

March 7, 2017

Skadden

# Compliance for Corporate PAC Programs

## Public Affairs Council

Skadden, Arps, Slate, Meagher & Flom LLP  
and Affiliates

### The Americas

Boston  
Chicago  
Houston  
Los Angeles  
New York  
Palo Alto  
São Paulo  
Toronto  
Washington, D.C.  
Wilmington

### Europe

Brussels  
Frankfurt  
London  
Moscow  
Munich  
Paris

### Asia Pacific

Beijing  
Hong Kong  
Seoul  
Shanghai  
Singapore  
Tokyo

# Federal Hard Money Rules



## • Contribution Limits for Individuals and Non-Multicandidate PACs

### 2017 – 2018 Limits

- |   |                         |
|---|-------------------------|
| To Candidates –   | \$2,700* per election   |
| To State Party Committees –   | \$10,000 per yr.        |
| To PACs –   | \$5,000 per yr.         |
| To National Party Committees –  | \$33,900* per yr. plus: |
| -An additional \$101,700* per yr. for buildings   |                         |
| -An additional \$101,700* per yr. for recounts and legal fees   |                         |
| -An additional \$101,700* per yr. for conventions (only for national party committees, not senatorial or congressional national party committees) |                         |
| -Aggregate contribution limit for all of the national party committees of a given party (Democratic or Republican): \$813,600* per year           |                         |

\*These limits are indexed for inflation



- **Contribution Limits for Multicandidate PACs**

**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. plus:

- 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 of the national party committees of a given party (Democratic or Republican): \$360,000 per year



# Attribution and Designation Rules



- Knowing to whom one is making a contribution and necessity of making designations on the contribution check
  - DGA and RGA representations
    - » Operating accounts
- Joint fundraising committees
- Spousal attribution
  - Contribution attributable to signer of check.
- Knowing the date of a contribution is important:
  - For applying contribution limits; and
  - For reporting purposes.
- Contributions are deemed to be made when one relinquishes control over the contribution check (e.g., mailbox rule).
- One may not give to a particular candidate's election after the date of that election, unless:
  - The campaign has net outstanding debt; and
  - The check is designated in writing for that election's "debt retirement."

# Establishing and Operating a Standard Corporate or Trade Association PAC



- PAC name/PACronym
- Federal law permits a corporation (but not a partnership or an LLC not filing as a corporation with the IRS) to establish and operate, and pay administrative expenses for, a PAC to make contributions to federal candidates.
- By-laws and organizational documents
- PAC officers
  - Only one is necessary but at least three is customary
  - Don't put names of individuals in by-laws. The identity of officers and directors should appear only in the PAC or corporate resolutions.
  - Indemnification
- Issues related to incorporation
- Is it necessary to get a W-9 for contributions?
- Taxpayer ID number
- Investing PAC funds
- Federal and state income taxes

# 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 AO 2010-04 (Wawa).
  - 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.
- Rules for LLCs and partnerships
  - Attribution rules
  - Most LLCs and all partnerships may only sponsor a non-connected PAC.
  - Calculating administrative expenses for non-connected PACs

# Soliciting for Corporate PAC



- Must provide union with same method for soliciting its members at the company.
  - May require the union to 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
  - Must have 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.



# Sample Format for PAC Solicitation Letter



- One page
- Paragraph 1: Briefly describe a couple legislative issues before Congress and the importance of those issues to the company, its employees, shareholders, and customers.
- Paragraph 2: The need for a strong PAC so our voices are heard and so we may support candidates who are pro-business, pro-our industry, and represent our employees.
- Paragraph 3: In deciding whether to make a voluntary contribution to the PAC, please review the enclosed/attached materials.
  - On the enclosed/attached materials, include the full legal disclaimers in clear type size



# Soliciting for PAC – 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.
  - 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.

# Soliciting for Corporate PAC



- Expanding your solicitation base
  - Soliciting board members
  - Soliciting employees of affiliates
  - Soliciting shareholders
    - » Senior retirees who are shareholders
- Incentives for contributing
  - One-third rule
  - Charity PAC match
    - » May not use company foundation
    - » Non-deductible
- Payroll deduction – maintain authorizations
  - 10 day deposit rule

# 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 (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.





- 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*



- 22 states generally prohibit corporate contributions:
  - 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.
- 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.
- Some states aggregate among affiliated PACs, some aggregate between company and its PAC, some do not.
- Partnerships: each state has different rules on pass-through



- 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 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 LLCs and partnerships – special rules
- Unsolicited contributions
- PAC-to-PAC donations



# Reporting Requirements



- For receipts, PAC must disclose the following for its contributors of more than \$200 per year:
  - Name
  - Mailing address (use home or business address)
  - Occupation
  - Employer



- Bank reconciliation against FEC report.
- 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 bank accounts must have their own Taxpayer ID number.
  - Bank reconciliations are done by someone other than a check signer or person responsible for PAC accounting.
  - PAC tax: federal.



