

# Federal Campaign Finance

## Public Affairs Council

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

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Singapore  
Tokyo



- 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.





- Federal Election Commission Form 1 (Statement of Organization)
  - Determine the type of PAC that will be formed: Connected vs. Nonconnected
  - Connected PACs must have the full name of the Connected Organization listed in the name of the PAC
  - Abbreviated name can be used, however, both the abbreviated name and full name must be listed on:
    - » Statement of Organization;
    - » All reports and notices filed by the committee; and
    - » Any disclaimer notices used by the committee in public political advertisements.
  - FEC has been tacitly permissive in the use of PAC nicknames
  - Connected Organization may not be a partnership or LLC unless treated as a corporation for tax purposes
  - Connected Organization may pay the administrative expenses for Connected PACs
    - » Nonconnected PACs need a policy for calculating and paying administrative expenses. There is no set formula for this calculation.



- Statement of Organization must be filed within 10 days of a PAC being established and amendments must be filed within 10 days of a change
- The Form 1 also requires: address, email, treasurer, custodian of records, name and address of a bank
- Use an email address that is frequently checked
  - Committees may enter up to two e-mail addresses on Form 1
- When amending the Statement of Organization, if applicable, make corresponding change to PAC Bylaws
- PAC Organization
  - PAC Board is not required, but most PACs have a board
  - Some banks request PAC bylaws or board resolutions along with the EIN to open a bank account
  - Treasurer is the only required position but it is good practice to have other officers
    - » Name an assistant treasurer who is available to review and sign off on PAC filings



- No benefit to incorporating a Connected PAC
- EIN Information
  - A PAC must have its own EIN. It may not use a Connected Organization EIN.
  - PAC should register with the IRS (Form SS-4) as a “Political Organization” with “Banking Purpose” as the reason
  - Keep track of your PAC’s EIN
  - Update IRS information on 1120-POL filings or through a letter to the IRS





- Form 3X
  - Reports are filed either monthly or quarterly in election years
  - Reports are filed either monthly or semi-annually in non-election years
  - The first five pages (Summary Pages), are the most reviewed parts of the report.
    - » PAC Name
    - » Address
    - » Type of Report
    - » Coverage Period
    - » Name of Treasurer or Assistant Treasurer
    - » Start/End Balance
    - » Calendar Year-to-Date Calculations



- Receipts and Schedule A
  - A person who collects contributions (including payroll deductions) must forward to the committee treasurer the contributions and the receipt information within:
    - » 30 days for contributions of \$50 or less
    - » 10 days for contributions greater than \$50
  - Receipts must be deposited within 10 days of the treasurer receiving the contribution
  - Those companies on 24 or 26 annual pay periods need to forward PAC deductions to the PAC at least twice a month
  - Refunded contributions from committees appear on Line 16
    - » This is not the same as voiding contributions that were lost
  - Bank interest is disclosed on Line 17



- Itemized contributions from individuals appear on Line 11(a)
- Any contribution that exceeds \$200, either individually or in aggregate when added to the contributor's previous contributions made during the same calendar year, must be itemized
  - » Contributor's full name
  - » Mailing address
  - » Occupation
  - » Employer
  - » Amount
  - » Date of contribution





- Disbursements and Schedule B
  - When making disbursements, abide by the set procedures outlined in your bylaws or policies
  - The same person should not be responsible for cutting the contribution checks, approving PAC contributions, and reporting to the FEC
  - Confirm candidate/committee name, address, office sought, election and election year
  - Transmittal letters should be sent only with legal disclaimers (e.g., for primary or general election, or debt retirement)



- 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) or any particular official matter (e.g., a particular legislation, rulemaking, or RFP)
  - 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).



- Recent trend: pressure for corporate PAC to focus on social issues, starting with 2016 LGBTQ rights and “bathroom bills”
- Expanded to include interest in diversity, equity, and inclusion as a result of Black Lives Matter movement and responding to events of January 6, 2021
- Challenging environment for PACs after January 6
  - Donors
  - Media
  - Shareholders
  - Impact on maintaining Democratic-Republican balance





- Corporate Reaction to January 6
  - Some companies temporarily suspended all federal PAC contributions
  - Others temporarily or permanently suspended contributions to the 147 members of Congress who voted against certifying the 2020 election results
  - One company terminated its PAC



- Options and potential legal considerations
  - Dissolution
  - Suspension of contributions
  - Permit donors to restrict contributions
    - » No earmarking
  - Consider revisions to candidate evaluation framework
    - » Substantive giving criteria: adding criteria addressing diversity, inclusion, and civic integrity
    - » Procedural approach: increase diversity on PAC Board or PAC Advisory Committee or appoint Diversity Officer
- Ensure any option taken is in compliance with governance provisions under PAC's Bylaws



- Disburse contribution checks on a timely basis
  - » Holding on to a check may cause a PAC to miss election cutoff dates
- If a check has not been deposited after 90 days then contact the committee to determine if the check has been lost.
  - » Outstanding checks effect both the FEC reconciliation and reported limits to a committee
- Bank fees and operating expenditures are reported on Line 21(b), not Line 29
- The processing fees for credit card transactions or online payments should be treated as an operating expense





- It is critical to do a bank reconciliation
- Some third-party platforms will make you think they are banking programs but they are simply databases that track the data you enter
  - Reconcile against ledger vs. against bank statement
  - Outstanding checks
  - Deposits in transit
  - Keeping a record of Column B figures
- Bank reconciliations should be done by someone other than a check signer
- Keep your reconciliations in the same Excel spreadsheet, with a different tab for each month
- Access to the PAC's bank account online is critical in identifying issues in advance of waiting for a bank statement



