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Skadden

Compliance: Pay-to-Play and Gift Rules

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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
 - *Skilling* (2010)
 - Municipal Court Judge Joseph Waters (Philadelphia, September 2014)
 - » Pled guilty to honest services fraud and sentenced to 24 months
 - » Intervened on behalf of contributor in small claims case by speaking with judges
 - » He claimed donor was a friend
 - *O'Brien* (Massachusetts federal district court denies dismissal January 2014)
 - » In denying dismissal of charges, court noted that "exchange" element of quid pro quo does not require an item-by-item correlation between bribes and official actions, but merely showing that a course of conduct of gifts or favors flowing to a public official in exchange for a pattern of conduct beneficial to the donor
 - > Defendant ultimately convicted of racketeering and mail fraud, but not bribery



- 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.
- Industry-specific rules, *e.g.*, MSRB G-17



- 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).

Employees Who Have Been Elected or Appointed to Office



- 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



- 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



- Pay-to-play laws in the following jurisdictions:
 - MSRB Rule G-37 (amended to cover municipal advisors), SEC Rule 206(4)-5, CFTC Sec. 23.451, proposed 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
 - Chicago, Cook County (IL), Dallas, Detroit, Houston, Jefferson Parish (Louisiana), Miami Beach, New Orleans, New York City, Orange County (FL), Orange County (NY), Philadelphia, Providence, Salt Lake County (Utah), 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, DuPage County (IL), Kane County (IL), Los Angeles City, Providence, San Antonio, and for CalPERS and CalSTRS



- Covered donors vary depending on the law
 - Some cover spouses and/or children (e.g., Connecticut, New Jersey, Denver, Illinois, Kentucky, Pennsylvania, and Philadelphia)
 - Some cover partners, officers, and/or directors (e.g., Connecticut, Illinois, New Jersey, and New Mexico)
 - Some cover employees who are dealing with the agency on a contract (e.g., Connecticut and California)
 - Some only cover corporate or PAC contributions (e.g., Hawaii, South Carolina, L.A. County, and Oakland)
 - Some cover all employees (e.g., L.A. MTA)
 - Some cover outside consultants who solicit state contracts (e.g., New Jersey pension fund rule)
 - Some cover affiliates, employees and directors of affiliates, and shareholders

Pay-to-Play Laws – Gifts and Entertainment



- Trend toward including gifts and entertainment in pay-to-play laws
 - Philadelphia Executive Order gift ban contains a penalty of loss of contract and/or debarment
 - Virginia: restriction on gifts during pendency of bid
 - CalSTRS adopted a policy that it may not do business with a company for two years if the company violates the \$460 per year gift limit
 - L.A. City limits gifts from an underwriting firm and its officers, public finance employees, and affiliates to \$49.99 combined during the year prior to and following selection for underwriting non-competitive bid revenue bonds
 - New Mexico has several gift provisions in its various pay-to-play laws
 - Pennsylvania has a gift restriction in its municipal pension system pay-to-play law
 - Pasadena prohibits gifts exceeding \$50 from the period beginning when the covered recipient approves the contract and (i) 1 year after covered recipient's term or departure from office; or (ii) 5 years after the approval, whichever is first

Strategy for Pay-to-Play Compliance



- Who do you pre-clear?
- What do you pre-clear?
- Controlling contributions to 527s (such as RGA/DGA)



- Federal pay-to-play bans
- In April 2015, Atlantic County (NJ) judge upheld ban on accounting firm receiving county contracts for four years due to a \$4,600 contribution to the county sheriff running for state office
- In February 2015, Paterson (NJ) disqualifies its bond counsel of 20 years due to \$500 contributions to the two leading mayoral candidates
 - Paterson also pulled a development consulting contract in 2014 due to firm mayoral contribution
- In March 2014, Medford (NJ) banned five engineering and insurance companies from bidding on township contracts for four years because they violated a local pay-to-play rule limiting political contributions to council candidates



- New Maryland pay-to-play regime and regulations
- MSRB amendments to Rule G-37, expanding the ban to municipal advisors
- FINRA's draft pay-to-play rule for third-party and affiliated placement agents
- Connecticut issues opinion warning about use of state parties' federal accounts
- Gov. Christie solicited contributions to the RGA from donors prohibited from contributing to him directly
 - These contributions were heavily scrutinized by the government and media, even though not expressly prohibited by any pay-to-play rule
- Movement continues with New Jersey localities

