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Corporate Lobbying Compliance & Political Activities in 2012

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Today's Presenters



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Today's Topics

- Corporate political activities in 2012
- Compliance with lobbying, ethics & pay-to-play
- Federal grant and procurement requirements covering federal lobbying expenditures

Corporate Political Activities in 2012

Overview of Corporate Political Activities and Issues

- Importance of Corporate Involvement
- *Citizens United* – Fact v. Myth
- Contributions from Corporations
- Expenditures by Corporations
- In-kind contributions
- Use of corporate resources for political purposes
- Corporate PACs
- Independent Expenditure PACs (“SuperPACs”)
- Disclosure of Corporate Political Activities

Importance of Corporate Political Involvement

- Government controls your business, your market and your ROI
- Easy answer is always “no”
- Purpose of seminar: pinpoint issues, describe how to be involved within legal parameters
- Those who oppose your company and your industry are involved

Citizens United: Fact vs. Myth

- Supreme Court held in *Citizens United* that corporations (and labor unions) have First Amendment rights to make political expenditures about candidates that are *independent of candidates*.
 - The vast majority of independent spending related to candidates is by individuals and labor unions, *not* business corporations
 - Labor unions spend hundreds of millions of dollars each election cycle to influence elections

Corporate Contributions

- To candidates:
 - Federal candidates: Prohibited
 - State and local candidates: Allowed in 22 states
- To PACs and political parties:
 - Federal: Prohibited
 - State PACs: Allowed in 22 states
 - Federal & state law allow 'separate segregated funds' – business PACs
- To Third party groups:
 - Trade Associations (U.S. Chamber of Commerce, etc.)
 - “SuperPACs” – independent expenditure PACs

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Corporate Contributions

- Solicitations and fundraising by corporations
 - Federal law: Corporate contributions are prohibited
 - Corporations may not *collect* or facilitate the *collection* of contributions for federal candidates
 - Corporations may pay for the costs of fundraising for their own PAC, but *not* for the costs of fundraising for other PACs or for candidates
 - State law: In states where corporate contributions are permissible, may spend corporate funds to raise \$ for candidates and other political committees

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Corporate Political Expenditures

- Difference between a contribution and an expenditure
- ‘two sides of the same coin’
- Examples of expenditures:
 - A billboard or newspaper ad, paid for by someone other than campaign
 - If independent of the candidate / campaign, legal – *Citizens United*
 - If made in consultation with the candidate / campaign, then not independent, and is illegal under federal law

Corporate Political Expenditures

- May never reimburse an employee for making a political contribution, *even* in states that allow contributions from corporation to candidates
- May have meetings with executives and those who are part of the ‘solicitable class’ of employees for the company PAC – and during such a meeting, the candidate may attend and solicit contributions, but *only* the candidate or the campaign may collect the contributions
- May not collect the contributions and send to candidate

Corporate In-Kind Contributions

- An expenditure by a corporation that is not independent of a candidate is an in-kind contribution
- Illegal under federal law, but not in half the states where related to state / local candidates

Use of Corporate Resources for Political Activities

- Facilities:
 - Candidate appearance to campaign on company premises permitted, if opposing candidate is permitted to do same
 - If only restricted class attends, not required to offer equal access to opponent
- Administrative Resources:
 - Fax, computers, equipment – should receive advance payment for use
 - Personnel – Company should not pay for use of personnel for political purposes; 4 hour per month *de minimis* exception in FEC regulations

Use of Corporate Resources for Political Activities

- Employee Political Activities on Company Premises
- Fundraising by executives for candidates and campaigns
 - Contact List: individual can use *his/her* personal list, not company list unless pays for use of list
 - Administrative support staff: executive or campaign should pay for time spent by company staff
 - Do not receive contributions at corporate office; send to po box or home address of designated person
 - Company should not pay for any printing, envelopes, reply devices for fundraising; all paid separately by campaign or executive