- Filing a report with validation errors (missing occupations/employers, missing addresses, etc.)
- Not comparing the starting cash on hand amount of the current report to the ending cash on hand amount of the last report
- Not properly reconciling FEC report with bank statements
- Listing wrong election year on a candidate contribution record. This error is especially prevalent when giving to Senate candidates.
- Having a payroll system issue a refund to an employee, and then reporting that refund as a negative receipt instead of a contribution refund (a positive disbursement)
- Not having a reliable record of all outstanding checks
  - Leaving checks as outstanding for a period of more than 3 months without issuing a stop payment and voiding the record



- Not updating the Statement of Organization within 10 days of any change
- Not updating PAC By-Laws
- Not designating an Assistant Treasurer, who can communicate with the FEC when the Treasurer is unavailable
- Failing to file the multi-candidate Form 1M disclosure when triggered
  - After filing Form 1M, forgetting to check the multi-candidate committee box on filed reports
- Failing to file an 1120-POL report with the IRS if receiving over \$100 in taxable income (most likely bank interest) in a calendar year. Also, be aware of states that tax PAC income.
- Failure to file state PAC filing, if applicable
- Joint fundraising committees
  - Carefully follow the legend on these solicitations
  - Break out info on LD-203 form





- Reports must still be filed until termination is approved by the FEC
- Make sure all terminations are filed in jurisdictions where the PAC also files, i.e., any state where the PAC is registered



- Mandatory Document Retention
  - FEC: 3 years from the date that the relevant information is reported
  - Automated payroll deductions, records must be kept for at least 3 years from the date of disclosure of the last deduction
  - Payroll deduction authorization must be kept for the entire period it is relied upon plus three years
- Must keep records of:
  - Copies of reports
  - Bank statements
  - Information of receipts and disbursements
  - If received contribution exceeds \$50, a copy of the check
  - If disbursement exceeds \$200, a receipt or cancelled check
  - Any other records to substantiate information in reports
- To the extent PAC gives at the state level, must keep records under state law. State retention laws vary widely. We are unaware of any that exceed 10 years.



- **Contribution Limits for Multicandidate PACs**

## 2021 – 2022 Limits

**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

- PAC limits do not index for inflation





- **Contribution Limits for Individuals and Non-Multicandidate PACs**

## 2021 – 2022 Limits

**To Candidates –**

\$2,900\* per election

**To State Party Committees –**

\$10,000 per yr.

**To PACs –**

\$5,000 per yr.

**To National Party Committees –**

\$36,500\* per yr. plus:

- An additional \$109,500\* per yr. for buildings

- An additional \$109,500\* per yr. for recounts and legal fees

- An additional \$109,500\* 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): \$876,000\* per year

\*These limits are indexed for inflation per election cycle



- Knowing to whom one is making a contribution and necessity of making designations on the contribution check
  - DGA and RGA representations
    - » Operating accounts
- Spousal attribution
  - Contribution attributable to signer of check
- Knowing the date of a contribution is important, especially in an election year:
  - 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."



- What is a solicitation?
  - Broadly interpreted
  - Pitching the benefits of a PAC is a solicitation
  - An article in a company's newsletter describing the PAC's activity and commending the enthusiasm of employees participating is a solicitation. FEC AO 1979-13.
- What is not a solicitation?
  - Information about a PAC without pitching the PAC is not a solicitation
    - » \$X was contributed to Republicans and Democrats
    - » \$X was contributed to the PAC
    - » X number of employees contributed to the PAC
    - » The PAC Board decides which candidates should receive contributions
    - » For information on eligibility or PAC activities, call [PAC official]. FEC AO 2000-7.





- 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: Remember PACs make contributions to help favorable candidates get elected. While favorable legislation is the ultimate goal, the contributions are to support candidates.
- Paragraph 4: 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



- 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.



- DO'S:
  - Require pre-clearance for solicitations by executives
  - Script group presentations (such as at a meeting)
  - Script any oral follow-up communication
  - Tell employee that it is important to contribute to the PAC given that a strong PAC is vital to the success of the company
  - Tell employee the PAC helps to elect candidates whose views are good for the company's business interests
  - Ensure written solicitations contain legal disclaimers
  - Follow up with employee (email or follow-up call) to offer assistance or to answer questions
  - Maintain disclaimer protocols on follow-up





- DON'TS:
  - Don't solicit non-eligibles
  - Don't forget the broad definition of "solicitation"
  - Don't treat PAC fundraising as a United Way drive
  - Don't use words suggesting that contributing is a condition of employment (e.g., "must contribute" or "expected to contribute")
  - Don't characterize the PAC as helping to gain access to candidates (e.g., gives us a seat at the table)
  - Don't say that PAC donations help get laws passed
  - Don't imply that contributing will affect opportunity to advance within the company (e.g., do not discuss issues regarding promotions and contributing)
  - Don't use one-on-one oral solicitations, except scripted peer to peer



- Expanding your solicitation base
  - Soliciting board members
  - Soliciting employees of affiliates
  - Soliciting shareholders
    - » Senior retirees who are shareholders
- Peer-to-peer solicitations



- Most PACs use incentives such as gifts, live events with politicians, and special events with the CEO
- Public Affairs Council Corporate PAC Benchmarking Report
  - What one benefit is the most effective in your fundraising efforts?
    - » PAC match (27%)
    - » Live events with politician or guest speaker (19%)
    - » Event with CEO and/or senior executives (15%)
    - » Special communications, such as newsletters (14%)
    - » Annual gift (11%)
    - » Raffles (2%)





- Incentives for contributing
  - One-third rule
    - » Applies only to fundraising with promotional items, prizes, and entertainment that have been paid for by the connected organization, its affiliates and, in the case of trade associations, its members
    - » Food, drinks, and facilities expenses are not subject to the one-third rule: FEC AO 1995-17



- Live and virtual events: watch fair market value
  - » One-on-one events can be problematic
- Charity PAC match
  - » Ensure 501(c)(3)
  - » May not use company foundation
  - » Non-deductible
  - » Be mindful of state law
  - » Consider combining a gift to contributor with PAC Match for those giving certain amount
- Online contributions: credit cards, PayPal, Venmo, Square, Zelle



- 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 partnerships – special rules
- Corporate members may pay overhead expenses of trade association PAC and donate gifts for PAC fundraising: FEC AO 1982-61
- Don't believe proposals that sound too good to be true
  - Trade associations getting around the prior approval rules
  - Soliciting beyond the restricted class
  - Trade association PAC-to-PAC solicitation





- 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 PAC bank accounts are opened using the committee's name and EIN, not a Tax ID for an individual or connected corporation
  - Bank reconciliations are done by someone other than a check signer or person responsible for PAC accounting



- 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 FEC AOs 2010-04 and 2012-02 (Wawa).
  - Includes spouses
  - 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



- 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.