- E-MAILS AND OTHER ELECTRONIC COMMUNICATIONS ARE DOCUMENTS. Virtually indestructible and potentially dangerous.
- PAC must keep records for 3 years from the date that the relevant information is reported.
- Payroll deduction authorization must be kept for at least 3 years from the date the employee's last deduction is reported.





- One must keep records of (1) copies of reports, (2) bank statements, (3) information of receipts and disbursements, (4) if received contribution exceeds \$50, a copy of the check, (5) if disbursement exceeds \$200, a receipt or cancelled check, and (6) any other records to substantiate information in reports.
- To the extent PAC gives at the state level, must keep records under state law.

# Solicitation Guidelines for Avoiding Even the Appearance of Coercion



- Not a United Way drive.
- No words suggesting that contributing is a condition of employment (e.g., "must contribute" or "expected to contribute").
- Do not imply that contributing will affect opportunity to advance within the company (e.g., do not discuss issues regarding promotions and contributing).
- One-on-one oral solicitations should be avoided except scripted peer to peer.
- Group presentations are permitted (such as at a meeting), but they should be scripted.

# Solicitation Guidelines for Avoiding Even the Appearance of Coercion

Skadden



- Follow-up communications (e.g., follow-up call or e-mail)
  - Should not be done to ask if employee has given, and if not, to ask why.
  - May be done to offer assistance or to answer questions that employee may have.
  - Any oral follow-up communication should be scripted.
- May tell employee that it is important to contribute to the PAC given that a strong PAC is vital to the success of the company.
  - Do not characterize the PAC as helping to gain access to candidates.
  - May characterize PAC as helping to elect candidates whose views are good for the company's business interests.
  - Do not say that PAC donations help get laws passed.





- In deciding as to whom to contribute, one should be careful when putting in writing the justification or reason for a contribution.
- To the extent that one puts such justification or reason in writing, one should:
  - Not mention any particular past, present, or future official action (e.g., a vote on a particular legislation or other governmental decision).
  - Not characterize the contribution as helping to gain access to the candidate or a "seat at the table."
  - Limit the writing to general reasons for supporting the candidate (e.g., the candidate's positions on general issues and the leadership positions held by the candidate).

# Sending Transmittal Letters with Contribution Checks



- Transmittal letters should be sent only with legal disclaimers (*e.g.*, for primary or general election, or debt retirement).
- If a transmittal letter is sent, the following guidelines should be followed:
  - Do not mention any particular past, present, or future official action (*e.g.*, a vote on a particular legislation or other governmental decision).
  - Do not mention any particular official matter (*e.g.*, a particular legislation, rulemaking, or RFP).
  - Limit the letter to merely expressing general support for the candidate.



- 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 AO 1994-23 (Northrop Grumman).
  - Spin-off: create new PAC before spin-off if PAC members are going to new company.



- Partnerships
  - Attribution rules.
  - Federal contractor restrictions.
    - » Giving to Super PACs: Chevron case



# Ban on Corporate Contributions Under FECA Soft Money Rules



- 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
- *Citizens United* permits corporate independent expenditures
  - Super PACs – federal contractor ban
- 501(c)(4)s and 501(c)(6)s: corporate independent expenditures
- 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



- Internal communication and fundraising—only solicitable class (*i.e.*, shareholders and executive or administrative personnel). See AO 1984-13 (NAM).
- External communication and fundraising—persons outside solicitable class.
  - Advance payment.
  - An individual employee volunteers his or her own time without using corporate facilities or personnel.
  - Directed employee time.
- Certain LLCs and partnerships cannot take advantage of these exemptions.



- 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: Prohibited Activity



- Corporation cannot facilitate contributions.
- Bundling and providing stamped or addressed envelopes. Exemption if individual is appointed to a significant position in the campaign.
- Westar case: FEC MUR 5573 (2005).
- Freddie Mac case: FEC MUR 5390 (2006).
  - \$3.8M civil penalty -- implications for corporations.
- Other cases
  - Amboy Bank MUR 5208 (2002).
  - Mirage and Harrah's MUR 5020 (2005).
  - Hughes MUR 3987 (1996).



