

Pay-to-Play Spotlight: Potential for Large Penalties Demands Regular Evaluation of Pay-to-Play Compliance Programs

November 2012

Recent enforcement actions in the pay-to-play arena highlight the necessity of a company evaluating its pay-to-play compliance program on a regular basis. Three areas of concern and emphasis in such an evaluation process are discussed briefly below.

First, each company must ensure that it has a policy about the use of corporate resources and company time for political purposes and that any such use is subject to the internal preclearance process. Such activities must be treated like potential contributions and potential solicitation activities. The employee needs to describe exactly what he or she wishes to undertake and when, where, and how it will be undertaken. This way, the company can ensure that volunteer activities are done on the employee's own time and at the employee's own expense so that no in-kind contribution by the company will be made. For this analysis the definition of what constitutes a contribution varies by jurisdiction, so the underlying federal, state, or local pay-to-play law and, often, the underlying campaign finance rules must be referenced.

Second, employee education is of paramount importance in a compliance program. Education must be ongoing and substantive in nature. Without knowledge and reminders of the application of the pay-to-play laws, employees can forget that the laws exist and apply to them or fail to understand the vast scope of activities covered by the laws. Also important is the education of managers who might become aware of campaign activities of their subordinates.

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Useful pay-to-play education needs to focus on the following:

- The pay-to-play rules themselves;
- The preclearance process, including the need to preclear any and all campaign activities as discussed above;
- The penalties (both for the individual involved and for the company); and
- The process for reporting suspected violations to the ethics hotline or up the chain through compliance or otherwise (including straw donors and political activity in the office).

If the company is in a rut and its pay-to-play educational messages are not getting through to its employees because of standard online and email programs, now might be the time to reinforce the message with live or conference-call sessions with experts in the field, discussing the latest developments and real-world situations based on the applicable laws and the company's own policies.

Finally, it is very important that a company's compliance department be equipped to root out possible violations and non-reporting by investigation, audit, internal procedure, or otherwise. Compliance must be able to answer questions from all employees about all types of political activities and determine whether such activity is covered or not covered by the applicable law. To do this effectively, compliance must have immediate and clear access to legal advice about the various pay-to-play laws and underlying campaign finance laws from in-house counsel and/or outside legal experts.

Now is the time to analyze internal compliance processes, policies, and substantive support capabilities and to make changes where needed.