration triggers:
    - ➢ (1) at least one employee of a company or trade association must have two or more lobbying contacts at any point in an employee's employment;
    - ➢ (2) the same employee must spend 20% or more of his or her time engaged in lobbying activity in a calendar quarter; and
    - ➢ (3) the company or trade association must spend more than $14,000 on lobbying activity in a quarter.

Registration

- Outside consultant triggers:
  - (1) at least one employee of the outside consultant must have two or more lobbying contacts on behalf of a particular client during the period of representation;
  - (2) the same employee of the consultant must spend 20% or more of his or her time engaged in lobbying activity on behalf of a particular client in a calendar quarter (the 20% test is a per client analysis); and
  - (3) the outside consultant must receive direct lobbying income of $3,000 or more in a calendar quarter computed on an accrual basis.

Registration

- When a company or trade association triggers registration as a result of one or more employees meeting the above tests, just the employer of that employee or employees registers.
- Foreign-owned companies – If a company or trade association triggers registration, the LD-1 form requires that all foreign entities that are 20% equitable owners must register. The guidance requires that even intermediate foreign owners must be disclosed.

What is Lobbying Activity? LD-2 Report

- Lobbying activity – The definition of lobbying activity applies to all employees of a company or trade association. Even if an employee spends less than 20% of his or her time lobbying, the value of the time spent engaged in lobbying activity must be calculated for disclosure purposes.
  - The definition of lobbying activity includes:
    - ➢ research and preparation for lobbying contacts for work performed with the intention of being used for a lobbying contact by the employee performing the work or by another employee of the registrant;
    - ➢ strategic planning and research;
    - ➢ time spent during a lobbying contact whether in person, in writing, electronic, or telephonic;
    - ➢ time spent educating covered officials on issues related to the lobbying effort; and
    - ➢ strategizing with others in the industry, trade associations, and task forces is likely included as lobbying activity.

What is Lobbying Activity? LD-2 Report

- Other considerations in computing lobbying activity:
  - Travel time
  - Door-opening
  - Administrative time
- What about:
  - “Hide-behind lobbying”?
  - Time spent at fundraisers?
  - Lobbying issues where there is no pending legislation?
  - Requests for proposals or pitches on government contracts?
  - “Shadow lobbying?”

Who is a Covered Official? LD-2 Report

- **Method A - Covered Officials (LDA Method)**
  - Legislative Branch:
    - Members of Congress
    - Senators
    - Congressional staff of Members of Congress and Senators
      - This includes personal and committee staff members
  - Executive Branch:
    - White House staff and those in the Executive Office of the President
    - Military grade O-7 and above (*e.g.*, generals and admirals)
    - Presidential and Schedule C appointees (does not include career Senior Executive Service)
      - Plum Book lists covered official positions

Who is a Covered Official? LD-2 Report

- **Method C – Covered Officials (Tax Code method)**
  - Federal:
    - Members of Congress
    - Senators
    - Congressional staff of Members of Congress and Senators
      - This includes personal and committee staff members
    - White House staff
    - Top two officials in any office or division of the Executive Office of the President (*e.g.*, OMB Director and Deputy Director)
    - Cabinet-level officials and their first deputies
    - No independent agency officials are covered

Who is a Covered Official? LD-2 Report

- **Method C - Covered Officials (Tax Code method)**
  - State:
    - ➢ State legislative officials on legislative matters
    - ➢ State executive officials only on legislative matters
  - Local legislative officials

- Other factors under Method C
  - Federal and state grassroots lobbying on legislative issues is included
  - Executive branch contacts with non-covered officials if on legislative matters
  - De minimis lobbying excluded if less than 5% and no contacts by an employee
    - ➢ Note: Method A has no de minimis exception

Social Media

- Direct lobbying
  - Email
  - Direct messages
  - Tagging
  - Texting

- Indirect lobbying (grassroots) – Method A does not cover these activities
  - Tweeting
  - Retweets
  - Facebook

Filing Dates – Due 20 Days After Each Quarter

- The House and Senate make the LD-2 filings publicly available
- Upcoming due dates:
  - 2nd Quarter: July 22, 2024*
  - 3rd Quarter: October 21, 2024*
  - 4th Quarter: January 20, 2025
  - 1st Quarter (2025): April 21, 2025*

* The LDA allows for filing on the next business day if a reporting due date falls on a weekend or federal holiday

What Accounts for the Total Spent on Lobbying Activities for the LD-2 Report?