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Use of Corporate Resources for Political Activities

- Company policy on Individual Employee Political Activity
 - Company may not prohibit or restrict employee political activity except during business hours and on company premises
 - Campaign buttons, bumper stickers
 - Company may not pay an employee to work for a candidate / campaign
 - Employee(s) may serve as volunteers if on their own time
 - Laws require allowing time for employees to vote

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Corporate PACs

- Corporations (and labor unions) may establish PACs, which are ‘political action committees’, also known as ‘separate segregated funds’
- Corporate PACs are separate legal entities from the corporation
- The corporation connected to the PAC may pay all compliance, administrative and fundraising costs of the PAC
- The corporate PAC is permitted to solicit the ‘restricted class’ (executives, management employees, shareholders and their immediate families) as often as desired
- All employees may be solicited twice – yearly in a solicitation sent to their homes, with a trustee to receive the contributions
- All contributions are voluntary with no threat or fear of reprisals or recriminations to those who choose not to participate / contribute

Independent Expenditure PACs – “SuperPACs”

- A federal (or state) PAC, filed with the Federal Election Commission (or similar state agency)
- May receive unlimited contributions from individuals and corporations, *except*
- May not receive contributions from foreign corporations or individuals who are not citizens or foreign nationals with permanent resident status in the United States
- Reports to FEC in the same manner as all other PACs
- May *only* make independent expenditures
- May *not* make contributions to candidates or parties

Disclosure of Corporate Political Activities

All of the following are subject to public disclosure under federal law:

- Contributions:
 - To candidates, PACs and political parties – if over \$200 aggregate in calendar year
- Expenditures:
 - Corporate political expenditures coordinated with a candidate are illegal; independent expenditures reported on scale depending on amount spent and when

Disclosure of Corporate Political Activities

All of the following are subject to public disclosure under federal law:

- In-kind contributions:
 - If over \$200, disclosed
 - Corporation should not make in-kind contributions to candidates, political parties or PACs, unless it is the company's own PAC
- Contributions to IE PACs
 - All contributions over \$200 in calendar year disclosed
- Contributions to Associations:
 - Generally not disclosed, except for contributions to specific communications or disclosed under the lobbying disclosure laws

Disclosure of Corporate Political Activities

- Movement to force companies (particularly publicly held companies) to disclose all political contributions and expenditures
- Purpose is to stop companies / corporations from being involved in political process
- SEC has been petitioned to force such disclosure

Compliance With Lobbying, Ethics & Pay-to-Play

Gifts and Entertainment for Government Officials and Employees

- Among other things, gifts and entertainment includes beverages, snacks, meals, transportation, lodging, tickets to sporting events, concert tickets, and promotional items

- Federal, state, and local governments each have their own gift laws and rules. Due to time constraints, I am only going to briefly highlight the federal gift rules.

Gifts and Entertainment for Government Officials and Employees

- **Congressional gift rules:**
 - Congress generally bans gifts from lobbyists and lobbyist employers
 - Civil and criminal donor liability for violations
 - Increased Department of Justice investigations and enforcement
 - Major exemptions: widely attended gatherings, receptions, personal gifts given to friends, informational materials, and nominal promotional items
 - Please note that congressional gift rules apply to gifts given to Members of Congress at National Party Conventions
 - Non-lobbyists/Non-lobbyist employer gifts are generally limited to \$49.99 per occasion and \$99.99 per calendar year per Member of Congress or staff member. The traditional congressional gift rule exemptions apply to their gifts as well.

