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Skadden

Digital and Advocacy Campaign Compliance

Public Affairs Council

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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)
- Special issues when lobbying on behalf of an outside client
- 50 states plus D.C. regulate direct lobbying
- 29 states regulate grassroots lobbying
- 6 additional states plus D.C. regulate the disclosure of grassroots lobbying but only if the lobbyist is already registered for direct lobbying

What is Direct Lobbying?



- Direct lobbying
 - Generally, direct lobbying includes preparation for (e.g., research, strategizing, or coordinating lobby activity) and communications with covered officials to influence legislative or executive action
 - Strategizing at a trade association on how to move policy
 - » Official need not be present, just need purpose to be attempting to influence
 - Discussing legislation or policy at a site visit
 - » If there is an attempt to influence
 - » Prep time counts if purpose was to attempt to influence
 - Attending a fundraiser and talking about legislation
 - » Generally, the time spent merely attending a fundraiser does not constitute lobbying. However, one-on-one opportunities to influence legislation should be included.
 - C-Suite activity: leveraging activity and managing compliance

What is Grassroots Lobbying?



- 3 prongs
 - Communication must pertain to legislation being considered or that will be considered in the immediate future, based on objective evidence (not insider knowledge)
 - » Federal, state, or local legislation
 - » Includes initiatives, constitutional amendments, and referenda
 - » Communication need not refer to specific legislation
 - » Exceptions
 - > Regulatory and administrative actions, general policy, procurement
 - > Communications after the legislation has been acted upon
 - > Ads
 - Communication “takes a view” on legislation
 - » No need for explicit “call to action”
 - Communicated in a form and manner to reach the general public as voters or constituents

What is Grassroots Lobbying?



- Is communicating with your own employees grassroots lobbying?
- Is a fly-in grassroots or direct lobbying?
- Is addressing a social or broad policy issue unrelated to legislation grassroots lobbying or goodwill advertising?



- Types of social media communications, expanding lobbying footprint:
 - Direct messages
 - “Tagging” public officials
 - Grassroots communications
 - Likes and retweets
 - Emails
- Petitions
- Form letters
- Employee personal activity: when, if ever, is it lobbying for the company?
- State regulators are giving increased consideration to social media activity
 - Evolving area
- Customer relationship management (CRMs)
 - Services that combine data regarding elected officials, including votes, tweets, sponsorship, and political contributions. This concentration of data can raise a pay-to-play compliance risk.



- Effective October 2017, California requires ballot measure campaign advertisements to clearly identify the committee's top three contributors within the ad.
- Effective October 2017, New Mexico requires persons making certain independent expenditures for ballot measures and other campaigns to disclose the sources of funds used.
- Effective September 2017, Denver requires persons spending \$1,000 on independent expenditures or electioneering communications to disclose the donors funding those communications.
- In December 2016, Cook County opined that its lobbying ordinance covers grassroots lobbying.



- In 2016, New York passed an ethics package amending disclosure requirements
 - Source-of-funding disclosure: lowered threshold from \$50,000 to \$15,000
 - Communications with professional journalists no longer grassroots lobbying, overruling JCOPE advisory opinion



- JCOPE proposed regulations
 - Would define "direct lobbying" to include, for example:
 - » Direct messages to a public official through Facebook Messenger
 - » A post on a public official's Facebook page
 - » A tweet tagging a public official, when posted as part of job duties
 - » A billboard clearly intended to reach a public official
 - "Direct lobbying" would not include, standing alone:
 - » A social media post or tweet mentioning, but not tagging, a public official, even if the public official is a "friend" or "follower"
 - Would expand the definition of "grassroots lobbying" to address social media communications



- FBI currently investigating whether Russian contributions to the NRA aided the Trump campaign.
- January 2018: Los Angeles City Ethics Commission recommended legislation exempting 501(c)(3) organizations with annual income less than \$2 million from lobbying ordinance requirements.
 - In 2016, L.A. City fined two nonprofits \$47,500 for reporting violations.
- November 2017: Maine fined four ballot question committees a record \$500,000 for disclosure violations.
 - Previous record was \$50,250 in 2014, but Maine voters passed a law in 2015 increasing penalties for campaign finance violations.
- September 2017: Massachusetts fined a 501(c)(4) entity \$426,466 for operating as a ballot question committee without registering or disclosing its donors.
 - In December 2017, Massachusetts fined another nonprofit \$18,000 for a similar violation.



