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# Building a Multi-State Giving Strategy

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# How to Avoid Pay-to-Play Violations



- Avoid linkage: when making contributions or donations (political or charitable) or providing gifts
- Make sure that your consultants are properly vetted
- Comply with specific conflicts of interest laws (dual hatted employees and post-employment rules)
- Be aware of strict liability pay-to-play laws (federal, state, and local)



- Honest Services Fraud: prosecutors and courts not requiring express agreement
- *McDonnell*
- Know who or what you are giving to.
- There should be no relationship between a gift, entertainment, charitable donation, or political contribution and official decision on business. Do not discuss fundraising in congressional offices or while lobbying.
- Be careful of timing.
  - In a January 2015 report, CEO of 21CT (a tech company) contributed \$10,000 to Texas Speaker Joe Straus
    - » Made days before approval of \$90 million contract to detect Medicaid fraud
    - » Lost \$90 million contract and criminal investigation





- It is generally a good idea not to:
  - put justifications or reasons for contributions in writing.
  - send transmittal letters.
- If you have to use e-mail, beware of making spontaneous statements that could erroneously imply legal violations or be embarrassing if it is produced or becomes public.
  - Appearance is sometimes as important as reality.
- Generally, e-mails should only contain language that you would feel comfortable putting in a formal memo to the General Counsel.

# ng Consultants

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- Compensation should be commensurate with consultant's services and industry standards
  - Make sure contingent fees/commissions are permitted
- Make sure consultant agreement is detailed and has proper representations and warranties
  - Good idea to make consultant regularly certify that it is complying with reps and warranties
  - Beware of reimbursement of expenses – especially those related to gifts and entertainment of public officials and political contributions
- Consultant relationship should be disclosed to government agency
  - May be specifically required under lobbying laws and procurement rules
- Know who you are hiring (does consultant, or someone at consultant's firm, have a public or fiduciary position with government)

# Employees Who Have Been Elected or Appointed to Office

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- General Description – Conflict of interest laws restrict the ability of public officials to either have employment with, or interest in, a company that is trying to influence the government.
- Types of Conflict of Interest Restrictions
  - Recusal requirement (most states).
  - Requirement that official not lobby his or her own agency on behalf of private employer (most states).
  - Requirement that official receive no benefit from a contract with the government (e.g., California, New York, Ohio, and Washington State).
  - Prohibition on using public office for financial gain of employer (e.g., Arizona and New York City).
  - Prohibition on private employer doing business with the official's agency (e.g., California, Florida, and Pennsylvania).

## Employees Who Have Been Elected or Appointed to Office

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- Sometimes, these restrictions apply to family members of public officials (e.g., Pennsylvania).
- Post-Employment Restrictions (hiring a former public official)
- Liability – Most states impose liability only on the official. A minority of states (e.g., Pennsylvania) impose liability on both the official and the private employer. Regardless, there is always possibility of indirect liability (e.g., the loss of a contract).



## Strict Liability Pay-to-Play Laws

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- Pay-to-play laws can prohibit a company from doing business or entering into a contract with a governmental entity if the company or its affiliates, and their PACs, owners, employees, directors, outside consultants, or family members make or solicit political contributions in that jurisdiction to officeholders, candidates, political parties, or other political committees (e.g., PACs)
- Nearly all the strict liability pay-to-play laws deal with political contributions where donor has state or local business. In certain limited jurisdictions, the restriction includes a gift or gratuity, not merely a political contribution.
- Does *McCutcheon* affect these laws?
  - Creates further doubt that these are constitutional
- Federal pay-to-play lawsuits



## State and Local Campaign Contributions Generally

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- 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

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

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

# Corporate Contributions

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- Six states currently permit unlimited corporate contributions (*i.e.*, Alabama, Missouri, 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 22 states plus D.C. allow corporate contributions but impose limits.
- Partnerships: each state has different rules on pass-through



- Reporting Requirements

- 16 states + D.C. require corporations to file reports if they make contributions.

