

Corporate Political Law Compliance During Election Season

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Course Overview

- **Corporate Political Engagement Concerns**
 - Direct Political Engagement
 - Direct Donations and Pay to Play Risk
 - SuperPAC Activity and IE Activity
 - Leveraging PACs
 - Indirect Political Engagement
 - Use of Corporate Resources in the Political Context
 - Volunteer Political Activities
 - Support for Non-Profit Entities and Leveraging Trade Associations
- **Corporate Policy Engagement Concerns**
 - Federal Lobbying Compliance Concerns
 - State and Local Lobbying Compliance Concerns
 - Vendor/Procurement Lobbying Compliance
 - Business Development and Business Engagement Risks
 - Gift/Ethics Concerns at the Federal and State Levels
 - Hiring Former Government Officials
 - Pay-to-Play
 - Foreign Agents Registration Act
- Q&A

The Balancing Act of Corporate Engagement in Policy and Politics

• Why Engage?

- To protect the economic interests of the company and enhance shareholder value by supporting/advancing public policies and election outcomes that align with business interests and long-term corporate goals
- To raise the profile of the company among key political leaders and decision-makers, strengthen corporate reputation in the community, and fulfill the responsibility of good corporate citizenship
- To gain advantage over or at least ensure equal footing with competitors in the legislative and regulatory space

• What's at Stake?

- Legal risks
 - Civil/criminal penalties for noncompliance
 - Loss of existing business and debarment from future business
 - Shareholder suits
- Reputational risks
 - Negative media attention and brand damage
 - Loss of customers

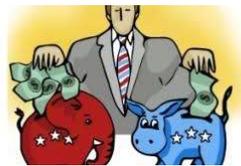
Corporate Political Law Compliance During Election Season

Direct Corporate Political Engagement Concerns

- Considering Direct Corporate Donations at the State and Local Levels
- Weighing Super PAC Donations and Independent Expenditure Activity
- Leveraging Your Corporate PAC (or PACs)
- Respecting the Bar on Foreign Political Activity

Considering Direct Corporate Donations

- Direct corporate contributions to candidates are barred at the federal level, but are permitted in many state and local jurisdictions
- Giving to state/local PACs and state/local political parties is permissible in some jurisdictions, but not all
- Corporate giving and engagement on state constitutional referenda and state/local/special district ballot initiatives is permissible and can be an effective “bang for your buck” means by which to substantially impact public policy in key jurisdictions



Considering Direct Corporate Donations

- **Benefits of Direct Giving:**
 - Giving directly from corporate treasury funds is administratively easier than other forms of direct political engagement
 - The full force and weight of the company is attached to the donation, which has a clear optical/political effect
- **The Considerations Before You Give:**
 - Internal corporate policies and approval processes
 - Corporate transparency and reputational considerations
 - Contribution limits under state and/or local law
 - Corporate disclosure, registration and reporting obligations under state/local law
- **Pay-to-Play considerations**

Weighing Super PAC Donations and Independent Expenditure Activity

- What do the terms “SuperPAC” and “Independent Expenditure” actually mean?
 - **SuperPAC** - a colloquial term for a political committee organized purely for the purpose of independent expenditure activities - generally independent expenditure advertising communications
 - Other common names for Super PACs at the federal, state and local level - independent expenditure-only committee; independent committee; IE committee; etc.
 - **Independent Expenditure** - an expenditure for a communication that expressly advocates for the election or defeat of a clearly identified candidate and which is not coordinated with a candidate, campaign committee, party committee or their agents

Weighing Super PAC Donations and Independent Expenditure Activity

- **Benefits of Super PAC Giving:**
 - Companies can give an unlimited amount from corporate treasury funds to a committee it knows is supporting favorable candidates or targeting unfavorable candidates, thereby:
 - Eliminating the contribution limits concern; and
 - Providing a layer of insulation between the activities of the SuperPAC and the corporation itself
 - Like other forms of direct giving, it is administratively easy and transparent
- **The Considerations Before You Give:**
 - Internal corporate policies and approval processes
 - Corporate transparency and reputational considerations
 - The risk of “losing control” over the messaging/engagement
 - Understanding the public disclosure dynamic - SuperPACs do report contributor information

Weighing Super PAC Donations and Independent Expenditure Activity

- **Benefits of Independent Expenditure Activity:**
 - Companies can spend an unlimited amount from corporate treasury funds to support favorable candidates or target unfavorable candidates
 - Companies can directly control the message of the communication going out to the public and focus on key issues tied to particular candidates or parties they wish to support or oppose
 - The full force and weight of the company is attached to the communication, which has a clear optical/political effect
- **The Considerations Before You Engage in IE Activity:**
 - Internal corporate policies and approval processes
 - Corporate transparency and reputational considerations
 - The administrative cost of developing and disseminating the communication
 - Applicable law governing IE activity - real-time and periodic reporting obligations; state and local registration obligations; disclaimer and media disclosure requirements

Leveraging Your Corporate PAC

- **Benefits of a Corporate PAC are Numerous:**
 - Provides a vehicle by which to support candidates, parties and causes that align with business prerogatives
 - Affords companies a visible presence in the public policy and political space that is more nimble and better able to deflect outside pressure than political giving by the corporations themselves
 - Affords employees and key company stakeholders with a voice in the public policy engagement of the company - fostering corporate citizenship and ownership among key personnel
 - Serves as an essential supplement to lobbying and other government relations activity
- **But How Do We Make Our PAC More Effective and Impactful?**

Leveraging Your Corporate PAC (or PACs)

Focus on Effective Governance and Oversight

- A cross-functional 'steering committee' or PAC Board of senior executives works well
 - Composition depends on nature and extent of PAC and corporate activities
 - Broader representation will reduce risks and help assure that spending decisions are linked to corporate strategy
- Set policy objectives and initiatives on the front end
- Spell out the specifics of the contribution review and approval process on the front end
- Stick to the review and approval process during the life of the PAC - always assess costs and benefits of donations, but have mechanisms for speedy decision making
 - Micro-managing of spending decisions can kill PAC effectiveness
 - Trust that the policy and established processes will link spending decisions to business strategy, not personal interests of decision-makers
- Dedicate time and resources to compliance
- Communicate and interact with the Corporate Board of Directors - periodic reporting is useful

Leveraging Your Corporate PAC (or PACs)

Make An Affirmative Effort to Engage All PAC Stakeholders

- Do not unduly pressure employees to participate - both legal and operational purpose for this
- Communicate with PAC stakeholders on the goals of the PAC, the benefits of the PAC and the activities of the PAC
- Hold PAC events that engage PAC stakeholders and energize prospective donors to participate - raffles; silent auctions; public official events of note; etc.

Coordinate PAC Activity with Your Government Relations Professionals (Internal or External) and Be Proactive in Giving to Match Business and Public Policy Goals

- PAC giving should always be strategically tied in with direct lobbying and public policy efforts focusing on key legislative and executive branch leaders in essential jurisdictions
- Bi-partisan giving is the norm, rather than the exception, and affords companies a better chance at shaping key policy initiatives and minimizing reputational risks

Respecting the Bar on Foreign Political Activity

- Foreign Nationals are STILL barred from participating in corporate political expenditures and PAC contributions
- Foreign National involvement in US elections is generally prohibited
 - foreign nationals are prohibited by federal law from contributing to federal, state or local elections
 - foreign nationals are prohibited from soliciting funds for federal, state or local elections
 - foreign nationals are prohibited from making direct or indirect independent expenditures
 - foreign nationals are prohibited from influencing corporate PAC activity
- US subsidiary PACs OK as long as foreign nationals do not influence US PAC contribution decisions (for now, at least)

Indirect Corporate Political Engagement Concerns

- Candidate and Public Official Appearance/Use of Corporate Resources for Political Purposes
- Volunteer Political Activities by Employees
- Support for Politically-Active 501(c)(4)s
- Leveraging Trade Associations

Candidate and Public Official Appearance/Use of Corporate Resources for Political Purposes

Candidate Appearance on Company Grounds

- Corporations may invite candidates to speak to their employees or shareholders—and may promote such appearances—but the opportunity must be given to all candidates in a particular race.
- Corporate PACs may host fundraisers and do so in a more targeted fashion, but the PAC must reimburse the corporation for the use of its space.
- Corporations may permit their space to be used by candidates, but must be reimbursed for the market value of the space to avoid making an impermissible in-kind contribution. This also applies to corporate space at sporting events and other external venues.
- Corporations may rent their jets to Senate candidates for campaign use, provided the candidates pay pro-rata share of the fair market value of the trip. Note that this rule does not apply to House candidates, who are prohibited from utilizing such aircraft.

Volunteer Political Activities by Employees

- While direct corporate contributions to political campaigns are prohibited at the federal level, corporate employees are permitted to use corporate resources to engage in incidental political volunteer work, such as making phone calls or sending emails, provided that such activities are limited to no more than one hour per week and are not endorsed by the company.
- Executives may host fundraisers at their homes and spend up to \$1,000 on food and beverages without triggering contribution limits

Support for Politically-Active 501(C)4s

- **501(c)(4) Social Welfare Non-Profits:** Non-profit organizations designed to advance the social welfare that can undertake an unlimited amount of advocacy/lobbying activity and a certain amount of political activity



501(c)(4)
“People for
Ethical and
Transparent
Elections”



501(c)(4) or
527
Independent
Political
Committee

Disclosure: None



Disclosure: “People for Ethical
and Transparent Elections”

Leveraging Trade Associations

- Trade associations - national, statewide and local - can serve as effective advocates for their business members
 - Leveraging the resources and business/political clout of their membership
 - Speaking with a unified voice and reaching a broader audience
- Political engagement by associations does carry risk, however:
 - Associations can sometimes take positions contrary to individual member interests on key policy issues and in key political races
 - Associations can take controversial activities or positions with a spill-over effect to members

Leveraging Trade Associations

- So How Do I Insulate My Company From Unnecessary Risk and Still Aid Our Policy Goals?
 - Although most associations are voluntarily transparent, be certain to communicate with association leadership and specifically ask about how membership funds are used
 - Be selective about the associations you join and be proactive in terms of being part of the political and policy decision-making of the association
 - Do your due diligence on a particular association (looking at past political engagement activities) before granting the association PAC authorization to solicit your “restricted class” personnel
 - Don’t be afraid to withdraw PAC solicitation authorization or membership in instances where the association is not adequately concerned with compliance risks or representing company interests

One Final Takeaway - Check on Your Corporate Political Activity Policy

- **For those companies with a policy - review it and revise it annually**
- **For those without a policy - get one!**
- Issues to Cover and Discuss:
 - Clearly empower individual leaders with authority over policy oversight and enforcement
 - Ensure the proper persons (business, legal and government affairs) are involved in developing the policy’s risk assessment framework and in the actual day-to-day engagement risk assessments
 - Where bright lines can be drawn, draw bright lines
 - What activities are too risky for the company to engage in?
 - Ensure that there is a mechanism for emergency political engagement, but place authority over such decisions with the proper individuals
 - Develop a dedicated compliance and reporting team and set the tone at the top on adherence to compliance protocols
 - Be clear about employee use of company resources and the impact of outside political engagement (voluntary or otherwise) on company business

Corporate Policy Engagement Concerns

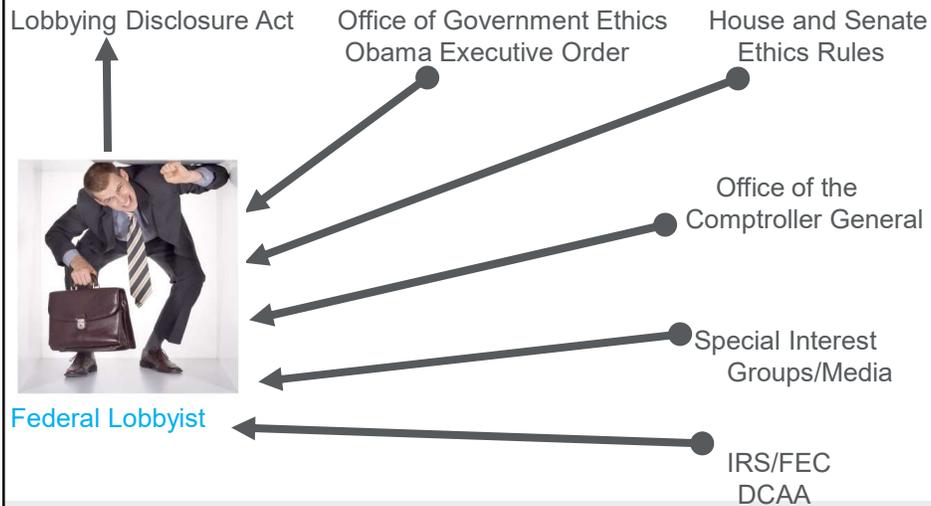
- Lobbying Compliance Concerns
- Business Development and Goodwill Engagement Risks
- Concerns for International Companies

Lobbying Compliance Concerns

Lobbying Disclosure Act Compliance

- Lobbying Disclosure Act (LDA) and Honest Leadership and Open Government Act (HLOGA)
- Definition of Lobbying under LDA and IRS Calculation of Lobbying Expenses
- Audits Abound – GAO, IRS, and other Government Agencies

The Compliance World for Federal Lobbyists



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Who is a Lobbyist?

- The LDA defines a "lobbyist" using a three-part test:
 1. More than one "lobbying contact" with covered officials
 2. "Lobbying activities" constitute 20% or more of the services performed by that individual on behalf of his/her employer or client during any quarter
 3. Total organization "lobbying expenses" of \$13,000 per quarter in the case of an employed "lobbyist" (or \$3,000 per quarter in income for a lobbying firm)

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Who Must Register

- Individuals are “lobbyists”. A corporation or nonprofit group that has at least one employee who meets the definition of a “lobbyist”, meets the definition of “registrant” and must register under LDA
- If an organization hires an outside person or entity that meets the definition of a “lobbyist” – then that outside person or entity must register under the LDA and disclose the corporation as the “client”
- Form LD-1 registration must be filed within 45 days
 - After lobbyist is employed or retained
 - After lobbyist employee makes second contact and meets 20% threshold

Covered Contacts (LDA Definition)

Oral, written or electronic communications with covered Legislative or Executive Branch official regarding:

- formulation, modification, or adoption of Federal legislation
- formulation, modification, or adoption of a Federal rule, regulation, Executive order, policy or position
- the administration or execution of a Federal program or policy (**including the negotiation, award or administration of a Federal contract, grant, loan, permit or license**)
- the nomination or confirmation of a person subject to confirmation by the Senate

Covered Individuals (LDA Definition)

- A "Covered Legislative Branch Official" includes
 - Members of Congress
 - an elected officer of either House of Congress
 - employees of a Member, Committee, leadership staff, joint committee, working group or caucus
- A "Covered Executive Branch Official" includes
 - the President
 - the Vice President
 - any officer or employee in the Executive Office of the President
 - any Executive Schedule level I – V officer or employee
 - any member of the armed services at or above pay grade O-7 & above
 - "Schedule C" political appointees

Covered Individuals (IRC Definition)

"Covered Executive Branch Official" includes

- All White House staff
- Top two officials of all departments within the Executive Office of the President (OMB, STR)
- Top two officials (and immediate staff) of each Cabinet Agency
- Any person in the Executive Branch with legislative responsibility with whom you interact in attempting to influence specific legislation

"Lobbying Activities" (LDA Definition)

Lobbying activities means lobbying contacts AND efforts in support of such contacts including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others

What is NOT a "Lobbying Contact"

- a speech, article or other material distributed to the public through a medium of mass communication
- a request for a meeting, a request for the status of an action, or other similar administrative request
- testimony given before Congress or submitted for inclusion in the public record
- information provided in writing in response to an oral or written request, or in response to a request for public comments in the Federal Register
- required by subpoena or civil investigative demand
- written comment filed as part of a public proceeding

LDA Reporting Expenses

- **Method A**

- Any LDA Registrant may use
- Entire Legislative Branch re legislative & policy/regulatory matters - state, local & grassroots activities are not covered
- Executive Branch officials & military officers for legislative, regulatory/policy and contract/grant matters

- **Method B**

- For Section 501(c)(3) organizations that have made a Section 501(h) election
- LDA definitions for Congressional activities; entire Executive Branch for legislative activities only (broader than LDA) - no Executive Branch for non-legislative activities (narrower than LDA)
- State and local for legislative activities only; grassroots where there is a "call to action" on legislative matters (broader than LDA)

- **Method C**

- For any 501(c)(4) or (c)(6) or corporation that calculates nondeductible lobbying expenses and dues under Section 162(e)
- LDA definitions for Congressional activities; Section 162(e) definitions for all other activities

Categories of Lobbying Expenses

- Calculation of time, overhead for all employees engaged in lobbying activities;
- Hard costs (travel, hotels, conference fees, meals)
- Payments to outside lobbying firms, vendors, consultants, coalitions
- Percentage of association dues for lobbying
- State and local lobbying costs for Method B/C
- Grassroots communications for Method B/C

Compliance Obligations

- Maintain records of your “lobbying contacts” for each reporting period using an appropriate tracking form. For example,

ATTACHMENT C
LOBBYING CONTACTS QUARTERLY TRACKING FORM

INSTRUCTIONS: For every “lobbying contact” that you make during the calendar quarter, please fill in the information requested below. If you make more than one contact on a particular date, you should identify each contact on a separate line. All time spent in person should be tracked on “lobbying contacts” and efforts to secure of such contacts should be tracked on the separate lobbying charge cards. The tracking form must be submitted to the Government Relations Department at the end of each calendar quarter. If you have any questions, please contact the Government Relations Department or the I&I Department.

Name: _____

Calendar Quarter: _____

Date	Type of Contact (e.g. – telephone call, person meeting, etc.)	Name of Covered Official(s) and Office	Purpose(s) of Contact and Subject(s) Covered

If lobbying contacts were made, submit completed form to Government Relations Department at the end of the quarter

Date

Type of Contact (e-mail, in person, etc.)

Name of Covered Official(s) and Office(s)

Purpose of Contact(s) and Subject(s) Covered

Surviving a Federal Audit

- Auditors want to see a system in place that tracks the type of information that must be provided; time sheets, collection of information
- Full disclosure of topics, sections of bills being lobbied
- IRS Auditors ask questions about percentage of time spent by CEO and other executives
- DCAA and other government contract auditors are asking questions about nature of services performed by outside consulting firms hired by corporations

Quarterly LDA (LD-2) Reports

- Lobbying Disclosure reports (LD-2) are filed quarterly (1/20, 4/20, 7/20, 10/20) and must disclose the topics of lobbying, the agencies contacted and a tabulation of lobbying expenses for the quarter, including internal lobbying costs, hard costs such as travel and lodging related to lobbying, payments to outside lobbying firms, and the share of dues payments utilized by trade associations for lobbying.
- Pursuant to the Justice Against Corruption on K Street Act of 2018 (The JACK Act), lobbyists must disclose any previous convictions associated with bribery; extortion; embezzlement; an illegal kickback; tax evasion; fraud; a conflict of interest; making a false statement; perjury; or money laundering on their public LDA reports.

Semiannual LDA (LD-203) Reports

- Filed by Registrants and individual Lobbyists (1/30 and 7/30)
- Must disclose campaign contributions or donations to presidential libraries/inaugural committees >\$200
- Also expenditures with respect to legislative & executive branch officials:
 - For events honoring covered officials
 - to an entity named after or in recognition of such official
 - to an entity “established, financed, maintained or controlled” or an entity designated by such official
 - to pay for a meeting, retreat or conference held by or in the name of one or more officials

LD-203 Certification Requirement

- LDA reports filed by Registrant and each listed lobbyist must include certification that:
 - They have “read and [are] familiar with” the gift & travel rules
 - Have “not provided, requested, or directed” any gift or travel “with knowledge” of any violation of these rules
- Civil fines up to \$200,000 and criminal penalties up to 5 years in jail for a knowing violation
- Failure to properly file LD-203s is common cause of referrals to Justice Department

Lobbying Disclosure and Ethics Compliance Checklist

- Does at least one employee make “lobbying contacts” and spend 20% or more time on “lobbying activities”?
- If Yes, is the entity registered under the Lobbying Disclosure Act?
- If No, and the entity is currently registered, should the entity terminate its registration?
- If registration is required, what method of reporting will it use?

Lobbying Disclosure and Ethics Compliance Checklist

- Are proper records of calculations maintained?
- How does entity pay for lobbying expenses? How does entity pay for gifts/meals to Members of Congress and staff?
- Has staff been trained about House and Senate gift and travel rules?
- Does entity obtain an acknowledgement from key employees that no gifts/travel have been offered to a Member of Congress or staff in violation of the rules?
- Are the Governmental Affairs officers/Public Affairs officers/Legal Counsel knowledgeable and prepared to answer any media questions that might arise?

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ELECTION

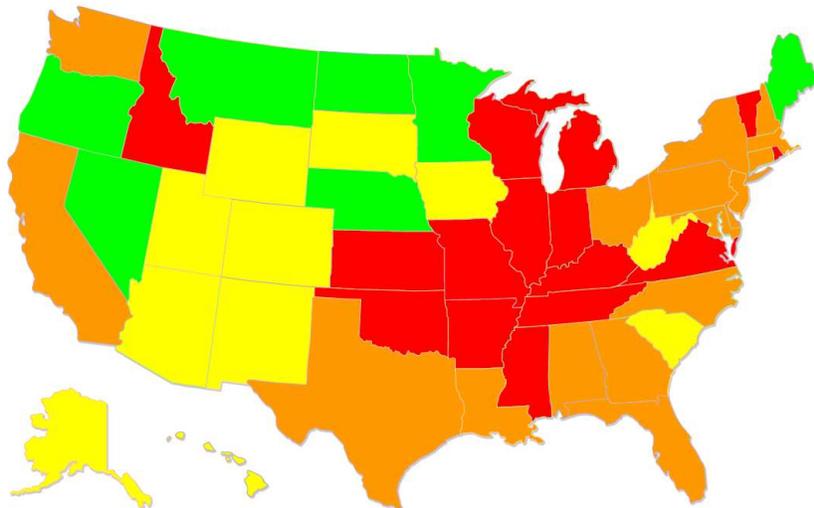
- If you are licensed in **Kansas, New Jersey or New York**, please write the code word in the **pop up box** that appeared on your screen.

(If you don't have a license in any of those states, you don't have to worry about this step - it is only required for Kansas, New Jersey and New York)

State/Local Lobbying Compliance

- The lobbying compliance playing field at the state and local levels is much more active (and complicated) than at the federal level
- Registration thresholds vary widely by jurisdiction:
 - Spending (Expenditure and reimbursement) thresholds
 - Time and activity thresholds
 - Gift thresholds
- Reporting requirements vary widely by jurisdiction:
 - Lobbying issue and subject matter reporting
 - Gift and expenditure reporting
 - Political contribution reporting (and sometimes bars on such giving)
- **New emphasis on the expansion of vendor/procurement lobbying frameworks across the country - activity that once was considered sales or business development with government purchasers is now considered lobbying**

The Vendor Lobbying “Heat Index”



Business Development and Goodwill Engagement Risks

- Gifts and Ethics Rules
 - Federal
 - State and Local
- Hiring Former Government Officials - “Revolving Door Rules”
- Pay-to-Play

Gift and Ethics Rules *Common Questions from the Private Sector and Government Employees/Officials*



Lobbying Community

1. What is the scope of the gift ban on lobbyists?
2. What type functions may I host?
 - a. Can I provide food of a certain value?
 - b. Who can attend the function?
3. Am I allowed to provide or accept hosted travel?
 - a. How long can the trip be?
 - b. Can I provide lodging?
 - c. Can a lobbyist be involved?

The Bottom Line at the Federal Level - Congress

- Member of Congress and staff and Executive Branch officials may NOT accept ANYTHING of value from ANYONE – whether personal or official – UNLESS acceptance is allowed under one of the Exceptions to the gift rules, including:
 - **Personal Friendship:** Based upon long-standing personal friendship evidenced by a history of reciprocal gift giving, similar gifts to others, etc.
 - **Widely Attended Event:** At least 25 people other than Members from throughout a given industry or profession; invitation came from sponsor of the event; attendance of the Member/staffer related to official duties.
 - **Items/Food of Nominal Value:** Nominal food not part of a meal, including meeting snacks, reception food and drinks, light hors d'oeuvres; any item of “nominal” value - any item under \$10, greeting cards, baseball caps and T-shirts.
 - **Other Relevant Exceptions:** Available exceptions include charity events, educational events, informational materials, special plaques or awards.

The Bottom Line at the Federal Level - Executive Branch Officials/Employees

- Generally, an Executive Branch employee may not accept gifts from “prohibited sources” (those seeking official action, doing business with the government or have interests that may be substantially affected by performance or non-performance of the employee’s official duties) or given because of the employee’s official position. Exceptions include:
 - **Small Value Gifts:** a gift valued at \$20 or less, provided that the total value of gifts from the same person is not more than \$50 in a calendar year (employees of the same company are considered the same source).
 - **Family or Personal Relationship Gifts:** a gift based on family relationship or personal friendship
 - **Widely Attended Events:** gifts of free attendance at certain widely attended gatherings, provided the agency has determined the attendance is in the interest of the agency
 - **Refreshments of Modest Value:** modest refreshments (not including alcohol)

Trump Executive Order on Ethics and Appointee Ethics Pledge

- Despite the traditional executive branch gift and ethics rules, the Trump Executive Order on Ethics prohibits all Executive Branch appointees from accepting gifts from federal lobbyists or registered lobbying organizations whatsoever.
- Very few exceptions to this prohibition exist. The following items do not qualify as "gifts" and may be given:
 - Modest items of food and non-alcoholic refreshments offered as other than a meal;
 - Items of little intrinsic value, such as greeting cards or plaques;
 - Gifts based on a personal relationship;
 - Certain types of publicly-available discounts;
 - Limited items based on outside business or employment relationships; and
 - Gifts authorized by supplemental agency regulation or statute.

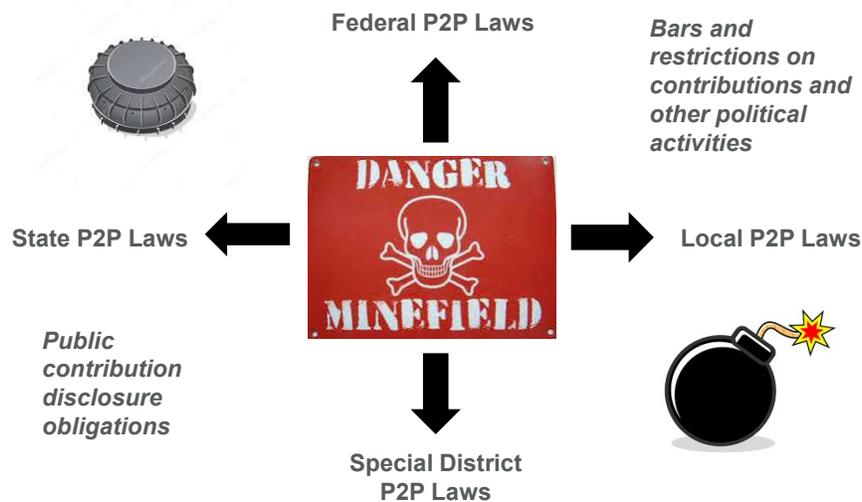
Gift and Ethics Rules - State and Local Level Issues

- All states and localities prohibit gifts/benefits provided for the purpose of influencing official action (bribery) or as a reward for official action (illegal gratuity) and internal corporate policies should expressly prohibit the creation of such *quid pro quo* scenarios.
- Beyond this setting, states and localities have their own jurisdiction-specific government ethics rules that either prohibit, restrain or require the disclosure of gifts/benefits provided to public officials and public employees under specific sets of circumstances.
- Corporations involved in business development activities targeting state and local public officials should be particularly mindful of jurisdiction-specific gift and ethics rules and implement appropriate pre-screening, tracking and reporting frameworks.

Hiring Government Employees - “Revolving Door”

- Before hiring a former government official, must factor in the following rules and restrictions:
 - **Former Federal Legislative Branch Officials**
 - One year cooling off period for Members of the House of Representatives and former senior House and Senate staff on lobbying activities
 - Two-year cooling off period for former Senators from lobbying or making advocacy communications to either House of Congress or any legislative branch employee
 - **Former Federal Executive Branch Officials**
 - Lifetime ban on representation before the government in connection with a particular matter involving specific parties in which the former employee participated personally and substantially while in federal service
 - Five-year ban on executive branch political appointees engaging in lobbying activities with respect to former agency
 - Two-year ban on representation before the government in connection with a particular matter involving specific parties if the matter was pending under the employee's official responsibility during their last year in federal service
 - Two-year cooling off period for very senior employees preventing them from representing another person or entity by making a communication to or appearing before specified senior officials at the employee's former agency to seek official action on any matter
 - One-year cooling off period for senior employees preventing them from representing another person or entity by making a communication to or appearing before the former employee's former agency to seek official action on any matter
 - **Former State and Local Officials**
 - A wide range of jurisdiction-specific revolving door restrictions exist limiting the ability of former officials to lobby, communicate with, or represent private business interests before specific government agencies/bodies and particular government officials/employees

Pay-to-Play Laws: A Minefield of Risk



Pay-to-Play Laws: Why Do We Care?

• Small Mistakes → Big Consequences

• **Financial**

- Loss of existing business
- Loss of future business
- Substantial monetary penalties



• **Institutional and Reputational**

- Negative media coverage
- Brand damage
- Scarlet "P2P"



A Refresher: What Are Pay-to-Play Rules?

- Federal, state and local restrictions on political activity by those that do or wish to do business with government, which are designed to restrict actual or apparent impropriety by contractors, their representatives and government officials.
- Pay-to-play rules take many forms, but they typically:
 - **Restrict** or **ban** political contributions to public officials by government contractors (and their representatives);
 - **Restrict** or **ban** fundraising or solicitation activities for public officials by government contractors (and their representatives); and/or
 - Obligate prospective and existing government contractors to **track and disclose** both institutional and individual political donations made to covered government officials.

A Refresher: What Are Pay-to-Play Rules?

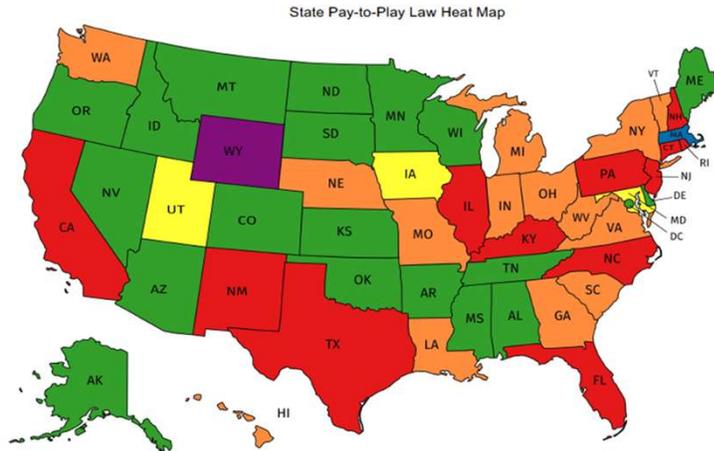
- The obligations placed on contractors under federal, state and local pay-to-play rules apply not only to the contracting entities themselves, but in many instances also apply to persons associated with those entities, including:
 - *Officers, directors, partners, managing members, or other senior administrative personnel of the corporation;*
 - *Employees of the contracting entity with procurement oversight or contract decision-making responsibilities;*
 - *The spouses and dependent children of the above individuals;*
 - *Subsidiaries and affiliates of the contracting entity; and/or*
 - *PACs or other political organizations controlled by the contracting entity.*

Pay-to-Play Risks:

Considering Direct Corporate Donations at the State and Local Levels

- State rules vary drastically by jurisdiction:
 - Some states have absolute bars on political giving by certain contractors/bidders and their representatives.
 - Some states restrict giving by contractors/bidders and their representatives to certain *de minimis* monetary levels.
 - Some states apply bars or restrictions and mandate associated public disclosure.
 - Some states have "disclosure only" frameworks.
 - Drastically different enforcement mechanisms exist - substantial civil monetary penalties, debarment provisions, and criminal enforcement options.
- While not all states label them "pay-to-play" rules, approximately half the states now have at least some type of restriction on political engagement by contractors that is analogous to P2P

State Pay-To-Play Risk Map



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Key Takeaways

Where Will Pay-to-Play Regulations/Enforcement Go from Here?

- **Continue Contribution Pre-Screening:** Utilize contribution pre-clearance system to ensure proposed contributions by covered personnel are screened against applicable federal, state and local P2P provisions.
- **Educate and Inform Those Impacted by P2P:** Educate and train all covered personnel on a periodic basis to ensure they are fully aware of their individual and institutional obligations under federal, state and local P2P provisions. Education/training should also include compliance certification by covered personnel.
- **Perform Targeted Testing and Covered Personnel Monitoring to Guard Against Inadvertent P2P Violations:** Undertake random testing of its pre-screening system and selectively audit political activity by various covered personnel. This is akin to testing the weaknesses of the firm's P2P security system.
- **Undertake An Annual Comprehensive Audit of P2P Compliance Framework:** Periodically perform a comprehensive audit of its P2P compliance framework to ensure its provisions and operations are in-line with existing law, effective and functional. As part of this audit, ensure internal "covered personnel" list is fully up to date.
- **Consistently Monitor and Update Its P2P Compliance Framework with Information Regarding Legal and Regulatory Changes:** Either internally or in conjunction with counsel, continuously update compliance framework with data concerning recent legal and regulatory changes in the P2P space.

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Concerns for International Companies

- Foreign Agents Registration Act (FARA)
 - Requires registration of any "agent" of a "foreign principal" that engages in activities **within the U.S.** that are intended to:
 - Persuade or influence the **Government of the United States** or any section of the **public within the United States** with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party.
 - Agent
 - Requires control or direction
 - More than mere agreement on point of view
 - Does NOT require ability to bind the foreign principal
 - Foreign Principal
 - Foreign government
 - Foreign political party
 - Foreign corporations or associations
 - Entities directed on behalf of the above

Key FARA Exemptions

- Legal representation
- Commercial activities on behalf of a foreign entity
- LDA registration
- Representing foreign companies on political or commercial activities, so long as the foreign company's activities are NOT directed or controlled by a foreign government or foreign political party
- **Exemptions are fact-specific, and largely subjective**

FARA Reporting Obligations - Informational Materials

- Informational materials are emails, memoranda, op-eds, social media posts, radio broadcasts, television ads, etc. that are transmitted, or are reasonably expected to be disseminated to two or more persons in the United States.
- Informational materials must be submitted to the DOJ within 48 hours of their distribution.
- Informational materials must be “conspicuously” labeled to identify the source of the document. Our standard disclaimer is:
 - “Dentons is a registered agent for XYZ Government under the Foreign Agents Registration Act (“FARA”).”

FARA RECORDKEEPING OBLIGATIONS

- FARA requires that registrants preserve the following books and records for the duration of the active registration and for three years following termination of the registration:
 - All correspondence and memoranda to and from the foreign principal related to registrant's activities on behalf of foreign principal;
 - All correspondence and memoranda to and from all persons relating to registrant's political activities on behalf of foreign principal;
 - Original contracts with foreign principal;
 - Records regarding recipients of informational materials; and
 - Financial records of income received from foreign principal, and all disbursements made on behalf of foreign principal.

Questions & Answers

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