- 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

# 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* only permits corporate independent expenditures
  - Super PACs – federal contractor ban
- 501(c)(4)s and 501(c)(6)s: corporate independent expenditures
  - *CREW v. FEC* struck down a longstanding FEC rule that limited the duty of 501(c)(4) and 501(c)(6) non-profits that make federal independent expenditures to publicly disclose donors. The D.C. Circuit upheld the decision August 21, 2020, so currently 501(c)(4)s and 501(c)(6)s must disclose the identity of donors whose donations are for the purpose of furthering independent expenditures.

# Ban on Corporate Contributions Under FECA Soft Money Rules



- 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
- KYC: Know Your Committee
  - Campaign committees
  - Joint fundraising committees
  - IE committees
  - PACs
  - 501(c)(4)s
  - 501(c)(6)s
- Purpose of corporate PAC
  - Promote interests of corporation, shareholders, employees, customers
  - Not personal views of PAC contributors
  - Shareholder derivative suit





- 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
  - Virtual event costs to be calculated
    - » Cost of Zoom or other service
    - » Value of time of equipment operators
    - » Gifts sent to donor's homes



- Live event costs to be calculated
  - » Food
  - » Value of the use of the room
  - » Use of any corporate facilities (e.g., for printing invitations)
  - » Use of corporate personnel in handling RSVPs or organizing the event, including directed 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.
- Can this be done as a virtual event?





- Employees volunteering for campaigns
  - Legal restrictions regarding employer in-kind contributions
    - » Employees may make occasional, isolated, or incidental use of corporate facilities for volunteer activity in connection with a federal election. However, the corporation must be reimbursed for out-of-pocket expenses. Activity not exceeding one hour/week or four hours/month is considered occasional, isolated, or incidental
      - > Hillary for America: attendees at a campaign event may pay for food, beverages, and parking in that it does not constitute an in-kind contribution. FEC AO 2015-7. Transportation limited to \$1,000.
  - Restricting an employee from taking adverse corporate positions



- Corporation cannot facilitate contributions
- Bundling and providing stamped or addressed envelopes
- Westar case: FEC MUR 5573 (2005)
- Freddie Mac case: FEC MUR 5390 (2006)
  - \$3.8M civil penalty -- implications for corporations
- Bundling may be permitted if a campaign issues a fundraising authorization to an individual and appoints that individual to a special position with the campaign
  - Attestations required in a bundling letter
    - » Authorized fundraiser
    - » Special position with campaign
- Best to have checks sent directly to campaign or credit card with a designation noting solicitor



- 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 it has acknowledged or recognized as having raised contributions totaling over \$19,300 (and the specific amount bundled) during that period. FEC Form 3L.



# Political Site Visits: House, Senate, and President – Virtual and Live



- 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
- Beware of calling political visits non-political meet-and-greets, especially in an election year



- Use of corporate aircraft (first-class airfare vs. charter rate)
- Sending corporate executives to political events
  - Boeing decision
- Corporate endorsements
- Providing registration information and absentee ballots if state law permits
- Registration and get-out-the-vote drives
- Voter guides



- 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





- 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.

# 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
  - Removal of SEC regulation
  - New proposed SEC regulations



# Proxy Proposals Regarding Disclosure of Political Activity



- Some of the more notable activist shareholders introducing proxy:
  - Center for Political Accountability
    - » CPA-Zicklin index – 2020 index is available
  - 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

# 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
      - > Numerous companies have policies requiring board oversight of political spending and board committee review of company policy, political expenditures, and trade association payments.
    - » 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))

# Proxy Proposals Regarding Disclosure of Political Activity



- What to do?
  - Who should be part of decisionmaking process?
  - Absent extenuating circumstances, not useful to seek a No Action Letter (See outcome of Boeing and Home Depot requests)
    - » However, consider seeking a No Action Letter for duplicate requests
  - Consider negotiating a settlement for withdrawal of proxy
  - This is an iterative process: even after negotiating a settlement you may receive a new request the following year. “Feeding the squirrels.”



# Federal Lobbying and Gifts

## 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 Lobbying Law—Lobbying Disclosure Act of 1995 ("LDA") and Honest Leadership and Open Government Act of 2007 ("HLOGA"): LD-1 Report



- 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 \$14,000 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.
- *Foreign-owned entities* – Requirement to list all foreign entities that are 20% equitable owners of the registrant (including intermediate foreign entities), in major part supervise or control the registrant's activities, or are affiliated with the registrant and have a direct interest in the outcome of the lobbying activity.