- FEC advised Facebook image and video ads not exempt from disclaimer requirement (Take Back Action Fund)
 - Qualified for neither "small item" or "impracticable" exemption
 - Electioneering communication by non-candidate, non-committee must state name and permanent street address, telephone number, or web address of the payor and that not authorized by the candidate or committee
 - Final advisory opinion issued December 15, 2017
- In 2002, FEC advised that a text message ad limited to 160 characters of text qualified for the "small item" exemption and need not include the disclaimer (Target Wireless)
- In November 2017, FEC unanimously voted to draft a notice of proposed rulemaking governing disclaimers on paid internet and digital communications

Political Activity at the Office

Campaign Events vs. Constituent Events



- Corporate site visits
 - Candidate appearances (political)
 - » Food
 - » Lobbyist participation
 - » Local transportation
 - » Partisan presentations to eligible employees
 - » Partisan presentations to all employees
 - Congressional visits (non-political)
 - » Meet and greets
 - » Food
 - » Lobbyist participation



- Foreign Agents Registration Act (FARA)
 - Any person who attempts to influence any U.S. government policy or position on behalf of a foreign government or foreign private entity must register and report with DOJ as an agent of a foreign principal
 - » Requires a communication with a U.S. government official (pure behind-the-scenes advice to foreign entity does not count)
 - » May file alternative federal lobby report in lieu of FARA filing if foreign principal is private
- Foreigners may lobby the U.S. government

Scenario #1



- A medical supplies company conducts direct lobbying of a federal agency which is drafting regulations concerning the approval of a class of medical devices. The company wishes to use its Facebook page, Twitter, and other media contacts to urge individual consumers who have benefited from the devices to submit comments to the agency during the public comment period.
 - Direct lobbying will likely trigger registration for:
 - » Company
 - » In-house or outside lobbyists
 - The social media campaign is grassroots activity
 - » LDA Method A (LDA definition) - not reportable
 - » LDA Method C (IRC definition) - reportable

Scenario #2



- A trade association of medical professionals has been engaging in direct legislative and regulatory lobbying in Pennsylvania on issues concerning the licensing of physician assistants. Now that the changes have been enacted, the association wishes to conduct a research survey on attitudes toward physician assistants and then mount a social media and advertising campaign to encourage consumers to visit and trust physician assistants. The posts and ads will not contain a call to action.
 - PA lobby law covers grassroots lobbying
 - Survey not covered lobbying if:
 - » No attempt to influence covered governmental action
 - » Not part of preparation to lobby
 - PA Ethics Commission takes broad view of grassroots lobbying
 - Ad campaign could be covered and reportable if part of broader lobbying effort
 - Otherwise, not covered or reportable

Scenario #3



- An energy company is concerned about proposed fracking legislation in West Virginia. The company organizes a social media campaign urging citizens to call specific senators and express support for the coal industry and the jobs it brings.
 - WV lobby law covers grassroots lobbying
 - » A campaign addressed to the public, a substantial portion of which is intended to influence legislation
 - » AO: Need not mention specific legislation to be covered
 - Likely triggers registration if meets expenditure threshold
 - May also trigger electioneering communication rules if close to election

Scenario #4



- A German manufacturer of power tools is under investigation by the Department of Justice after faulty tools were imported into the U.S. and caused injury. The company has seen a sharp drop in U.S. sales, and is worried about its reputation. It wishes to have its U.S. distributor assist it in organizing a grassroots reputational campaign to improve the company's image by, e.g., producing commercials touting the company's commitment to safety.
 - Does not implicate LDA
 - May require FARA registration
 - Active investigation may mean not exempt commercial activity



- Russian agents published posts on U.S. social media in connection with 2016 elections stoking tensions on all sides of divisive issues:
 - Facebook posts reaching 126 million users
 - 120,000 posts on Facebook's Instagram service
 - 1,000 videos on Google's YouTube service
 - 130,000 posts on Twitter
- Eight Russia-backed Facebook accounts publicized or financed at least 22 rallies, protests, and marches



- Representatives of Facebook, Google, and Twitter testified in House and Senate committee hearings in late 2017
 - Tech companies expressed concern about being seen as suppressing speech, focusing their efforts on removing inauthentic accounts
 - Sen. Graham called nefarious social media activity "the national security challenge of the 21st century"
 - Sen. Franken criticized Facebook accepting ad payments in rubles
 - Lawmakers considering regulating social media platforms if tech companies do not
- Shareholder proposals seek information and remedies from Facebook, Google, and Twitter regarding Russian interference
 - Including Illinois State Treasurer, New York State Common Retirement Fund



- Facebook promised to publish all political ads going forward
 - Released a feature allowing users to see whether they were targets of Russian disinformation
- Twitter suspended 36,000 automated accounts that posted 1.4 million election-related tweets linked to Russia, which received approximately 288 million views
 - Banned RT and Sputnik from its platform
- Google working on a publicly accessible database on election ads
 - No action against RT, which has not violated its terms of service

HLOGA Enforcement: Criminal and Civil



- 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.

HLOGA Enforcement: Criminal and Civil



- Meeting the good faith standard
 - No definition in the law
 - Rounding (up or down) to the closest \$10,000
 - » GAO found 26% in non-compliance for not rounding
- Random GAO audits
- DOJ announced increased focus on HLOGA compliance
 - Carmen Group
 - » \$125,000 fine announced August 2015
 - Mauk
 - » March 2014 complaint filed
 - » Potential fines of \$5.2 million
 - > \$30,000 settlement
 - Biassi Business Services
 - » December 2013: \$200,000 default judgment