

FOCUS *Extra*

New Federal and State Ethics Laws Present High-Stakes Challenges for Business and Their In-House Counsel

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Lunches, lobbying, and campaign donations—once activity considered to be just part of doing business—have become a high-stakes compliance challenge for corporations and associations, and the in-house counsel who advise them. A new federal ethics and lobbying law requires an executive in every organization that employs a lobbyist to swear under oath that the entire organization is in compliance with Congressional ethics and lobbying rules. Even if a company only occasionally hires an outside lobbyist, the employees of that company must now comply with more rigid Congressional gift and lobbying restrictions.

At the state and local levels, a personal campaign contribution by a senior executive may cause a company to face debarment from government contracting or loss of existing contracts. State and local governments have also tightened gift rules and expanded lobbying laws to cover a wide range of interaction with legislative and executive officials, boards, commissions, and public corporations.

Here are some of the biggest risks now facing businesses and their executives:

“Sarbanes-Oxley-Type” Certification For Companies That Employ Even A Single Lobbyist

The new federal ethics and lobbying law (“The Honest Leadership and Open Government Act” or “HLOGA”) requires that, for the six-month period beginning on January 1, 2008, and every six-month period thereafter, one person sign—under penalty of perjury—a “Sarbanes-Oxley-type” certification on behalf of the organization. The certification must state that the organization is familiar with Congressional gift and travel rules, and that no one has “provided, requested, or directed” a gift (including travel) to a Member of Congress or staffer in violation of the gift and travel rules. Each individual lobbyist must also file a separate certification.

It remains unclear whether the sworn certification must attest to compliance by every employee of the company or some subset of employees. Further guidance from the House and Senate ethics committees is expected, possibly when the new filing form is released in March 2008. What is clear is that companies that employ lobbyists may not reimburse any of their employees for a meal or other benefit provided to a Member or Congressional staff.

This new semi-annual certification must also disclose detailed information about political contributions, and donations to inaugural events, Presidential libraries, and charities with close ties to a Member of Congress.

New Private Sector Liability For Violations of Congressional Gift and Lobbying Rules

Before the passage of HLOGA, Congressional ethics rules applied only to Members and their staffs. Now businesses that employ or retain lobbyists are subject to liability for violating these rules. Moreover, the House ethics committee has announced that the new gift restrictions apply even to a non-lobbyist employee of a company that occasionally retains an outside lobbyist. When that non-lobbyist employee merely buys lunch for a Congressional staffer, it exposes the employer to liability.

In general, HLOGA prohibits gifts from lobbyists, and the organizations that employ or retain them, to Members of Congress and their staffs. While there are some circumstances where payments for food and other gifts are permissible, the exceptions are nuanced and are subject to continuing guidance from the ethics committees. Indeed, lunches with Members, fact-finding missions, and Member appearances at company-sponsored events all may implicate gift and travel restrictions, and must be analyzed carefully. Also, companies that employ or retain lobbyists may no longer pay for a Member’s travel, except for one-day visits and one overnight—and even those trips may not be planned or requested by a lobbyist.

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While the effect of these new gift and travel restrictions may be to push more activity into the campaign fundraising arena, caution is advised there, too. Federal campaign finance laws prohibit the use of corporate facilities, equipment, and staff in connection with fundraising activities, and impose other restrictions. This means an executive's assistant may not handle RSVPs for a private fundraising event, for example, and the company's courier services and stamps may not be used to transmit campaign contributions.

Companies May Forfeit Public Contracts Under State and Local Pay-To-Play Laws

Many states are taking aim at the "pay-to-play" culture that surrounds the awarding of state and local contracts. An ever-growing number of states, counties and municipalities now bar or severely limit campaign contributions to certain covered officials by state and local contractors, their top executives, and in some instances, executives' spouses and dependents. Businesses that fail to comply with these laws may face the immediate severing of existing contracts, suspension from consideration for future contracts, significant fines, and imprisonment.

Currently 20 states have so-called "pay-to-play" laws at the state or local level, and others are actively considering them. Keeping track of these laws is a challenge. For instance, many U.S. cities have their own pay-to-play rules, as do approximately 21 New Jersey counties.

Just Who Is A Lobbyist Anyway?

If a person spends substantial time on Capitol Hill or in state legislatures, trying to get new legislation passed or keep the law as it is, he or she is usually required to register as a lobbyist. HLOGA, however, sharply reduces the thresholds for registration, in particular the amount of money a company must pay its employees for lobbying activities before triggering registration under the Lobbying Disclosure Act.

New state and local lobbying laws sweep even more broadly, regulating all kinds of activity that does not fit within traditional concepts of lobbying. In some states, the definition of "lobbying" includes attempting to influence government contracts, seeking

business and tax incentives, calling an executive branch or board official to describe a client's product or service, grassroots activities, or even having lunch with an official which will merely engender "goodwill." Once a person meets a state's definition of lobbying, there are usually registration and reporting requirements, and there may be restrictions that apply to campaign contributions.

Ignore These New Laws At Your Peril

The price for violating these new federal, state, and local laws is steep. HLOGA has added enforcement muscle to the Lobbying Disclosure Act by increasing maximum fines from \$50,000 to \$200,000 per violation, and making felonies of certain violations, punishable by up to five years in jail. The Comptroller General is also empowered to conduct random audits of Lobbying Disclosure Act filings, starting with the first quarter of 2008.

Similarly, new state and local laws call for hefty fines, debarment, and imprisonment. Many states have established new enforcement agencies or handed new powers to existing agencies. And the harm to business reputation can be more damaging than the sanction imposed by a government agency.

For any business that interacts with public officials, a sound compliance program is critical. In developing the program it is essential to understand the vulnerabilities of the company and its executives, and tailor a program to address them. Businesses must treat government affairs compliance as seriously they do other areas of organizational exposure. In fact, because companies cannot completely eliminate the possibility of a rogue employee or inadvertent violation, the existence of a serious compliance program is the best defense to a government inquiry or investigation.

Lawrence H. Norton and James A. Kahl served as general counsel and deputy general counsel, respectively, of the Federal Election Commission from September 2001 to March 2007. As leaders of the FEC's legal team, Larry and Jim played a critical role in every aspect of implementation and enforcement of the landmark McCain-Feingold law. They currently lead the Political Law Practice at Womble Carlyle Sandridge & Rice, PLLC. Larry can be reached at Lnorton@wcsr.com and Jim can be reached at jkahl@wcsr.com.