



Senior Management Engagement 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
Sydney
Tokyo

Political Law Compliance: What Every Manager Should Know



- Any time you communicate or interact with a public official, or spend money and a public official participates in the event or occasion, it is likely you are engaging in regulated activity.
 - If related to election or campaign, campaign finance and pay-to-play considerations.
 - If providing a personal benefit, gift considerations.
 - If in connection with influencing an official decision, lobbying considerations.

When Does a Company Need to Track Lobbying?



- Three requirements must be met to trigger LDA registration and reporting requirements:
 - A company must have at least one employee who spends 20% or more of his or her working time engaging in lobbying activity;
 - That same employee must have 2 or more lobbying contacts; and
 - The company must spend more than \$12,500 on such lobbying activity over a 3-month period.
 - » Lobbying firm threshold: lobbying income for a particular client must exceed \$3,000 over a 3-month period.
- Register only the entity that employs the lobbyists.



- Lobbying activity
 - Lobbying contacts; and
 - Research and preparation for such contacts (*i.e.*, work done with the intent that the results will be used for lobbying contact).
 - » Includes strategizing, planning, possibly other background work
 - » What about attending fundraisers?
- Covered officials
 - Lobbying contact includes making the following communications in an attempt to influence legislation, federal contracts, or any other position of the federal government:
 - » Communications with Congressional members and staff; and
 - » Under Method A (LDA), communications with Covered Executive Branch Officials (*i.e.*, White House Staff, Military Personnel at or over pay grade O-7, and Presidential and Schedule C Appointees but not career SES employees).
 - > Plum book: <http://www.gpo.gov/fdsys/pkg/GPO-PLUMBOOK-2012/content-detail.html>



- Under Method C (IRC), lobbying contact includes communications with Covered Executive Branch Officials (*i.e.*, White House Staff, top two officials in any office of the EOP, and Cabinet-level officials and their deputies).
 - » Includes communications with any executive branch official regarding federal legislation
- Other differences between Method A and Method C
 - Method A
 - » Only covers federal lobbying
 - » Does not cover grassroots lobbying
 - » No de minimis exception
 - Method C
 - » Includes federal lobbying plus state legislative and limited local lobbying
 - » Covers grassroots lobbying
 - » The time of employees with no contacts and who spend less than 5% of their time on lobbying activity does not need to be reported



- Any discussion with a public official or employee, elected or non-elected, is potentially regulated activity.
 - This goes beyond attempting to influence legislation.
 - Attempts to influence any decision of an executive branch agency, including financial arrangements and contracts (e.g., seeking business from agency) may be considered lobbying. Procurement lobbying.
 - “Education” typically defines lobbying activity.
 - » Responding to a formal inquiry by a government official is in some instances exempt.
 - » Responding to an informal request by a government official is not exempt.
 - Strategic planning typically defines lobbying activity.
 - » Working with a trade association strategizing on a legislative agenda or discussions on how to respond to a legislative proposal.
 - » What about a CEO or senior executive serving on the Board of a trade association?



- Contemporaneous tracking of time
 - The identity of public officials is not disclosed
 - The issues worked on are disclosed only if a lobbyist works on the issues, not a non-lobbyist employee
- Challenges of tracking CEO and senior management time
 - GR responsibility
 - Admin responsibility
- Documentation supporting contacts with covered officials



- With each semi-annual report, lobbyists, lobbying firms, and lobbyist employers must provide a certification that (i) they are familiar with the House and Senate gift rules, and (ii) they have not provided, requested, or directed a gift (including travel) to a Member or staff with knowledge that receipt of the gift would violate such rules.



- Any time you pull out your credit card or spend money and a public official participates in the event or occasion, it is likely you are engaging in regulated activity.
- Providing anything of value to anyone (especially a public official or employee) triggers gift, and possibly lobby and pay-to-play, rules.
- In some jurisdictions, a cup of coffee may violate the law.
- In-kind gifts are also covered. Offering a ride in a car or use of equipment in a facility is something of value and is included in the definition of gift.
- You cannot avoid the restrictions by not putting in for the expense. Regardless of whether it is submitted for reimbursement, the expenditure is regulated.



- Many gift laws impose penalties on the donor and the recipient. The penalties can result in personal liability.
- Gifts laws often involve criminal and civil exposure for the donor and the public official/government employee.
- Don't rely on the public official for advice on legality.
- There is no uniformity of gift laws. One size does not fit all situations.
- Many counties and cities have their own gift laws which may be stricter than state law.



- Employee compliance training
- Lobby reports: tracking employee time (lobbyists and non-lobbyists) and capturing all covered expenditures
- Gift ban: preclearing all employee expenses on behalf of federal officials
- Semi-annual certification: compliance with gift and lobby disclosure rules
- Policies on lobby disclosure, gifts, and campaign contributions
- Involvement of the Board of Directors

Guidelines for Processing Contribution Checks and Gift Requests



- 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).



- Beware that the informality of language in e-mails can create compliance issues.
- By generating an e-mail, you are creating a document which is generally discoverable by the government in an enforcement action or by a private party in a lawsuit.
- There is no way to actually delete an e-mail (even if you press the “delete” button). Also, the recipient of the e-mail has a copy in his or her computer system. Individuals tend to save copies of e-mails from CEOs and senior management.
- 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.



- Donor Liability – HLOGA amends the Lobbying Disclosure Act ("LDA") to make lobbyists, lobbying firms, and lobbyist employers liable for providing gifts or travel not permitted by Senate or House rules.
- Increased Penalties – HLOGA amends the LDA to increase civil penalties for violations and add criminal penalties (up to 5 years in prison and/or fines under Title 18 of the U.S. Code). HLOGA sets a "knowingly and corruptly" standard for criminal penalties.
- There is still a 60-day cure provision for reporting violations, but not for violations of the gifts law, which are the basis of the LD-203 certification.



- PAC and Campaign Fundraising
 - What to do if the CEO requests a list of employees who did not contribute to the PAC.
 - Coercion: where is the line



- When making contributions to federal, 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
 - » Imposed on company, PACs, individuals
 - » Monetary and in-kind
 - > Including corporate resources, facilities, personnel
- Should corporations give to 527s, Super PACs, and political 501(c)(4)s? Impact of *Citizens United*.
 - RGA/DGA – operating accounts
- Implications of being a federal contractor

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
 - Province of St. Joseph of the Capuchin Order

Proxy Proposals Regarding Disclosure of Political Activity



- Proxy proposals have requested disclosure of one or more of the following:
 - Most common requests:
 - » 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 decision to make contributions
 - Lobbying expenses
 - » Trend toward seeking more lobbying information
 - In the last few years, requests expanded to include portion of trade association dues attributable to political activity (SEC No Action Letter to Boeing (February 14, 2011))



- 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)



- Approving and tracking of corporate contributions for pay-to-play compliance purposes, including contributions of key executives and subsidiaries, as well as contributions made by related PACs (e.g., PAS system)
- Who do you pre-clear?
- What do you pre-clear?
- Controlling contributions to 527s (such as RGA/DGA)



- 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.

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.