# What is Lobbying Activity

## Under the LDA and HLOGA: LD-2 Report



- Lobbying activity – definitions apply to all employees. It is not limited to “20-percenters.”
  - Lobbying contacts
  - 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
    - » Does time spent at PAC fundraisers count?
  - Work performed with the intent that it will be used for lobbying purposes at the time it is created
  - Education and strategic planning
    - » Strategizing with trade associations, task forces, and others in the industry



# What is Lobbying Activity

## Under the LDA and HLOGA: LD-2 Report



- Must there be pending legislation, rulemaking, or RFP?
- Ripening of preparation time that does not result in a contact
- Travel time
- Subject matter experts
- Door-opening
- Administrative time
- Hide-behind lobbying
- Shadow lobbying

# Who is a Covered Official Under the LDA and HLOGA: LD-2 Report



- Lobbying contact includes making the following communications in an attempt to influence legislation, federal contracts, or any other position of the federal government:
  - Method A – Covered Officials
    - » Communications with Congressional members and staff; and
    - » 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: <https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2020/pdf/GPO-PLUMBOOK-2020.pdf>

# Who is a Covered Official Under the LDA and HLOGA: LD-2 Report



- Method C – Covered Officials: federal
  - » Communications with Congressional members and staff and any executive branch official (regardless of position) regarding federal legislation
  - » Communications regarding executive branch decisions with White House Staff, top two officials in any office of the EOP, and Cabinet-level officials and their deputies
    - > Independent agency officials not covered
- Method C – Covered Officials: state/local
  - » Communications with any official (legislative or executive) on state/local legislative decisions
    - > Communicating on non-legislative decisions such as rules, regulations, executive orders, policies, programs, or other official decisions, is not covered
- Other notable Method C differences:
  - Federal and state grassroots lobbying (legislative only)
  - 5% de minimis rule for employees with no contacts





- Types of social media communications, expanding lobbying footprint:
  - Direct lobbying
    - » Direct messages
    - » “Tagging” public officials
    - » Emails
  - Grassroots lobbying
    - » Tweets
    - » Likes and retweets
    - » Facebook
- Electronic petitions and form letters
- State regulators are giving increased consideration to social media activity
  - Evolving area



- Lobbying reports ("LD-2") are quarterly
- Reports are electronic and placed on a public database
- Reports are due 20 days after end of quarter. Upcoming due dates:
  - July 20, 2021
  - October 20, 2021
  - January 20, 2022
  - April 20, 2022



- Disclosure only of lobbyist employer
  - In-House Personnel: Must include internal expenditures (employee salary and overhead). Must include compensation of all employees who lobby. Time tracking.
  - Outside Lobbyists: Must include payments made to outside lobbyists.
  - Trade Association and Coalition Dues: Must include the portion of dues payments made to trade associations for lobbying.
    - » Guidance requires reporting of dues in the quarter in which they are paid.
    - » Serving on a trade association legislative committee or task force and participating in strategy or policy matters.
    - » When are company personnel wearing a company hat vs. a trade association hat.
  - Travel and Entertainment: Must include travel and entertainment expenses related to lobbying.





- 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
- Documentation supporting contacts with covered officials
- Documents reflecting issues lobbied supporting representations on LD-2
- Should include bill and brief description of legislation
- Special issues in tracking C-Suite lobbying time



- LDA registrants required to identify whether any client is a state or local government or government-controlled entity (e.g., agency, district)
- The interest of any foreign entities listed on the LD-1 with respect to an issue lobbied during the quarter should be disclosed on line 19 of the LD-2
- Updates to registration information are made on the last page (e.g., terminations, address change, etc.)
- Disclosure of Previous Legislative and Executive Branch Employment – Registrants required to disclose certain legislative and executive branch employment during the past 20 years (previous requirement: two-year look back).
  - Disclose only once per client (the first time a new lobbyist is reported).



- Effective January 3, 2019, LDA registrants must disclose on the LD-1 (line 15) and LD-2 (line 29) any federal and state convictions of listed lobbyists for bribery, extortion, embezzlement, kickbacks, tax evasion, fraud, a conflict of interest, making a false statement, perjury, or money laundering.
  - Date and description of the offense, including jurisdiction, and either a list of the covered predicate offense (e.g., bribery, extortion) or the code section convicted under.
  - Once a disclosure is required for a listed lobbyist, the disclosure must be repeated on every subsequent LD-2 filing listing that lobbyist.
  - If an organization is filing, or has filed an LD-1 since January 3 for the first time, the LD-1 may need to be amended to capture required disclosures.
  - If the organization filed the LD-1 prior to January 3, the convictions will need to be disclosed on subsequent LD-2 filings beginning with the first quarter of 2019.





- If a corporation has an affiliated entity and the affiliate contributes or has a "chargeback" to its profit-and-loss statement of more than \$5,000 in a calendar quarter and an employee of the affiliate actively participates in the planning, supervision, or control of the registrant's lobbying activity, that affiliate must be disclosed on the LD-1 at line 13.
  - Additions are made on the LD-2 at line 25, and deletions are made on the LD-2 at line 26.



- Disclosure by Trade Associations and Informal Coalitions – HLOGA requires registrants to disclose any entity that:
  - (i) contributes over \$5,000 per reporting period to the lobbying effort of the Registrant; and
  - (ii) "actively participates" in the planning, supervision, or control of the Registrant's lobbying activities (under pre-existing law, the threshold is contribution of \$10,000 per reporting period and "in whole or major part plans, supervises, or controls" lobbying activities).
    - » The term "actively participates" sets a lower threshold than the pre-existing law.
    - » Certain foreign entities affiliated with or interested in such entities must also be disclosed.



- Disclosure by Trade Associations and Informal Coalitions
  - There is an exemption from this disclosure requirement if:
    - » (i) the Registrant lists the member entity on its public website as being a member of the Registrant or a contributor to the Registrant's lobbying effort (the specific Internet address must be provided); and
    - » (ii) the member does not in whole or major part plan, supervise, or control the Registrant's lobbying activities.





- Reports are due 30 days after the end of a semi-annual period. Upcoming due dates:
  - July 30, 2021
  - January 31, 2022
- Semi-Annual Disclosure Report ("LD-203") – Lobbyists, lobbying firms, and lobbyist employers are required to file a semi-annual report detailing political contributions, charitable contributions, and other expenditures related to covered legislative and executive branch officials
- Even if an employee had no activity or activity that fell below the threshold for becoming a lobbyist, if he or she was listed on an LD-2 report, that employee must file an LD-203 for that semi-annual period



- FECA
  - The name of all PACs established or controlled by the lobbyist, lobbying firm, or lobbyist employer.
  - Each federal candidate or incumbent, leadership PAC, or party committee that received contributions of \$200 or more (aggregate) from the lobbyist, lobbying firm, lobbyist employer, or their PACs during the semi-annual period.
    - » The date and amount of each contribution is required.
  - When reporting contributions to joint fundraisers, break out ultimate recipients. Merely importing FEC data does not always properly reflect them.