- In-house employees – compensation of employees for time spent lobbying, including a gross-up for overhead
- Outside consultant fees
- Coalition dues
- Trade association dues for the portion spent on lobbying. If a company pays dues for the entire year in one quarter, the entire amount goes on that quarterly report. It cannot be amortized.
- Travel expenses
- Entertainment expenses

Tracking of Time

- Preference is contemporaneous tracking of time
- At least keeping time on a weekly basis if not daily
- Estimating time without back-up is not advised
- Putting down 100% is not a solution if not lobbying all the time

Tracking Issues

- Pre-disclose issues on which the registered lobbyists work
  - A filer does not disclose issues that only non-registered employees work on
  - A company or trade association does not disclose contacts and lobbying activities of its outside consultants, only the contacts and activities of its in-house lobbyists
- Description of issues should include bill number (if applicable), a brief description of the legislation and the portions of the bill lobbied
- Dealing with issue codes

Other Issues

- Interest of foreign entities disclosed on the LD-1. This may be important regarding the interplay between the LDA and the Foreign Agents Registration Act.
- Updates or changes
  - For example, changes in address and incoming and outgoing lobbyists get reported on the quarterly LD-2 on the last page of the report
- Previous legislative and executive branch covered employment
  - Lobbyists disclose prior covered positions during the past 20 years
  - In-house lobbyists do this once when they are first listed as “new”
  - Do not list private positions, such as “CEO of a company”

Justice Against Corruption on K Street – JACK Act

- Disclose on the LD-1 and LD-2 federal and state convictions of lobbyists for bribery, extortion, embezzlement, kickbacks, tax evasion, fraud, false statements, perjury, money laundering, and certain conflicts of interests
- Provide details of the offense such as jurisdiction and statutory cite
- Even if very unlikely that any such convictions have occurred, it is necessary to survey lobbyists quarterly and so report

Affiliate Disclosure

- A registrant only discloses the identity of an affiliate if:
  - (1) an employee of an affiliate actively participates in the planning, supervision, or control of a registrant's lobbying activity; <u>and</u>
  - (2) the affiliate contributes $5,000 or more in a calendar quarter in the lobbying effort.

Terminating and Switching Lobbyist Registrations

- Termination is permitted if an individual has no reasonable expectation of continuing to meet the 20% threshold
- A registrant can terminate a lobbyist by listing the lobbyist's name on the LD-2 report
- The registrant (not the lobbyist) must sign in to the LD-203 Contribution System and update the lobbyist's status to "inactive" and enter an effective date of termination
- The lobbyist must file an LD-203 report for any reporting period for which he or she was an active lobbyist
- When a lobbyist leaves a company or organization, the lobbyist should properly terminate registration and make it part of the exit interview process to make sure the employee files an LD-203
- If a lobbyist is merely switching employers and will continue to lobby, then the lobbyist must sign into the LD-203 Contribution System in the “Manage Your Profile” section and request an employer transfer

Trade Associations and Informal Coalitions

- Requirement:
  - A trade association or coalition must identify members or participants that contribute over $5,000 in a reporting period and actively participate in the lobbying effort
- Exception:
  - A trade association does not need to list its members meeting the $5,000/active participation threshold if it publicly discloses the identity of its members
- A coalition is an informal group. If it engages an outside lobbyist, the outside lobbyist must register and report and note on the disclosure the group it represents is an informal coalition