Federal Executive Branch Gift Rules

- **Executive branch gift rules for non-political appointees:**
 - Gifts from vendors or prospective vendors to executive branch employees are generally prohibited (“prohibited source”)
 - \$20 per occasion and \$50 per calendar year in aggregate (so called “20/50 rule”) per government employee
 - Widely attended gatherings
 - Nominal food and beverages that are not part of a meal
 - Personal gifts given to friends

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Federal Executive Branch Gift Rules

- **Executive branch gift rules for Obama appointees:**
 - Via Executive Order, President Obama has generally prohibited his political appointees from accepting gifts from lobbyists and lobbyist employers
 - Obama appointees may not accept free attendance from lobbyists or lobbyist employers for widely attended gatherings
 - Obama appointees may not accept gifts from lobbyists and lobbyist employers under the 20/50 dollar rule

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State and Local Pay-to-Play

- A number of state and local governments and other government entities (e.g. CalSTERS) prohibit or limit political contributions from vendors that do or seek business with the jurisdiction or entity
- Some state and local governments and governmental entities impose reporting obligations on vendors
- Covered donors and recipients vary around the country
- Covered donors may include the company and its executives or employees. Some jurisdictions also include spouses and dependent children of covered donors.
- Covered recipients may include candidates, office holders, political party committees, and political action committees

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State and Local Pay-to-Play

- Pay-to-Play laws may prohibit a company from doing business or entering into a contract with a government or governmental entity if the company or its employees make or solicit certain prohibited political contributions
- Some examples of Pay-to-Play jurisdictions: California, Chicago, Connecticut, Hawaii, Maryland, New Jersey, New Mexico, New York City, Ohio, Philadelphia, Virginia
- Please note that some jurisdictions also include gifts and entertainment restrictions in their Pay-to-Play laws
- Please note that there are federal Pay-to-Play rules as well

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Lobbying

- Federal, state, and local governments all define lobbying differently
- I will provide a brief summary of the federal lobbying rules today under the Lobbying Disclosure Act of 1995 (LDA) and the Honest Leadership and Open Government act of 2007 (HLOGA)
- Lobbying means attempting to influence covered federal officials or employees regarding federal legislation, regulations, rules, policy, or the awarding of government contracts on behalf of a client or your employer
- Covered officials include Members of Congress, congressional staff, and political appointees in the executive branch. Career civil servants and senior executive service officials are not covered under the LDA.
- An in-house lobbyist is a person who has made two or more lobbying contacts at any time and spends 20% of his or her time in a calendar quarter on lobbying activities and contacts on behalf of his or her company
- A lobbying contact means an oral, written, or electronic communication to a covered federal legislative or executive branch official or employee on behalf of a client or employer
- Lobbying activity includes preparation and research for lobbying contacts

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Lobbying

- A company must register if it employs a federal lobbyist, individual in-house lobbyists do not register. Once registered, a company must file quarterly lobbying reports (LD-2) detailing lobbying activities and expenses and semi-annual (LD-203) reports with Congress detailing certain political action committee contributions to Members of Congress, certain charitable contributions, and other donations related to covered officials. Additionally, the Company has to certify that it is in compliance with congressional gift rules as part of its LD-203 report.
- Additionally, individual lobbyists must file semi-annual reports with Congress certifying their compliance with congressional gift rules and report certain political contributions and other donations
- All registrations and reports are publicly available online
- All lobbying registrations are subject to random audits by the Government Accountability Office (GAO)
- Civil and criminal penalties for violations

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Federal Lobbying

- What is not lobbying under the LDA?
 - Meeting requests
 - Status requests
 - Submitting a formal written response to an RFP
 - Submitting a comment letter in a public regulatory rulemaking
 - Public testimony at a congressional hearing
 - Communications to government officials in enforcement actions or proceedings

Federal Grant And Procurement Requirements Covering Federal Lobbying Expenditures

Prohibition On Using Appropriated Funds For Lobbying

- 31 U.S.C. § 1352
 - Covers recipients of Federal “covered Federal actions”:
 - Contract
 - Grant
 - Loan
 - Cooperative agreement
 - *Prohibits* using Federal *appropriated* funds:
 - To pay any person for influencing or attempting to influence “covered Federal persons”
 - Officers/employees of any Federal agency
 - Members of Congress
 - Officers/employees of Congress
 - Employees of a Member of Congress
 - In connection with any “covered Federal action”