- Honorary Expenses
  - Donations to entities or events related to a covered official (unless required to be reported under FECA), including:
    - » Events held to honor or recognize a covered legislative or executive branch official.
    - » Entities designated by, or established, financed, maintained, or controlled by, such an official (e.g., Congressional Black Caucus, Congressional Hispanic Caucus).
      - > A charity established by an official prior to becoming a covered official is not covered if the official has no relationship to the organization after becoming a covered official.
    - » Entities named for a legislative branch official.
    - » Any entity in recognition of a legislative branch official.





- Meeting Expenses
  - Any funds paid or contributed by a lobbyist, lobbying firm, lobbyist employer, or their PAC(s) to pay for a meeting, conference, or similar event held by, or in the name of, one or more covered legislative or executive branch officials.
- Presidential Library Expenses and Inaugural Committee
  - Each Presidential library foundation and inaugural committee to which contributions of  $\geq \$200$  (aggregate) were made by a lobbyist, lobbying firm, lobbyist employer, or their PAC(s).



- 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.



- Who signs the LD-203 report and certification
  - For internal governance purposes, companies should identify who is ultimately responsible for the certification.
- Robust gift policy
- Training
  - Ensure appropriate employees are familiar with gift rules
- Conduct due diligence to support the gift certification
- Conduct gift email confirmation for gift compliance
  - "Negative sign-off" vs. affirmative response





- The LD-203 provides an optional comment box (fits 250 characters)
- With regard to the certification, filers may insert "disclaimer" language such as, "to the best of my knowledge," "after reasonable due diligence" or "after good faith efforts"
- Filers may also insert comments related to other parts of the LD-203
- Note if filer serves on a corporate, trade association, or other PAC Board



- Registrations
  - Termination is permitted if an individual has no reasonable expectation of continuing to meet the 20% threshold.
- Lobbyists
  - A registrant can terminate a lobbyist by listing the lobbyist's name on Line 23 of the LD-2 report
  - The registrant (not the lobbyist) must sign in to the LD-203 Contribution System and update the lobbyist's status to "inactive" and enter an effective date of termination
  - The lobbyist must file an LD-203 report for any reporting period for which he or she was an active lobbyist, even if for only one quarter of the LD-203 semi-annual period
  - When a lobbyist leaves a company or organization, lobbyist should properly terminate registration and make it part of exit interview process



- Prior employer registrant terminates the lobbyist on line 23 of LD-2
- Once the individual meets the registration threshold under new employer, new employer registers the individual by listing the individual's name on Line 18 of the appropriate LD-2 report
- Registrants should not create an account for new lobbyists who already have a lobbyist ID
- The lobbyist must sign in to the LD-203 Contribution System and, in the Manage Your Profile section, click on the Request Employer Transfer link and follow the instructions.



# Government Accountability Office – Lobbying Disclosure Act and Honest Leadership and Open Government Act (HLOGA) Audits



- Approximately 80-100 LD-2 random audits per year
- Approximately 160 LD-203 random audits per year
- Department of Justice (DOJ) is responsible for civil and criminal enforcement
- 2010 through 2020: 3,956 referrals from Secretary of Senate and Clerk of House to DOJ for LD-2 failure to comply
- Pre-audit online survey asks about documentation and support for lobbying activity and issues, among other disclosures

# Government Accountability Office – Lobbying Disclosure Act and Honest Leadership and Open Government Act (HLOGA) Audits



- Statistically significant findings in the 2020 GAO Report on federal lobbying released in April 2021.
  - 21% of LDA reports were not properly rounded to the nearest \$10,000.
  - 91% of lobbyists who filed new registrations also filed LD-2 reports for the quarter in which they first registered
  - 29% of all LD-2 reports did not properly disclose one or more previously held covered positions
  - 8% of LD-203 reports were missing reportable contributions



- Good faith standard for disclosure of expenditures
  - No definition in the law
  - Having a reasonable basis for your numbers
  - Be careful of using the same amount or percentage each quarter
- Random GAO audits
- DOJ increased focus on HLOGA compliance
  - Abramoff criminal plea
  - 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





- Foreign Agents Registration Act (FARA)
  - Lobbying on behalf of a foreign private entity may trigger a FARA registration. Generally, for direct lobbying, the LDA exemption applies. However, the LDA exemption is not available for grassroots activity that does not involve any direct lobbying.
  - Any person who attempts to influence any U.S. government policy or position on behalf of a foreign government or foreign political party must register and report with DOJ as an agent of a foreign principal
- Proposed legislation



- 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.
- Federal government, each state, and certain cities and counties have their own separate gift laws.



- Lobbyist/Lobbying Firm/Lobbyist Employer Gift Ban – the gift limit from lobbyists, lobbying firms, and lobbyist employers is \$0.
- 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.





- 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 (including Lobbying Firm) 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 Lobbyist Employer Involvement
    - » Employer may pay for necessary expenses of factfinding trip if one-day event (excluding travel time and overnight stay).
    - » Non-commercial company 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.





- 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.
  - 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 must be less than \$50
    - » Five or more non-lobbyist constituents must participate
    - » Lobbyist allowed to accompany local transportation



- 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.
  - On-site meal may be served and corporation may provide local transportation
    - » Lobbyist may participate in meal and accompany local transportation



- 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 per se
  - 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



# Biden Executive Order Federal Executive Branch Gift Rules



- Biden Executive Order prohibits most gifts to executive branch officials and employees from lobbyists, lobbying firms, and lobbyist employers
- 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



- Under Biden 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



- 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.



# State and Local Campaign Finance and Pay-to-Play

## 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



- When giving to 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



- 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

- 17 states require corporations to file reports if they make contributions.

Alaska

Maryland

North Dakota

California

Massachusetts

Ohio

Georgia

Minnesota

Pennsylvania

Hawaii

Montana

Rhode Island

Iowa

Nebraska

Tennessee

New Hampshire

Washington

- Some of these states are corporate ban states, where the reporting requirement is triggered by ballot measure contributions (e.g., Ohio and Massachusetts).
- 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.



- Aggregation among affiliate companies
  - Most states aggregate among affiliates, e.g., Georgia and Maryland.
  - New York does not aggregate among corporate affiliates for purposes of the \$5,000 per corporation limit.
    - » As of January 31, 2019, LLC contributions are also subject to the \$5,000 per entity limit, and LLC contributions are attributed to its corporate members.
  - California aggregates 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.





- 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.



- New Jersey – Prohibits insurance companies, banks, utilities and their affiliates, doing business in the state from making contributions "for any political purpose whatsoever."
- New York state limits political contributions by owners of premises contracted for or used as a place of registration or as a polling place.
- Delaware has a ban on insurers, or banks acting as an insurer, contributing to an Insurance Commissioner candidate.
- Several states impose restrictions on lottery or gaming contractors.



- 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 (*e.g.*, Ohio and Texas).
- Some states make it difficult or illegal to use a federal PAC (*e.g.*, Alaska, Connecticut, Massachusetts, Minnesota, New York, and Rhode Island).
- New York Department of Labor payroll deduction statement and regulation.
- New Jersey payroll deduction restriction.
- Many states do not exempt administrative expenses or certain solicitation expenses. This can, for example, make PAC match impermissible.
  - For example, New Hampshire treats administrative expenses as contributions subject to the \$5,000 per election corporate limit.





- Some states impose burdensome restrictions on PACs.
  - 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.
  - Vermont requires compliance with state limit on what a PAC can receive to \$4,210 per two-year cycle.
  - Washington state requires a federal PAC receive contributions of \$10 or more from at least ten persons registered to vote in the state in the 180 days prior to the time a contribution to a state candidate or PAC is made.
- 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.

# Hot Topic: Ban on Foreign-Influenced Corporate Contributions



- Trend of proposed legislation prohibiting contributions from a corporation with a certain percentage held by a foreign owner
  - St. Petersburg, FL and Seattle, WA have passed ordinances prohibiting contributions from a “foreign-influenced corporation”
    - » St. Petersburg – covers companies with 5% or more stake owned by a single foreign entity, 20% or more owned by multiple foreign entities, or where a foreign entity participates in the political activity decision making of the company
    - » Seattle – covers companies with 1% or more stake owned by a single foreign entity, 5% or more owned by multiple foreign entities, or where a foreign entity participates in the political activity decision making of the company
  - Similar bills proposed at state level; may also cover IEs, ECs, and company PACs
  - Washington state now requires certification of compliance with existing federal foreign national contribution ban for entities making contributions
  - Montana created state cause of action for violations of federal foreign national contribution ban



- Effective November 9, 2022, New York lowers contribution limits for state candidates. This was previously a binding recommendation by the Campaign Finance Reform Commission and was then overturned by a state court prior to being passed by the legislature.
- On January 21, 2021, the South Carolina Ethics Commission adopted an advisory opinion stating political contributions may not be made in cryptocurrencies, such as Bitcoin
- Effective January 1, 2021, California contributions to local candidates are limited to \$4,700 per election in counties or cities that have not adopted local limits.
- In November 2020, Missouri voters approved a ballot proposition that reduced the contribution limits for state legislative candidates and eliminated indexing
- On August 31, 2020, a federal court granted a preliminary injunction enjoining enforcement of a Missouri statute that requires a PAC file a statement of organization no later than 60 days before an election in which it receives contributions.





- 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)
  - Impact of *McDonnell v. U.S.* and definition of “official acts”
  - Former St. Louis County Executive Steve Stenger
    - » At dinner, accepted a \$5,000 contribution from businessman John Rallo who said he was tired of giving money to politicians and not getting anything in return. Stenger made statements to assure Rallo that, if elected, he would help Rallo.
    - » This one toxic conversation tainted a consulting contract Rallo obtained with the County Port Authority and contracts he obtained to purchase property from the County Land Clearance for Redevelopment Authority (LCRA)



- » Problematic emails and texts were uncovered
  - > Stenger: John is there a way we would be able to get your 2500 for the quarter dated 3.31 in the next few days so we could count it for this quarter. We are trying to hit 300k for the quarter and it would be helpful
  - > [Five texts later, same thread, same day:]
  - > Rallo: Check is ready! Need 5 min call to go over a concern I have on the insurance RFP...are u avail later today?





- » Stenger pleaded guilty May 3, 2019 to honest services fraud, sentenced Aug. 9, 2019 to 46 months and \$250,000 fine, plus restitution
- » Rallo pleaded guilty July 16, 2019 to three counts of honest services fraud, sentenced Mar. 5, 2020 to 17 months plus restitution
- » Sheila Sweeney, Port Authority Executive Director and LCRA board member, pleaded guilty May 10, 2019 to misprision of a felony in relation to the Rallo contracts, sentenced Aug. 16, 2019 to three years' probation and \$20,000 fine
- » Stenger's Chief of Staff Bill Miller pleaded guilty May 31, 2019 to a felony count of theft of honest services through bribery and wire fraud, sentenced Sept. 6, 2019 to 15 months



- 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.



## Areas of heightened linkage risk:

- Employing or retaining official or someone else at the official's request.
  - *U.S. v. Weyhrauch*: Alaska state legislator voted on oil tax legislation while negotiating future employment with oil pipeline company VECO, which was lobbying that same tax.
    - » No explicit bribe, but convicted because voted with understanding of future employment and was required to disclose conflict
    - » On remand, Weyhrauch pled to a misdemeanor
- Contributing to charities and other non-profits at the request of a public official





- Avoid weird or potentially problematic gifts
  - Former Baltimore Mayor Catherine Pugh
    - » Purchase of large quantities of her books coinciding with award of government contracts
    - » Pleaded guilty Nov. 21, 2019 to conspiracy to commit wire fraud, conspiracy to defraud the United States, and two counts of tax evasion. Sentenced Feb. 27, 2020 to three years imprisonment plus restitution.
      - > Pleaded guilty June 19, 2020 to a state perjury charge, sentenced to 6 months concurrent to her federal sentence
  - 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



- Indictment of Ohio House Speaker Larry Householder, several consultants and lobbyists, and the 501(c)(4) organization with which they were involved
  - Some defendants and the 501(c)(4) pleaded guilty, but not Householder
- Alleged link between \$60 million in donations and legislation pushed by the Speaker that benefited the donor
- 501(c)(4) organization allegedly secretly donated to another 501(c)(4), which then made a reportable contribution to a Super PAC.
- Indictment also suggests certain spending in Ohio campaigns funded by the 501(c)(4) was coordinated
- More than \$400,000 from the 501(c)(4) was allegedly also used to provide a personal benefit to the Speaker, including payment of his debts and vacation home expenses



- 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)
- Practical policies and procedures

# 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).





- 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



- COVID-19
  - Unprecedented crises created the inclination to act first and ask compliance questions later – however, that can have serious repercussions in the future
  - Increased chance of media and regulatory scrutiny of those who benefited from legislation/government action
  - Companies were asked, and have been looking for ways, to assist governments
    - » Quick award of government contracts
    - » Donations of goods and services
    - » Employees working or consulting for government agencies



- 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.





- Pay-to-play laws in the following jurisdictions:
  - California, Connecticut, D.C., 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 (NM), Allentown (PA), Chicago (IL), Chicago Ridge (IL), Cook County (IL), Dallas (TX), Detroit (MI), Grand Rapids (MI), Holyoke (MA), Houston (TX), Jefferson Parish (LA), Lehigh County (PA), Miami Beach (FL), Miami Gardens (FL), New Orleans (LA), New York City (NY), Orange County (FL), Orange County Public Schools (FL), Orange County (NY), Philadelphia (PA), Plano (TX), Providence (RI), Salt Lake City (UT), Salt Lake County (UT), San Antonio (TX), Seattle (WA), South Miami (FL), Spokane (WA), and St. Louis County (MO)
  - In California: All California Counties, Costa Mesa, Culver City, Gardena, Glendale, Los Angeles City, L.A. County MTA, Malibu, Oakland, Pasadena, San Francisco, Santa Ana, Santa Monica, West Covina, Yorba Linda, and CalSTRS
  - In New Jersey: numerous localities
- We are aware of pay-to-play reporting-only requirements in Connecticut, Illinois, Maryland, Missouri, Montana, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, Deerfield Beach (FL), Denver (CO), Detroit (MI), DuPage County (IL), Kane County (IL), Laredo (TX), Los Angeles City (CA), Nassau County (NY), Providence (RI), Rockland County (NY), San Antonio (TX), San Diego County (CA), St. Paul (MN), and Travis County (TX), 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 and South Carolina)
  - 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



- More and more RFPs requiring certification no gifts have been provided
- Trend toward including gifts and entertainment in pay-to-play laws
  - New Jersey: debarment liability for violation of vendor ban EO
  - Philadelphia Executive Order gift ban contains a penalty of disqualification 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 \$520 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





- 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

# State and Local Lobbying and Gifts

## 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





- 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; 25 hours or \$2,500 compensation in Massachusetts).
- Special issues when lobbying on behalf of an outside client
  - Both placement agent and client have to register in most states
- Placement agent restrictions under public pension fund policies





- 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
California (except for retirement systems)	South Carolina
Colorado	Utah (as to state actions or decisions)
Hawaii	Vermont
Iowa	Washington
Minnesota	West Virginia
(as to state actions or decisions)	Wisconsin



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

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

\* Metropolitan governmental units only

\*\* Local and education decisions only



- Some state lobby laws cover local lobbying
  - Alabama, Arkansas, Georgia, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, New York, Utah
- Some Florida county lobby laws cover lobbying municipalities within the county
  - Miami-Dade County, Palm Beach County





- 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 30 states, grassroots lobbying triggers registration (including Maine, effective December 1, 2020).
  - In 5 additional states, grassroots lobbying does not trigger registration but if already registered, grassroots expenditures must be reported (Alaska, Florida, Kentucky, Texas, and Wisconsin).



- Contingent fee restrictions under the lobbying laws (e.g., restriction in California, Connecticut, Florida, Massachusetts, New York).
- 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





- Register the precise entity
- Follow the money
- What if a lobbyist is paid by one entity but lobbies in the interests of another?
- New York requires disclosure of both contractual client and beneficial client
- Kentucky requires disclosure of “real party in interest” in addition to employer
- In Chicago, compensation is not required to trigger registration, and both a client and an employer must be disclosed
- In North Carolina, the principal is the entity that both pays for and benefits from the lobbying
- Typically, reportable activity is of the registered entity and not affiliates



- Effective February 23, 2021, Montana removed references to public officials in its lobby law, confirming a previous interpretation that only legislative lobbying is covered
- Effective March 18, 2021, Nevada no longer requires appearance in person to trigger lobby registration and reporting
- In 2021, the Puerto Rico House of Representatives adopted Administrative Order 2021-03, requiring registration and reporting for lobbyists that attempt to influence
- Effective December 1, 2020, Maine lowers the reporting threshold of grassroots lobbying expenditures to \$2,000 and requires non-registered lobbyists to report grassroots activity
- On October 1, 2020, Chicago began enforcing a ban on state and non-Chicago local elected officials lobbying



- Civil fines to criminal penalties.
- Losing business in jurisdictions where procurement activity is defined as lobbying.
  - 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.