LD-203 Reports: Semi-annual

- All lobbyists, lobbying firms, and lobbyist employers must file their own semi-annual LD-203
- Upcoming due dates:
  - For first six months of 2024 – July 30th, 2024
  - For second six months of 2024 – January 30th, 2025
- LD-203 Reporting Categories
  - PAC donations under the Federal Election Campaign Act
    - ➢ Covers contributions to federal candidates, leadership PACs and party committees
  - Honorary expenses
    - ➢ Includes controlled committees, such as the Congressional Black Caucus, Congressional Hispanic Caucus, and Congressional Asian Pacific American Caucus
  - Presidential library and inauguration
  - Other expenses, such as certain meeting expenses

LD-203 Certification and Compliance Program

- An LD-203 filer must certify that they are familiar with House and Senate gift rules and that they have not provided, requested, or directed a gift to a Member of Congress, Senator, or staff
- Due diligence
- Companies and trade associations need a method of contacting certain employees to make an accurate certification
- Training in lobby and gift rules
- Robust gift policy
- Disclaimers: if due diligence is performed, a filer may state that a filing is to the best of his or her knowledge after reasonable due diligence
- Disclosure of service on a corporate, trade association, or other PAC board

Federal Legislative Branch Gift Rules

- Reception exception
- Widely attended gatherings
- Friendship exception
- Site visits
- Home district products
- Nominal items
- Training
- Commemorative items
- Informational materials
- Personal hospitality
- Political contributions
- Items paid for at fair market value

Federal Executive Branch Gift Rules

- Gifts to executive branch officials and employees are generally limited to $20 per occasion and $50 per calendar year
- Exceptions:
  - Widely attended gatherings (requires preclearance from agency)
  - Meals and entertainment from non-prohibited source
  - Personal relationship
  - Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal
  - Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation
  - Gifts the receipt of which is specifically authorized by statute (e.g., Foreign Gifts and Decorations Act)
  - Gifts to the President and Vice President

Federal Executive Branch Gift Rules - Biden Executive Order

- Biden Executive Order prohibits most gifts to executive branch officials and employees from lobbyists, lobbying firms, and lobbyist employers
- May not utilize $20/$50 or widely attended gathering exceptions, among others
- Limited exceptions remain, including:
  - Personal relationship
  - Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal, but not including receptions with alcohol like in the legislative branch
  - Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation
  - Gifts the receipt of which is specifically authorized by statute (*e.g.*, Foreign Gifts and Decorations Act)
  - Gifts to the President and Vice President

Enforcement and Audits

- Government Accountability Office (“GAO”) oversight of LDA and HLOGA filings
- Random audits only
  - 80-100 LD-2 per year
  - 160 LD-203 per year
- Referrals from House and Senate to the U.S. Attorney for the District of Columbia
- Any U.S. Attorney may prosecute an LDA/HLOGA violation
- Errors from GAO Audits:
  - 16% of LD-2 reports are not properly rounded to the nearest $10,000
  - 23% of LD-2 reports failed to properly disclose one or more covered positions
  - 7% of LD-203 reports missed reportable contributions

Good Faith Compliance

- The standard for compliance is good faith, but the law provides no definition
- DOJ stated an increase for review of HLOGA compliance
  - Abramoff pleas – prison term
  - Carmen Group – $125,000 fine
  - Mauk – $30,000 settlement
  - Biassi Business Services – $200,000 default judgment
- Penalties:
  - Civil and criminal penalties of up to 5 years of imprisonment for knowingly and corruptly violating the law
  - 60-day cure provision for reporting violations but not for gift rule violations; however, returning gifts and late amendments mitigate

Multistate Political Activity: State and Local Laws and Pay-to-Play

State and Local Campaign Contributions Generally

- When giving to state or local candidates, party committees or PACs, applicable federal, state and/or local laws may come into play
- These laws may prohibit or limit contributions or impose reporting requirements

Corporate Contributions

- 28 states plus D.C. permit corporate contributions:

Alabama
California
Delaware
District of Columbia
Florida
Georgia
Hawaii
Idaho
Illinois
Indiana
Kansas
Louisiana
Maryland
Maine
Mississippi
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
Oregon
South Carolina
South Dakota
Tennessee
Utah
Vermont
Virginia
Washington

Corporate Contributions

- Five states currently permit unlimited corporate contributions (*i.e.*, Alabama, Nebraska, Oregon, Utah and Virginia)
  – Illinois limits for a particular elected office are lifted if IE or self-funding threshold is reached for that particular office
- The remaining 23 states plus D.C. allow corporate contributions but impose limits
- Partnerships: each state has different rules on pass-through
- Reporting requirements: 17 states require corporations to file reports if they make contributions

Alaska
California
Georgia
Hawaii
Iowa
Maryland
Massachusetts
Minnesota
Montana
Nebraska
New Hampshire
North Dakota
Ohio
Pennsylvania
Rhode Island
Tennessee
Washington

Corporate Contributions

- Reporting Requirements
  - Ohio and Massachusetts ban corporate contributions but require disclosure of permissible corporate ballot measure contributions
- Aggregation among affiliate companies
  - Most states aggregate among affiliates, *e.g.*, Georgia and Maryland
  - New York does not aggregate among corporate affiliates for purposes of the $5,000 per corporation limit
    - ➢ LLC contributions are also subject to the $5,000 per entity limit, and LLC contributions are attributed to its corporate members
  - California aggregates only if companies do not act independently
- Aggregation among affiliated PACs
- Most states aggregate affiliated PACs, *e.g.*, Kentucky and Maine

Corporate Contributions

- 22 States generally prohibit corporate contributions:

Alaska
Arizona*
Arkansas*
Colorado
Connecticut
Iowa
Kentucky
Massachusetts
Michigan
Minnesota
Missouri*
Montana*
North Carolina
North Dakota
Ohio
Oklahoma
Pennsylvania
Rhode Island
Texas
West Virginia
Wisconsin*
Wyoming

- *Some of the above states permit corporate contributions to PACs and/or party committees
- Some states that prohibit corporate contributions to political committees permit contributions to administrative accounts of political party committees (*e.g.*, Texas and Ohio)
- Ballot measure contributions are generally permitted, even if corporate contributions prohibited in the state
- Maine repealed ban on corporate contributions in 2023

Special Restrictions on Certain Industries

- New Jersey – Prohibits insurance companies, banks, utilities and their affiliates doing business in the state from making contributions "for any political purpose whatsoever"
  - Recent district court ruling permits regulated entities to make independent expenditures
- New York state limits political contributions by owners of premises contracted for or used as a place of registration or as a polling place
- Delaware has a ban on insurers, or banks acting as an insurer, contributing to an Insurance Commissioner candidate
- Several states impose restrictions on lottery or gaming contractors

Operating a Multi-State PAC

- If a PAC (including a federal PAC) contributes at the state or local level, it must comply with that state's or locality's law
- Some states make it easy for federal PACs to give (e.g., Ohio and Texas)
- Some states make it difficult or illegal to use a federal PAC (e.g., Alaska, Connecticut, Massachusetts, Minnesota, New York and Rhode Island)
- New York Department of Labor payroll deduction statement and regulation
- New Jersey payroll deduction restriction
- Many states do not exempt administrative expenses or certain solicitation expenses. This can, for example, make PAC match impermissible.
  - For example, New Hampshire treats administrative expenses as contributions subject to the $5,000 per election corporate limit

Operating a Multi-State PAC

- Some states impose burdensome restrictions on PACs
  - New York treats administrative expenses as contributions that count against the contribution limit, and requires an in-state bank account. Transfers exceeding $1,000 from out-of-state accounts are not permitted.
  - Vermont requires compliance with state limit on what a PAC can receive –$4,210 per two-year election cycle
  - Washington state requires a federal PAC receive contributions of $10 or more from at least ten persons registered to vote in the state in the 180 days prior to the time a contribution to a state candidate or PAC is made
- Most states require registration and reporting by the PAC
  - Some require greater itemization in reports than is required under federal law
- Beware of state and local pay-to-play laws, which may apply to PAC donations