Broad Reach of Section 1352

- Agency includes:
 - Federal executive departments/agencies
 - Independent regulatory commissions
 - Government corporations
- Covered Federal actions include:
 - Awarding
 - Making
 - Entering into
 - Extending, continuing, renewing, amending, or modifying
 - A Federal contract, grant, loan, or cooperative agreement

Broad Reach of Section 1352

- Covered Federal persons include:
 - Employees
 - Appointees
 - Temporary appointees
 - Member of the uniformed services
 - Special Government employee (18 U.S.C. § 202)
 - Members of Federal advisory committees

Broad Reach of Section 1352

- Federal grant means award of financial assistance:
 - Money
 - Property in lieu of money
 - Any direct appropriation
- Does not include:
 - Technical assistance of services
 - Revenue sharing
 - Direct cash assistance to individuals

Broad Reach of Section 1352

- “Influencing or attempting to influence” means:
 - Making, with the intent to influence
 - Any communication to, or
 - Appearance before
 - Covered Federal persons
 - When in connection with covered Federal actions
- Generally does not include regular employees of recipients

Grant Disclosure Obligations

- *In addition* to ban on lobbying using *appropriated* funds, Section 1352 also applies to *all other* funds of the FA recipients if:
 - Used to pay any person for
 - Influencing or attempting to influence covered Federal persons
 - In connection with any covered Federal action
- Requires certification of compliance and disclosure concerning use of non-appropriated funds
- Essentially requires *recipients* of Federal assistance to make LDA-type disclosures to federal agencies
 - By contrast, LDA filing burden is on lobbyists

Grant Disclosure Obligations

- Certification also requires *recipients* to flow-down the certification/disclosure requirements to *sub-recipients*
- In turn, *sub-recipients* are to make the required disclosures to the *recipient*
- So that the *recipient* can make necessary disclosures to Federal agency

Grant Disclosure Obligations

- Section 1352 implemented by agency regulations
- Need to consult specific agency regulation
- Get professional support/advice
- DOT regulation typical:
 - 49 C.F.R. Part 20, *New Restrictions on Lobbying*
 - Covers DOT entities, such as Federal Transit Administration (FTA)
 - Part 20 requirement contained in FTA's Master Agreement for FTA grants
 - FTA provides guidance FTA Circular 4220.1F

Certification Implementation

- Agencies require certifications
 - From applicants for Federal assistance
 - Routinely enforced
- Recipients required to obtain certifications
 - From sub-recipients (i.e., subcontractors)
 - Obligation on recipient
 - Federal agencies frequently do not check
 - Absent flow-down, no contractual obligation on subs

Certification Implementation

- Sub-recipient compliance
 - Recipient must require certifications covering federal lobbying from subrecipient
 - Include in sub-contracts
 - Cover all sub-contracts, not just lobbyists
 - But – always cover lobbyists
 - Maintain executed certifications in contract files
 - Provide sub-recipients with guidance letters
 - Remind them of *their* obligations
 - Flow-down the lobbying certification/disclosure requirement to their sub-sub-recipients
 - File SF LLLs with recipient when required

Certification Implementation

- Standard Form LLL
 - SF LLL is the disclosure filing form
 - Filed with grantor agency
 - Regional office if FTA
 - Other agencies designate agency HQ
 - Technically required with applications and awards
 - Usually required with application
 - Sometimes deferred until award, and then sometimes forgotten
 - Covers mostly same information as in LDA filings
 - Penalties can be imposed for failure to file / amend
 - New SF LLL required whenever “material change” occurs
 - New lobbyist contract for Federal matters
 - Change in any lobbyist on prior SF LLL (Block 10)
 - Increase of \$20,000 in lobbying fees in calendar quarter
 - Informal guidance - change in grants not a material change

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Certification Implementation