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.
 - Factors to consider
 - » Timing
 - » Contacts with campaign staff or office staff?
 - » Content of presentation
- Covered gifts do not include benefits to a governmental entity but a letter of acceptance should be obtained.
- Federal government, each state, and certain cities and counties have their own separate gift laws.
 - FCPA and jurisdiction-specific foreign gift issues
- Special issues
 - Presidential conventions
 - Split events (fundraiser/personal)
 - Charitable donations

Federal Congressional Gift Rules



- Lobbyist/Lobbying Firm/Lobbyist Employer Gift Ban – the gift limit from lobbyists, lobbying firms, and lobbyist employers is \$0.
- Every lobbyist registrant, lobbying firm, and lobbyist individually must sign an LD-203 certification of compliance with Congressional gift rules. This provision is the most significant provision of HLOGA's post-Abramoff reforms.
- Non-Lobbyists/Non-Lobbying Firms/Non-Lobbyist Employers – For those entities that are not lobbyists and do not employ a lobbyist, gifts are limited to \$49.99 per occasion and \$99.99 per year.

Federal Congressional Gift Rules



- However, many gift exemptions are available, even to lobbyists/lobbying firms/lobbyist employers, including, but not limited to:
 - Reception exemption
 - Nominal food in certain settings
 - Widely attended gathering
 - Outside activities
 - Friendship (cannot be expensed and subject to increased scrutiny)
 - Site visits: food and local travel outside D.C. (House rules vs. Senate rules)
 - Attendance at events sponsored by charity (House rules vs. Senate rules)
 - Home district products
 - Nominal items (baseball caps, t-shirts, and greeting cards)
 - Training
 - Informational materials
 - Items paid for at market value or promptly returned
 - Commemorative items (allows certain gifts during site visit)
 - Personal hospitality exemption is not permitted for lobbyists
 - Political contributions



- Tickets to sporting or entertainment events: valuation rules
 - Senate: A ticket is valued at face value.
 - » A ticket holder may seek pre-approval of an "equivalent ticket" value for a ticket with no face value (considering the value of tickets with similar seating, parking, food, access to non-public areas, etc.).
 - » Otherwise, tickets with no face value are valued at the highest priced ticket with a face value, as in the House.
 - House: A ticket is valued at face value, but "face value" is face value only if the price is offered to the public.
 - » A ticket without face value is valued at highest cost of a ticket with a face value.



- Factfinding trips vs. site visits
 - Restrictions on Lobbyist Involvement
 - » Lobbyist may not pay for expenses related to otherwise exempt factfinding trip.
 - » Lobbyist may not accompany Member or staffer on trip.
 - » Lobbyist may not have more than de minimis involvement in arranging or organizing trip for employer.
 - Restrictions on Lobbying Firm or Lobbyist Employer Involvement
 - » Firm/Employer may pay for necessary expenses of factfinding trip if one-day event (excluding travel time and overnight stay).
 - » Non-commercial corporate aircraft may not be used for such trips.
 - Member/staffer must certify compliance with above and all factfinding trips must be preapproved by the House or Senate Ethics Committee.

Federal Executive Branch Gift Rules



- Gifts to executive branch officials and employees are generally limited to \$20 per occasion and \$50 per calendar year.
- Commonly used exceptions include:
 - There is no reception exception
 - Widely attended gathering (but requires pre-clearance from agency)
 - Meals and entertainment from non-prohibited source
 - Personal relationship (factors: personal payment and relationship history)
 - Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal
 - Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation
 - Gifts the receipt of which is specifically authorized by statute (e.g., Foreign Gifts and Decorations Act)
 - Gifts to the President and Vice President

Obama Executive Order Federal Executive Branch Gift Rules



- Obama Executive Order prohibits most gifts to executive branch officials and employees from lobbyists, lobbying firms, and lobbyist employers.
 - Non-Obama employees may be covered as well
- May not utilize \$20/\$50 or widely attended exceptions, among others.
- Limited exceptions remain, including:
 - Personal relationship (factors: personal payment and relationship history)
 - Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal, but not including receptions with alcohol like in the legislative branch
 - Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation
 - Gifts the receipt of which is specifically authorized by statute (e.g., Foreign Gifts and Decorations Act)
 - Gifts to the President and Vice President
- Press and charity exceptions



- 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



- 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.
 - On-site meal may be served and company 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 company 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



- If Obama political appointee:
 - No reception 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 Site Visits: House, Senate, and President



- With eligible class only (as defined under Federal Election Campaign Act)
 - Candidate and company 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.
 - Company 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

HLOGA Enforcement: Criminal and Civil

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- 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.

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