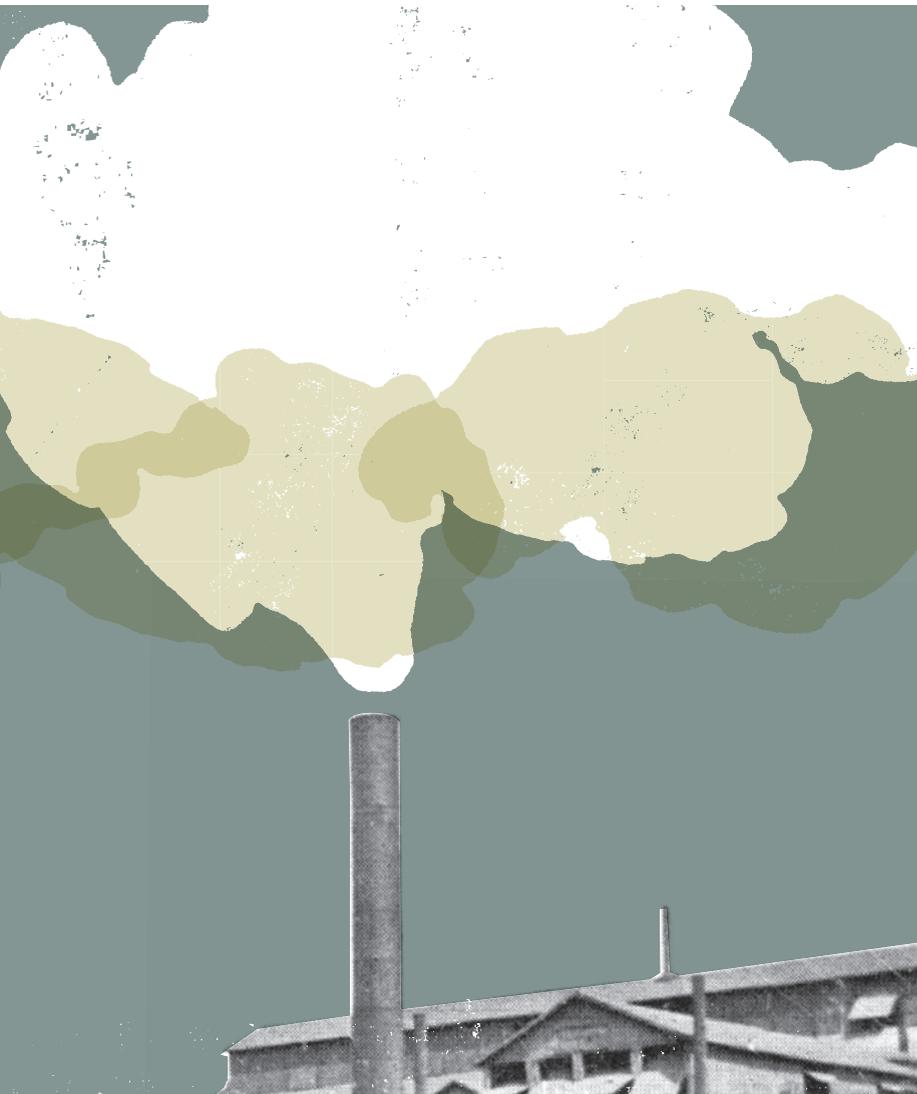


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Lobbying Reforms Bring New Rules, New Exposure for Corporations

Political Equivalent of Sarbanes-Oxley?

By Robert K. Kelner

THERE WAS A TIME, back in the day, when corporate lobbyists operated mostly under the radar. Much of what they did was concealed from public view. Indeed, even the general counsel, other senior executives and board members tended to know little about their lobbyists' day-to-day activities.

If the lobbyists were succeeding at bringing home the legislative bacon and fending off unwanted interference from Washington, they were often given a relatively free hand – and a generous expense account.

Then came the Jack Abramoff investigation. One of Washington's most prominent lobbyists became the focal point of a series of congressional and criminal investigations that resulted in jail sentences for Abramoff, a member of Congress, and assorted congressional staff.

As the Abramoff scandal unfolded, the U.S. Department of Justice assigned hundreds of federal agents and prosecutors to investigate public corruption. Numerous lobbyists found themselves under

scrutiny. Washington was awash with subpoenas. And employers began to think about ways to manage the newly recognized enterprise risk associated with their lobbyists.

Many corporations long ago had recognized the value in adopting codes of conduct and corporate compliance programs to address a wide range of federal regulatory risks, from antitrust to the Foreign Corrupt Practices Act. But few had thought to include lobbying compliance in those compliance programs. That's changing now. There are many ways that aggressive lobbying, without proper oversight, can expose not only corporations but individual corporate officers and directors to regulatory and

even criminal penalties.

Lobbying reform legislation just passed by Congress [but not signed by the President as of press time] would heighten that risk by requiring various certifications by lobbyists and their employers and by imposing new civil and criminal penalties — the political equivalent of Sarbanes-Oxley.

The exposure risks to corporations largely concentrate in three areas: campaign fundraising, lobbying disclosure, and gifts to public officials.

CAMPAIGN FUNDRAISING

Since the Tillman Act was enacted one hundred years ago, it has been illegal for corporations to make contributions or expenditures with corporate treasury funds to influence federal elections. As is often the case in the context of political law, there are significant exceptions to this general rule. For one thing, a corporation can spend unlimited (and unreported) amounts of corporate funds on the administrative expenses of a federal political action committee (PAC).

When a corporation's lobbyists solicit corporate executives to make political contributions, it is all too easy to run afoul of the FEC's strict ban on corporate "facilitation" of contributions.

The PAC in turn can raise funds from individual executives, and the corporation is free to direct those funds to federal candidates.

A corporation also can solicit executives to make personal contributions to federal candidates, so long as the corporation does not collect the personal checks or otherwise "facilitate" delivery of the checks. And individual executives can engage in purely personal political fundraising activity, outside the office, such as holding fundraisers at their homes.

Each of these exceptions entail risks. The least risky is the PAC exception. