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Pay-to-Play Laws

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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)
- Conflict of interests in government procurement process
- Be aware of strict liability pay-to-play laws (federal, state, and local)



- Honest Services Fraud: prosecutors and courts not requiring express agreement (18 U.S.C. 1346)
 - *Skilling* (2010)
 - *McDonnell* (June 2016)
 - *U.S. v. Kevin Ring*: convicted and sentenced to 20 months prison plus 30 months supervised release
 - » D.C. Circuit upheld conviction (post-*Skilling*) on basis that:
 - > There can be an "implicit" quid-pro-quo (aka linkage)
 - > Violation can be one-sided
 - » All evidence came from e-mails
 - » Provided Congressman Doolittle and his aides meals, concerts and sporting events, campaign contributions, and hired his wife as consultant
 - » Provided meals, concerts and Redskins tickets to DOJ official who helped obtain grant for Ring's client
 - » One e-mail between Ring and his colleague stated that official "helped on [a matter] and was now looking for tickets"
 - > So he was charged on a gratuity violation as well – after-the-fact thank-you



- Know who or what you are giving to.
 - Former Congresswoman Corrine Brown recently convicted on 18 fraud charges:
 - » She set up a charity, One Door for Education, to fund scholarships for disadvantaged students, and raised \$833,000
 - » But she never obtained 501(c)(3) status, and used small fraction for scholarships
 - » Takeaway: You should obtain IRS determination letter
- 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.



- 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.

Avoid Linkage



- Avoid weird or potentially problematic gifts
 - Internship requests
 - Letters of recommendation
 - Strip clubs
- It is becoming more important to have a policy on giving to charities and non-profits
- Industry-specific rules



- 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



- 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).



- Be careful in making certifications
 - Read any reference to a statutory or regulatory cite carefully
 - Limit certifications where necessary to avoid misrepresentations
 - Advisable for Legal Department to be involved
- Most jurisdictions have a ban on being involved in deriving the terms of an RFP and then bidding on it

Strict Liability Pay-to-Play Laws



- 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
 - On July 13, 2017, the Sixth Circuit dismissed challenges by the Tennessee, Georgia, and New York Republican parties of new pay-to-play rule for municipal advisors
 - » Dismissed for lack of standing

Pay-To-Play Laws – Political Contributions



- 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, 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 CalPERS and CalSTRS

Strategy for Pay-to-Play Compliance



- 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)
- Importance of avoiding willful blindness
 - Use a negligence standard for due diligence
 - Appearance concerns and legal liability

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State and Local Campaign Finance Laws

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Corporate Contributions



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

Alabama

California

Delaware

Florida

Georgia

Hawaii

Idaho

Illinois

Indiana

Kansas

Louisiana

Maine

Maryland

Mississippi

Nebraska

Nevada

New Hampshire

New Jersey

New Mexico

New York

Oregon

South Carolina

South Dakota

Tennessee

Utah

Vermont

Virginia

Washington



- 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

- 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.

State PAC and Corporate Contributions



- 22 states generally prohibit corporate contributions:

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

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 \$4,080 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*

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.
- Federal law prohibits national banks from contributing to federal, state, or local political committees.

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State and Local Lobbying and Gift Laws

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- 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 formal rulemaking by executive branch agency.
 - Attempt to influence legislation or any decision of executive branch agency, including financial arrangements and contracts (e.g., seeking business from agency).
- Thresholds: Even if activity is considered lobbying activity, must meet thresholds (e.g., \$3,000 compensation in Connecticut; 2 contacts for executive lobbying in Kentucky; and 25 hours or \$2,500 compensation in Massachusetts).
- Special issues when lobbying on behalf of an outside client
- Placement agent restrictions under public pension fund policies

Traditional Lobbying Laws



- Category 1 lobbying (attempting to influence legislation)

Maine

North Dakota

Montana

Oregon

Nebraska

South Dakota

Nevada

Wyoming

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

Alaska

New Mexico

Colorado

South Carolina

District of Columbia

Utah

Hawaii

Vermont

Iowa

Washington

Minnesota

West Virginia

(as to state actions or decisions)

Wisconsin

Trend Toward Category 3 Lobbying Laws



- Beyond "traditional" lobbying, trend toward regulation of Category 3 lobbying (including financial arrangements and contracts)

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

* Metropolitan governmental units only

What is Lobbying Activity?



- 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
 - “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 limited federal definition.



- 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 29 states, grassroots lobbying triggers registration.
 - In 6 additional states plus D.C., grassroots lobbying does not trigger registration but if already registered, grassroots expenditures must be reported (Alaska, Florida, Kentucky, Maine, Texas, Wisconsin).

Contingency Fee Bans



- Contingent fee restrictions under the lobbying laws (e.g., restriction in California, Florida, Massachusetts, New York, and Connecticut).
- Types of compensation that may be permissible under a contingency fee ban:
 - Retainer or flat fee
 - Target-based compensation
 - » This approach has some risk
 - Discretionary bonus
 - » Has to be based on a number of factors
 - » Cannot be formula-based
 - » No dollar of compensation should be traceable to a particular contract



- Rhode Island became Category 3 January 1, 2017.
- San Francisco lobbyist gift, contribution, and bundling bans effective January 1, 2018.
- In November 2016, Florida House passed a rule requiring electronic notice of appearance.
- Effective September 23, 2016, New York lobby law amended to:
 - Lower applicable thresholds to require a lobbyist client or entity that spends more than \$15,000 (previously \$50,000) to disclose the source of donations over \$2,500 (previously \$5,000), and
 - Exempt membership dues, fees, and assessments from the above disclosure requirement.
- New York also amended the definition of "lobbying" to exclude communications with professional journalists, effective August 24, 2016.
- On October 13, 2016, New York JCOPE released proposed regulations defining when social media activity constitutes direct or grassroots lobbying.
- New York's JCOPE issued an advisory opinion clarifying that "opening doors" constitutes lobbying and defining grassroots lobbying.



- Civil fines to criminal penalties.
- Losing business in Category 3 states.

There are increased certification requirements.

Requirement that company certify in RFP that it is in compliance with lobbying laws.

- Mandatory under law in Kentucky and L.A. County.
- Matter of practice in Ohio, Florida, and Dade County.

Recent Enforcement



- Chicago levies numerous fines for failure to register in the Rahm Emanuel e-mail case, led by a \$90,000 fine for one lobbyist
- New York fines a lobbying firm \$180,000 for registration and reporting violations
 - \$62,000 settlement was reached but firm failed to comply with agreement terms
- Current North Carolina criminal investigation into an outside lobbyist for failure to register
- New York City sweep based on New York State lobby filings.
- In California, retirement systems are refusing to meet with individuals who should be registered as lobbyists but have not.
- Hawaii lobbyist and employer fined for failure to register, having misinterpreted an exemption.
- New York fines a company \$98,000 for unreported lobby compensation and expenses
- Connecticut \$10,000 contingent fee fine will be waived if lobbyist satisfies conditions, including obtaining written permission from Ethics before entering into a communicator lobbying contract (5 years) and providing annual list of all clients (10 years).
- California: record \$133,500 fine for lobbyist and lobby firm violation of the ban on contributions and gift restrictions.
- San Francisco lawsuit successfully brought by the City against an individual for failing to register as a lobbyist.

What Is a Gift Law?



- Prohibition, limit, or restriction on providing personal benefit to public officials.
- Covered gifts include anything of personal value, such as meals, entertainment, transportation, and lodging, including in-kind gifts; but not in-kind political contributions.
 - Factors to consider
 - » Timing
 - » Contacts with campaign staff or office staff?
 - » Content of presentation/meet and greets vs. campaign events
- Federal government, each state, and certain cities and counties have their own separate gift laws.
 - FCPA and jurisdiction-specific foreign gift issues

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 non-lobbyist law – \$100 per occasion) and some are per period (e.g., California – \$470 per 12-month period).
- Prohibition on gifts that may reasonably tend to influence an official (Contrast: New Jersey and Nevada).

State and Local Gift Law Exemptions



- Meals are sometimes exempt (*e.g.*, Michigan lobby gift law).
- Travel and entertainment are sometimes exempt – usually, they must be provided in connection with giving a speech or as part of official duties (*e.g.*, New York).
- Single source issue – In states that have an aggregate gift limit, a company and its employees are considered part of a single source. Gifts made by those employees to a certain official are aggregated toward the same limit (*e.g.*, Kentucky and Rhode Island). Subsidiaries are generally not included.



- Valuation
 - Fair market value/face value vs. cost vs. value on secondary market
 - Actual consumption vs. pro rata share
- Tax and tip
- Buydowns
 - Permissible in California and Florida, impermissible in Illinois and Chicago
- Splitting
 - Permissible in Florida, impermissible for Louisiana's meal limit
- Bargained-for in an arms-length agreement (e.g., BPA, advisory board meetings)
- Large events
- Gift to agency
- Consultant gifts



- Effective July 1, 2017, Virginia widely attended event exemption narrowed and reception exemption added
- Effective July 1, 2017, South Dakota limits lobbyist employer gifts to high-level state officials to \$100 per year, exempting food, beverage, and entertainment
- Georgia EO raises executive branch gift limit from \$25 to \$75
- Kentucky legislative lobbyist/lobbyist employer restrictions on gifts to legislators enjoined
- Colorado Ethics statement asserting jurisdiction over home rule localities with gift rules less restrictive than state law
- Denver amends its gift rule to create a \$300/year limit on meals and tickets from interested parties
 - Was four occasions/year
- Gifts to certain Texas local officials exceeding \$100/12-month period may trigger a vendor report
 - Exemption for food accepted as a guest
- Missouri prohibitions on lobbyist gifts to executive branch employees



- More and more RFPs ask for certification of gift law compliance
- Philadelphia fines person who offered Phillies baseball tickets to regulator
- Fine in connection with a California lobbyist paying for a public official's \$52 lunch
- Enforcement cases in Ohio and California in connection with prohibited and unreported sporting event tickets
- A regulated company's series of gifts to government officials of its New York regulator ranging in value from \$8 to \$72 resulted in fines nearing \$1.7 million
- Illinois officials were fined for accepting fair beer tickets that they distributed to others
- New York legislators were told they must return bobblehead dolls that were accompanied by a letter thanking them for passing legislation

Lobby and Gift Compliance Programs



- Registration and reporting services for employers and in-house lobbyists
- Prepare monthly reporting calendars to lobbyists and principal
- Prepare, file and maintain registrations required in various localities. Prepare termination notices as required.
- Prepare customized questionnaires for relevant employees to obtain information necessary for reports and establish systems for tracking activity
- Approval and tracking of gifts
- Prepare corporate gift reports and notification to officials in jurisdictions with such requirements
- Archive and maintain back-up documentation as required by record retention statutes

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