Recent Developments

- In March of this year, Oregon adopted a campaign finance law which will impose new contribution limits for beginning in 2027:
  - Individuals and corporation will only be permitted to give up to $3,300 per election cycle to statewide candidates and non-statewide legislative, district attorney and circuit judge candidates
  - Contribution limits lowered for political party committees and membership organizations (labor unions and non-profits)
  - Additional reporting requirements go into effect in 2028
- Effective January 1, 2024, California began requiring persons who are paid by a political committee to make online communications that support or oppose candidates or ballot measures to include a disclaimer disclosing that they received compensation for the communication.
- In 2023, Maine repealed ban on direct corporate contributions. Corporations may contribute:
  - $1,950 per election to gubernatorial candidates
  - $475 per election to state legislative candidates
  - $975 per election to county candidates
  - $575 per election to municipal candidates

Recent Developments

- Effective January 1, 2024, Minnesota prohibited “foreign-influenced” corporations and LLCs from making independent expenditures in connection with state and local elections and contributing to super PACs. But law was enjoined before it went into effect while legal challenge continues.
  - Applies to corporations/LLCs with a single foreign investor with 1% or more ownership, or two or more foreign investors with 5% or more aggregate ownership.
- In March of 2024, a similar law enacted by Maine voters in 2023 was enjoined by a federal court.
- Effective for the 2023-2024 election cycle, Illinois raised corporate contribution limits by nearly 15%
- Effective for the 2023-2024 election cycle, New Jersey significantly increased corporate contribution limits (for corporations not subject to pay-to-play bans) to:
  - $5,200 per election to state and local candidates other than Gov./Lt. Gov.;
  - $14,400 per year to PACs; and
  - $75,000 per year to state party committees and legislative leadership committees.
- Effective November 9, 2022, New York lowered contribution limits for candidates
  - *E.g.*, PACs are able to give $9,000 per election to statewide candidates, $5,000 per election to State Senate candidates and $3,000 per election to State Assembly candidates

Pay-to-Play Issues

- Avoid linkage: covers political, charitable and gifts
- Vet consultants
- Conflicts of interest laws
- Strict liability pay-to-play laws
- Honest Services Fraud: prosecutors and courts not requiring express agreement (18 U.S.C. § 1346)
  - Impact of *McDonnell v. U.S.* and definition of "official acts"
  - Former St. Louis County Executive Steve Stenger
  - Charges against Senator Robert Menendez

Linkage

- Don't put justifications or reasons for contributions in writing
- Emails and texts should only contain language that you would feel comfortable putting in a formal memo to the General Counsel
- If it doesn't feel right, it probably isn't
  - Former Baltimore Mayor Catherine Pugh
    - Purchase of large quantities of her books coinciding with award of government contracts resulting in six months in prison
- Internship requests
- Letters of recommendation
- A policy on giving to charities and non-profits

Vetting Consultants

- Compensation should be commensurate with consultant's services and industry standards
- Contingent fee arrangements are usually problematic

Conflicts of Interest

- Types of conflict of interest restrictions
  - Recusal requirement (most states)
  - Prohibition on using office/confidential information for private gain (most states)
  - Requirement that official not lobby his or her own agency on behalf of private employer
- Post-employment restrictions (hiring a former public official)