# Bundling per HLOGA: Disclosure Requirements



- Bundling Disclosure by Candidates – HLOGA amends 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 has provided two or more "bundled" contributions totaling over \$17,900 (and the specific amount bundled) during that period.

# Political Site Visits: House, Senate, and President



- With eligible class only (as defined under Federal Election Campaign Act)
  - Candidate and corporate executives may advocate election and solicit contributions
  - Opponent does not need to be invited or request to appear granted
  - Food may be served
- With all employees
  - Candidate may advocate his or her election and solicit donations but the candidate may not accept donations before, during, or after the presentation. The candidate may just leave campaign literature.
  - Corporate executives may introduce but not advocate election and no solicitation of contributions
  - Opponent upon request must be given same opportunity
  - Light refreshments may be served
  - Press is permitted



- Non-political non-constituent visit where Senator or staff pays his or her own travel
  - Reception exemption unless widely attended, in which case meal and local transportation may be provided

# Site Visits: Senate – The 5/50 Rule



- Non-political constituent visit where Senator or staff pays his or her own travel
  - Visit must take place at least 35 miles outside of D.C.
  - Member may speak about issues of the day to all employees. No advocacy of any kind or fundraising.
    - » Can we hand the Senator a PAC check?
  - On-site meal may be served and corporation may provide local transportation
    - » A lobbyist may not participate in the meal
    - » The cost of the meal may not exceed \$50
    - » Five or more non-lobbyist company employees must participate
    - » Lobbyist allowed to accompany local transportation
  - Recommend not having non-political events within 60 days of an election if the Member is up for reelection
  - Commemorative gift permitted
  - Reception permitted





- Non-political visit where Member of Congress or staff pays his or her own travel
  - Visit must take place at least 35 miles outside of D.C.
  - Member may speak about issues of the day to all employees. No advocacy of any kind or fundraising.
  - On-site meal may be served and corporation may provide local transportation
    - » Lobbyist may participate in meal and accompany local transportation
  - Recommend not having non-political events within 60 days of an election if the Member is up for reelection
  - Commemorative gift permitted
  - Reception permitted

# Site Visits: Executive Branch



- Under Trump Executive Order:
  - Just soft drinks, coffee, and donuts, no widely attended exception
  - No \$20 de minimis
- If not a political appointee:
  - Just soft drinks, coffee, and donuts unless widely attended
  - Small reception if food and beverage is \$20 or less

# Political Activity at the Office



- Use of corporate aircraft (first-class airfare vs. charter rate).
- Sending corporate executives to political events
  - Boeing decision
- Corporate endorsements
- Registration and get-out-the-vote drives

# Other Prohibited Contributions



- 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.



# Proxy Proposals Regarding Disclosure of Political Activity



- Activist shareholders have been introducing proxy proposals requiring public disclosure of company's and its PAC's political activities
- Evolution of proposals
  - First proxies proposed more than ten years ago by AFL-CIO pension fund: 11 companies targeted
  - In 2006, shareholder research organizations such as ISS started to support proxies
  - *Citizens United* reinvigorated this effort
  - Reported that in March 2011, 85 companies were targeted
  - On January 19, 2012, institutional investors announced new shareholder initiative seeking disclosure of 40 companies' lobbying activities
  - Removal of SEC regulation
  - Trump presidency injects uncertainty as to where the regulation of money and politics is headed

# Proxy Proposals Regarding Disclosure of Political Activity



- Center for Political Accountability surveys
  - » 2015 BDO Board Survey of 150 public company directors: 53% support mandatory disclosure of corporate political spending
  - » 305 companies have adopted political disclosure policies
  - » More than half of S&P 100 companies have come to agreements with shareholders on disclosure

# Proxy Proposals Regarding Disclosure of Political Activity



- Some of the more notable activist shareholders introducing proxy:
  - Center for Political Accountability
    - » CPA-Zicklin index
  - 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



- Civil penalties for FECA violations
  - Civil penalties for violations involving reimbursed contributions are no less than 300% and no more than 1000% of amount in violation.
- Criminal penalties for FECA violations
  - 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.





- DOJ
  - Public Integrity and FBI have made election law and public corruption cases top priority. "Public corruption is one of the FBI's top investigative priorities—behind only terrorism, espionage, and cyber crimes."
- FBI Priorities
  - Deter corruption by aggressively pursuing high-level corruption.
  - Partner with outside groups, ethics committees, FEC, and other stakeholders to identify public corruption issues and trends.
  - Create and enhance media awareness campaigns.
  - Expand the scope and breadth of reporting on corruption matters.
  - Expand the public corruption intelligence base.

*This information is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice.*