- SF LLL best practices
 - File SF LLL
 - With application
 - Certainly with award
 - End of calendar quarter filings
 - Not required, but BEST practice
 - Insist that subrecipients, file each quarter
 - SF LLL with recipient, if material change
 - Or, file letter stating no material change
 - Get LDA filings and compare
 - If a material change in prior quarter
 - File new SF LLL with agency
 - Include subrecipients filings
 - If no material change, send agency a letter stating so
 - Include subrecipient filings
 - Keep records
 - Federal assistance recipient is the responsible party

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Certification Implementation

- Segregate Federal assistance funds
 - Use identified accounts for Federal assistance funds
 - Includes funds from loan insured/guaranteed by Federal agency
 - Maintain separate accounts for non-Federal funds
- Use non-Federal accounts to pay lobbying fees, expenses and costs
- Keep books and records showing separate treatment
- Provides “fire-wall” against use of appropriated funds for lobbying fees and costs

Procurement

- Section 1352 applies to contracts
 - Implemented by Federal Acquisition Regulation (FAR) 3.8
- FAR 3.8
 - Excludes “profit or fee” from appropriated funds
 - If person has “sufficient funds other than appropriated funds” to pay lobbyists – those funds *presumed* used for lobbying
 - Creates regulatory safe-harbor
 - Requires certification/disclosure declaration
 - FAR clause 52.203-11
 - Has update requirement

Procurement

- FAR 3.8
 - Does not apply to contractor's employees if regularly employed by contractor:
 - 130 working days with contractor
 - Within prior year before first contact with agency concerning covered Federal action
 - Does not apply to contractor's employees not regularly employed by contractor:
 - If lobbying contract not for covered Federal action
 - General procurement discussions not related to specific procurement
 - Nature of products/services
 - Application to agency requirements
 - Pre-solicitation necessary to agency decision-making as to initiation of a covered Federal action
 - Technical discussions
 - Capability presentations
 - Bid/proposal preparation, submission, negotiation

Procurement

- Does not apply to consultants/trade associations
 - Professional/technical support
 - When rendered directly for bid/proposal
 - Preparation
 - Submission
 - Negotiation

Procurement

- FAR 52.203-11
 - Certification/disclosure requirement automatic by signing offer
 - Covers appropriated funds
 - SF LLL disclosure required with offer if a LDA registrant
 - Made lobbying contact
 - With respect to contract
 - Excludes regularly employed officers/employees
 - Imposes penalties for
 - Making prohibited payments
 - Failing to file/amend

Procurement

- FAR 52.203-12
 - Implements FAR 3.8
 - Imposes continuing obligation to file SF LLL
 - When no SF LLL submitted with offer
 - If subsequent lobbying contact made
 - For contractor
 - Concerning the contract
 - When SF LLL submitted with offer
 - Within 30 days of end of calendar quarter, if
 - Material change to SF LLL Block 10 (change in lobbyists)

Procurement

- FAR 52.203-12
 - Requires flow-down to subcontracts over \$150,000
 - Requires obtaining subcontractor certification/disclosures
 - Requires quarterly filings by subcontractor
 - Quarterly contractor filings with agency
 - Gives blanket authority to rely on subcontractor statements “without liability”
 - Safe harbor for contractors

Contractor Campaign Contributions

- Direct contributions prohibited
 - Section 441(c) of FECA
 - Does not apply to officers, employees
 - So PACs contributions not covered
- Does *Citizens United* nullify Section 441(c)?
 - No, according to US District Court for DC
 - *Wagner v. FEC* (Apr. 16, 2012)
- Executive Order requiring disclosure not implemented to date
 - Legislation pending to preclude EO

Questions & Answers

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- 2012 NDI Checkpoint Sessions
 - July 18, 2012
 - August 22, 2012
 - December 5, 2012

- Save the Date! NDI Executive Exchange
 - November 14, 2012 – Chicago, IL – Invitation-only

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