- Arizona Secretary of State's Office found reasonable cause that two employees of a think tank failed to register as lobbyists, and referred the case to the Office of the Attorney General.
- In California, retirement systems are refusing to meet with individuals who should be registered as lobbyists but have not
- Los Angeles issued five fines totaling \$162,500 to persons failing to register as lobbyists
- Los Angeles imposed a fine of \$281,250 to the city's former planning director for violating the one-year cooling off period
- Chicago fined a political consultant \$25,000 for unregistered lobbying after media reports of an FBI investigation, including evidence of the lobbyist leaving a massage parlor with a Chicago alderman
- Chicago fined a former elected official for violating the one-year post-employment period restriction and his employer for retaining an unregistered lobbyist. The former elected official listened in on a conference call with city officials unannounced and provided advice to his colleagues in real time



- Colorado lobbyist fined \$74,000 for failure to register, state senator filed the complaint
- A Massachusetts state judge ruled that a former House speaker, previously convicted of public corruption, is permitted to lobby despite the Secretary of State's denial of his lobbying registration
- 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
- New York City sweep based on New York State lobby filings
  - Detroit sweep based on Michigan lobby filings
- A North Carolina lawyer was sentenced to two years probation and is permanently prohibited from practicing law after pleading guilty to criminal contempt, misdemeanor obstruction of justice, and four counts of lobbying without registration for his work on behalf of a bail company
- Philadelphia fined a company \$2.9 million for failing to report use of outside lobbyists and their contributions during procurement process



- The Alabama Lobbyist Code of Ethics prohibits a lobbyist from engaging in sexually harassing behavior
- California incorporates anti-harassment policies into mandatory lobbyist training
- Georgia requires lobbyists to acknowledge and agree to abide by the General Assembly's sexual harassment policy when they register or renew
- Hawaii's Senate and House of Representatives implemented policies that address sexual harassment involving lobbyists
- Illinois requires registrants to undergo sexual harassment training and adopt a harassment policy
- Maine requires in-person sexual harassment training for lobbyists (expanded to associates, effective Dec. 1, 2020)
- Maryland mandates that Ethics Commission training cover sexual harassment





- Nebraska legislature policy requires legislators and employees to take action to correct or prevent sexual harassment committed by third parties, including lobbyists
- Nevada addresses harassment in mandatory lobbyist training and lobbyists are covered under the Joint Standing Rules of the Senate and Assembly prohibiting harassment
- New Mexico offering voluntary sexual harassment training, with attendance indicated on lobbyist registration forms
- Utah requires lobbyists to complete an anti-harassment course within 30 days of registration or renewal
- Washington extended the respectful workplace code of conduct provisions to all members of the legislative community and requires registered lobbyists to complete code of conduct training as a condition of registration



- Absolute ban regardless of value (e.g., Florida lobbyist law).
- Dollar limits – Some are per occasion (e.g., Florida interested party law – \$100 per occasion) and some are per period (e.g., California – \$520 per 12-month period).
- Prohibition on gifts that may reasonably tend to influence an official (Contrast: New Jersey and Nevada).



- 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.
- There may be special gift limits for lobbyists and lobbyist employers.
- Lobby registration gift triggers
- Lobby expenditure disclosure
  - May be disclosable even if not in connection with lobbying
    - » Goodwill





- Virtual events
  - Texas Ethics held that for the purposes of the exception to the lobbyist gift limits for food and entertainment, a lobbyist cannot be “present” by being on a videoconference such as Zoom or FaceTime
- Valuation
  - Fair market value/face value vs. cost vs. value on secondary market
  - Actual consumption vs. pro rata share
- Tax and tip
- Buydowns
- Splitting
- Bargained-for in an arms-length agreement (e.g., BPA, advisory board meetings)
- Legal liability
- Large events
- Gift to agency
- Consultant gifts



- Colorado Ethics asserting jurisdiction over home rule localities with gift rules less restrictive than state law
- Florida Commission on Ethics issued opinion noting that lobbyists, lobbyist principals, and interested parties are prohibited from providing PSAs featuring certain state and local officials
- Hawaii adopted updated ethics regulations, largely prohibiting gifts from interested parties, subject to certain exceptions
- Missouri voters approved a ballot proposition that prohibits gifts from lobbyists and lobbyist employers to state legislative officials, previously there was a \$5 limit
- New York's JCOPE issued an opinion providing factors for when gifts provided to a third party at the direction or on behalf of a public official from a lobbyist are permitted
- Effective January 5, 2021, North Dakota prohibits gifts from a lobbyist to an executive or legislative official or a legislative employee and adopted rules expanding the definition of lobbyist for the purpose of the gift ban.
- Vermont interested party ban now extends beyond executive branch to legislative branch



- More and more RFPs ask for certification of gift law compliance
- Arkansas pursued five cases against vendors that contract with county jails, generally for providing gifts without proper registration and reporting.
- Former Colorado governor fined for violating gift ban by accepting flight on a corporate jet and a ride in a Maserati limousine
- A Hawaii Department of Commerce and Consumer Affairs examiner was fined \$5,000 for accepting free meals from a vendor he oversaw
- Illinois officials were fined for accepting fair beer tickets that they distributed to others
- A Massachusetts teacher was fined \$7,000 for improperly accepting travel points and stipends from a travel company for organizing school trips to Europe





- 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
- Forty former and current Ohio state officials cited for improperly accepting a fishing trip made as a gift to an agency
- Philadelphia fines person who offered Phillies baseball tickets to regulator
- San Francisco Controller investigation into public works holiday party paid for by contractors who were prohibited from making gifts
- The "surgeon general" of Wisconsin, a Department of Natural Resources employee, was accused of accepting over \$20,000 worth of caviar in an illegal trading scheme



- Types of preclearance strategy
  - Preclear everyone and everything
  - Preclearance thresholds
- Gift preclearance software

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