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ALERT

How to Reduce Your Political-law Risk in Five Easy Steps

May 22, 2024

Political-law risk is always present, but it becomes particularly acute in even-numbered election years such as 2024. Below, however, we outline five easy steps you and your organization - whether it is a corporation, partnership, trade association, or other type of nonprofit - can take to reduce this risk now and for election cycles to come.

1. Create Written Compliance Procedures

Hopefully, your organization already has strong political-law policies – such as policies regulating corporate contributions, PAC contributions, pay-to-play compliance, lobbying, and gifts to government officials. Nonetheless, having even more than generic policies lying on the shelf or in the virtual locker on the intranet does less than is optimal on their own to promote compliance. Instead, you need to breathe life into these policies by developing and maintaining current written policies for areas of particular concern. These processes or procedures help ensure those responsible for certain reports, certifications, approvals, or actions know when and how they are going to make it happen and who is there to help. A few examples of the questions the written procedures can answer are as follows:

- Who is responsible for signing the lobbying reports?
- Who reviews those reports?
- When are the reports due?
- Who has the final say on a proposed contribution?
- Who else reviews?
- Who has the e-filing credentials for the New York lobbyist employer reports?

Authors

D. Mark Renaud
Partner
202.719.7405
mrenaud@wiley.law

Practice Areas

Election Law & Government Ethics

- Who signs the PAC checks?
- Where in the cloud are corporate contribution documents kept?
- How do issues about pay-to-play restrictions get resolved?
- What about gift approval for dinners involving government officials?
- What is the process for procurement lobbying review as opposed to legislative lobbying? Is it in sales or compliance?

To be useful, the written processes need to be specific. Hopefully to the individual – *Frank or Fran in accounting put the California major donor report together, Sean in the office of general counsel approves*. Just saying legal approves doesn't get you much past the long-winded policy on the shelf. If not to the individual, then perhaps to the generic email for a particular issue or a group inside the chief legal officer's office or inside the compliance department. Every question doesn't have to be anticipated, but there should be road maps for the most common problems that arise.

And the written procedures need to be updated – when the departments are reorganized, when there are changes in personnel, etc. Maybe the electronic credentials should just be in the procedural document itself since it won't help much if Sally kept them and now Sally is gone and unreachable.

2. Adopt a Government Gift Preclearance Policy

The suggestion of written processes above assumes that the organization has adopted the relevant policies. One that many organizations lack is an important check on gifts to government officials. Every government official and employee is subject to some type of gift-rule. It may be just vaguely worded anti-bribery statutes, or it may be a gift ban such as in Florida, $3 de minimis gift exception like in Iowa, or a $590 calendar-year gift limit, such as in California. Or there could be a ban but with 24 or 25 exceptions, such as the case for lobbyist employers and Congress.

Whatever the jurisdictions involved, government officials are different. Thus, your officers and employees should preclear with compliance or legal any thing of value they wish to provide to federal, state, or local government officials or employees.

Of course, you could have a gift ban, but that can be problematic when you want to hold a reception for a ribbon-cutting or to welcome a new CEO; therefore, there would need to be the possibility of exceptions. And then this brings us back to what is essentially a preclearance policy. Many gifts – including lunches, breakfasts, dinners, etc. – will be banned by applicable law, but others will not, although they may be subject to reporting on the lobbyist report, the lobbyist employer report, or a pre-contract certification. Your company doesn't have to approve every legally permissible gift, but it might want to on occasion so that, for example, the association can involve legislators in the community event it sponsors or provide its home-state products to Congressional offices.

The worst policy is one that goes unstated or leaves it to the rank-and-file executive or field employee to figure out under the applicable gift rules. These rules are complex and necessitate a larger understanding of the entity's status in that jurisdiction (as a, for example, lobbyist employer or grant recipient or potential government contractor), and it is not a reasonable compliance approach to rely on the government official to know the applicable gift rules or even to rely on outside lobbyists.

3. Make Pay-to-Play Preclearance a Habit

If you and your organization are in the financial services industry or have state or local government contracts, then you should have a pay-to-play preclearance program. The penalties can be substantial, and no compliance department wants to be the reason the business is precluded from government contracts in a jurisdiction for months or even years.

Nonetheless, even with a formal policy that calls for preclearing all state and local-related political contributions and fundraising by the employee and his or her spouse and written procedures to back the policy up, employees can forget. They can forget because they often get contribution requests on their "own" time, like the weekends. Or they agree to host a fundraiser with their spouse, and it seems just so commonplace. Or, often, they really hate that the company wants them to preclear such personal and intimate First Amendment activity, so it does not stick in their brain.

It doesn't matter the reason, but forgetting to preclear increases the chance that the personal contribution, personal fundraising activity, or spousal contribution triggers one of these strict liability pay-to-play laws or rules with their attendant penalties. In order to avoid this happening, covered associates and other covered persons need to be reminded of their preclearance obligations often. This would mean more than once a year when folks go through the company's policies. More than twice per year. Probably at least quarterly, with a pre-general election push in a year like 2024. Those emails may get deleted, but the message comes across (if the subject line is drafted carefully).

For the risk to be reduced, it must be second nature for a covered employee to preclear any state or local-related contribution or fundraiser, period. Like brushing your teeth. The political activity shouldn't feel right without the clearance from compliance/legal.

4. Implement a Political-law Compliance Training Program

Continuing with the above theme of bringing the substantive compliance policies to life, regular and in-depth training is an essential element of a vibrant compliance program. As discussed, we want employees to habitually follow the rules, but, for larger issues and themes, we want them to know the important questions to ask before taking action and the resources available to them to help make compliance and even substantive decisions. Training addresses all of these issues and ensures that your employees know where the company or association stands on compliance, disclosure, and the rule of law.

Brief digital materials are fine for small issues covering a large swath of the workforce – such as no gifts to government officials without preclearance – but it is important to go into more detail with those persons interacting with federal, state, or local government officials or likely to interact with such officials. For example, the federal GR team should have annual training on the Lobbying Disclosure Act (LDA) requirements and Congressional and Executive Branch gift rules. The state team should receive focused training on state political-law compliance issues across their regions or the nation as a whole. A training session should not be a monotone recitation of the law, but an exciting presentation that highlights the political-law risks and the measures taken to mitigate those risks. Executives also should receive some regular training about the political-law compliance issues, especially if they are involved in reducing the political or legislative risks out there.

5. Provide Access to Legal Support

As in most other areas of the law, the rules for compliance in the political-law arena often turn on the specific statutory definitions or regulatory obligations. Although one can approach political-law compliance with a broad prophylactic method, following the spirit of the law or of good government can create its own risks and headaches. Voluntarily registering as a lobbyist in New Jersey when one hasn't met the 30-hour threshold, for example, means that subsequent lobbying reports must be timely and accurately filed, something that is not without cost. Such registration also could cause gift-rule or campaign finance complications.

Thus, for proper compliance, those involved in government affairs and government relations – plus the executives who work with them – need to have access to proper legal support. In-house support is great and goes a long way in helping navigate the thicket of political-law regulations, but specialized political-law attorneys may be necessary when time is limited or the legal/political/PR consequences are substantial. Companies and associations should deploy this legal expertise either through or in partnership with in-house counsel or separately so that political-law compliance decisions can be made in real time.