State and Local Pay-to-Play Laws

- Generally, strict liability comes into play when a company has a contract with a state or locality and makes political contributions to certain elected officials in those jurisdictions
- State pay-to-play laws:
  - California, Connecticut, DC, Florida, Hawaii, Illinois, Kentucky, Louisiana, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia and West Virginia
    - ➢ Effective beginning in 2023, New Jersey pre-empted local pay-to-play laws and lowered de minimis contribution limit from $300 to $200
- Many cities and counties have pay-to-play laws requiring all contributions to be vetted by union employees in a company
- Some jurisdictions cover contributions by spouses and/or children (*e.g.*, Connecticut, New Jersey, Denver, Illinois, Kentucky, Pennsylvania and Philadelphia)
- An increasing number of jurisdictions are imposing strict liability for government contractors for gifts, not just political contributions
- More and more RFPs requiring certification no gifts have been provided

Pay-to-Play Compliance

- There is no substitute for preclearance of contributions and gifts
- It is the most effective way to achieve compliance

State and Local Lobbying and Gift Laws

Lobbying Laws

- Three categories of activities may trigger lobby registration and reporting requirements at federal, state and local levels:
  - Attempt to influence legislation
  - Attempt to influence legislation or executive branch rulemaking
  - Attempt to influence legislation or any decision of executive branch agency and procurement lobbying

Traditional Lobbying Laws

- Category 1 lobbying (attempting to influence legislation)

  Maine
  Montana
  Nebraska
  Nevada
  North Dakota
  Oregon
  South Dakota
  Wyoming

- Category 2 lobbying (attempting to influence legislation or rulemakings)

  Alaska
  California (except retirement systems)
  Colorado
  Hawaii
  Iowa
  Minnesota (as to state actions/decisions)
  New Mexico
  South Carolina
  Utah (as to state actions/decisions)
  Vermont
  Washington
  West Virginia
  Wisconsin

Trend Toward Category 3 Lobbying Laws

- Beyond "traditional" lobbying, trend toward regulation of Category 3 lobbying (including procurement)

Alabama
Arizona
Arkansas
California (placement agents)
Connecticut
Delaware
D.C.
Federal
Florida
Georgia
Idaho
Illinois
Indiana
Kansas
Kentucky
Louisiana
Maryland
Massachusetts
Michigan
Minnesota*
Mississippi
New Hampshire
New Jersey
New York
North Carolina
Ohio
Oklahoma
Pennsylvania
Puerto Rico
Rhode Island
Tennessee
Texas
Utah**
Virginia

* Metropolitan governmental units only

** Local and educational decisions only

Local Lobbying

- Some state lobby laws cover local lobbying
  - Alabama, Arkansas, Georgia, Illinois, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, New York and Utah
- Some Florida county lobby laws cover lobbying municipalities within the county, such as Miami-Dade County, Broward County, Palm Beach County and Hillsborough County (Tampa)
- Several local jurisdictions have their own lobby laws
- Major cities:
  - New York City
  - Chicago
  - Los Angeles

Lobbying Activity

- Lobbying activity typically includes
  - Lobbying contacts even if the communication does not include words of influence
  - Research and preparation for such contacts
  - Strategizing, planning and possibly other background work
  - "Education" is often a good description of lobbying activity
- Covered officials
  - Concept varies widely across states. Some states cover virtually all public employees, unlike the federal definition.

Grassroots Lobbying

- Grassroots lobbying: communicating with the public or segment of the public, including with vendors and employees, asking them to contact their government representatives regarding legislation
  - In 30 states, grassroots lobbying triggers registration (including Illinois, as of January 1, 2022)
  - In five additional states, grassroots lobbying does not trigger registration but if already registered, grassroots expenditures must be reported (Alaska, Florida, Kentucky, Texas and Wisconsin)

Types of State and Local Gift Laws

- Absolute ban regardless of value (*e.g.*, Florida lobbyist law)
- Dollar limits – Some are per occasion (*e.g.*, Florida interested party law - $100 per occasion) and some are per period (*e.g.*, California - $590 per 12-month period)
- Prohibition on gifts that may reasonably tend to influence an official. Most common gift restriction language.

Recent Developments

- Effective this year, Arkansas and Maine rolled out new websites for lobbyists to file public disclosures
- Effective January 8, 2024, Washington changed reporting requirements for grassroots lobbying activities
  - A person who makes grassroots expenditures not otherwise reported by a registered lobbyist or political committee exceeding (i) $3,000 in a three-month period or (ii) $1,500 in a one-month period must register as a sponsor of a grassroots lobbying campaign. This more than doubled the previous registration thresholds.
  - Registration required within 24 hours or five business days depending on campaign's proximity to a legislative session. Sources of funding of over $100 must be disclosed on registration.
- Effective January 2024, Michigan increased registration and reporting thresholds
  - Individuals who receive more than $775 for lobbying during any 12-month period must register (increased from $725)
  - Employers who spend more than $3,075 for lobbying or more than $775 for lobbying a single public official in any 12-month period must register (increased from $2,900 and $725, respectively)
  - Gift limits also increased

Recent Developments

- Effective January 1, 2024, Texas increased its lobbyist registration and reporting thresholds:
  - A person must register as a lobbyist if the person receives compensation/reimbursement in excess of $1,870 in a calendar quarter (increased from $1,760). The 40 hour per quarter de minimis exception remains unchanged.
  - A person must also register as a lobbyist if the person spends more than $940 in a calendar quarter to communicate with state officials (increased from $880).
  - The threshold for filing monthly rather than annual lobbyist reports was increased as well. A lobbyist who makes expenditures in excess of $2,150 in a calendar year must file monthly. The prior threshold was $2,020 per year.
- Effective January 1, 2024, South Carolina increased the expenditure limits for lobbyist principals to $70 per day and $560 per calendar year, per public official. The previous limits were $60 per day and $480 per calendar year.

Recent Developments

- Effective January 1, 2024, Minnesota's lobbying law covers attempts to influence any political subdivision of the state. This includes county and city governments, school districts and townships. Previously, only metropolitan areas with populations over 50,000 were covered. Lobbyist principals must also now round the amounts spent on categories of lobbying activities to the nearest $9,000 instead of $20,000 on their annual reports.
- Effective October 25, 2023, Maine shortened the time period for lobbyists to register. Now, a lobbyist must register within 10 calendars days after he or she spends more than eight hours lobbying in a calendar month. The prior deadline was 15 days. Additionally, a one-year cooling off period went into effect for certain executive branch officials before they may lobby.
- Effective June 2023, Hawaii banned political contributions and gifts from lobbyists to state candidates and officials while the legislature is in session.
- Effective June 8, 2023, West Virginia increased the registration and reporting thresholds for grassroots lobbying. A person spending more than $1,000 in a one-month or more than $5,000 in a three-month period for a legislative grassroots campaign must register. The previous thresholds were $200 and $500, respectively.

Recent Developments

- Effective January 3, 2023, Minnesota amended the definition of lobbyist to include any individual who is compensated over $3,000 in a calendar year from a business whose primary source of revenue is derived from providing government affairs services
- Effective July 1, 2022, Maryland required lobbyist employers to file semi-annual contribution disclosure reports each May 31 and November 30 even if no reportable contribution was made during the reporting period. Penalties increased from $1,000 to $25,000.
- Illinois passed an omnibus ethics bill, SB 539. The below changes became effective January 1, 2022:
  - State registration for local lobbying
  - Preemption of inconsistent local lobbying laws, except for Chicago
  - Registration for grassroots lobbying
  - Reporting of certain expenses for outside consultants providing “behind-the-scenes” advice
  - Certain deputy statewide officials now covered under statute
  - Restrictions on compensated lobbying of other levels of government by local and state officials

Practical Considerations

- Valuation
  - Fair market value/face value vs. cost vs. value on secondary market
- Tax and tip
- Buydowns
- Splitting
- Bargained-for in an arm's-length agreement
- Gift to agency

Compliance

- Types of preclearance strategy
  - Preclear everyone and everything
  - Preclearance thresholds
- Gift preclearance software

Questions?

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