Alaska

Maryland

Ohio

California

Massachusetts

Pennsylvania

Georgia

Minnesota

Rhode Island

Hawaii

Montana

Tennessee

Iowa

Nebraska

Utah

Washington

- Some of these states are corporate ban states, where the reporting requirement is triggered by ballot measure contributions (*e.g.*, Ohio and Massachusetts).
  - Emerging issue: contributions to non-profits, mostly 501(c)(4) organizations, engaging in political spending. This is sometimes referred to as "dark money" because (c)(4)s generally do not disclose political activity. CA passed legislation requiring certain non-profits to disclose activity.





- Aggregation among affiliate companies
  - Most states aggregate among affiliates, *e.g.*, Georgia and Maryland.
  - New York does not aggregate. The \$5,000 per corporation limit is still intact.
  - California and New Jersey aggregate only if companies do not act independently.
- Aggregation among affiliated PACs
  - Most states aggregate affiliated PACs, *e.g.*, Kentucky and Maine.
- Aggregation among company and its PACs
  - Washington aggregates between company and its PAC.
  - California aggregates if decisions regarding company and PAC contributions are made by the same people.
  - Kansas is an example of a state that does not aggregate between a PAC and a corporation donation made by a connected corporation to the same candidate.

# Corporate Contributions

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- 22 states generally prohibit corporate contributions:

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

- \*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, Ohio).
- Ballot measure contributions are permitted, even if corporate contributions are prohibited in that state.

## Creating a Multi-State PAC

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- 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 (Ohio and Texas).
- Some states make it difficult or illegal to use a federal PAC (Alaska, Connecticut, Massachusetts, New York, and Rhode Island).
- New York Department of Labor payroll deduction statement and regulation.
- New Jersey payroll deduction restriction.

## Creating a Multi-State PAC

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- Some states impose burdensome restrictions on PACs.
  - Michigan used to require annual authorization on payroll deductions – repealed January 2016
  - New York treats administrative expenses as contributions that count against the contribution limit, and requires in-state bank account. Transfers exceeding \$1,000 from out-of-state accounts are not permitted.
  - North Carolina requires in-state assistant treasurer.
  - Vermont requires compliance with state limit on what a PAC can receive to \$4,000 per two-year cycle.
- Most states require registration and reporting by the PAC.
  - Some require greater itemization in reports than required under federal law.
- Beware of state and local pay-to-play laws, which may apply to PAC donations.
- Some PAC aggregate limits struck down in wake of *McCutcheon*



## Interface with Other Rules

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- Special restrictions on lobbyists and their employer.
  - Special restriction on political contributions by lobbyist and their employer (e.g., Alaska, Kentucky, Maine, and South Carolina).
  - Special restriction on other political activity – Ability to help with campaign or be a fundraiser (e.g., Alaska, Maryland, New Mexico, and South Carolina).
- Need to coordinate with lobby compliance program.
- Beware of sessional bans.
- Special restrictions for state and local contractors subject to strict liability pay-to-play laws.

# Pay-to-Play Laws – Political Contributions

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- Pay-to-play laws in the following jurisdictions:
  - MSRB Rule G-37 (amended to cover municipal advisors), SEC Rule 206(4)-5, SEC Rule 15Fh-6, CFTC Sec. 23.451, FINRA Rule 2030
  - California, Connecticut, Florida, Hawaii, Illinois, Kentucky, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, and West Virginia
  - Albuquerque, Allentown (PA), Chicago, Chicago Ridge (IL), Cook County (IL), Dallas, Detroit, Houston, Jefferson Parish (Louisiana), Lehigh County (PA), Miami Beach, Miami Gardens, New Orleans, New York City, Orange County (FL), Orange County (NY), Philadelphia, Providence, Salt Lake City (UT), Salt Lake County (UT), San Antonio, Seattle
  - In California: All California Counties, Culver City, Los Angeles City, L.A. County MTA, Oakland, Pasadena, San Francisco, Santa Ana, and CalSTRS
  - In New Jersey: numerous localities
- We are aware of pay-to-play reporting-only requirements in Connecticut, Illinois, Maryland, Missouri, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, Denver, Detroit, DuPage County (IL), Kane County (IL), Los Angeles City, Nassau County (NY), Providence, San Antonio, and for CalIFRS, CalSTRS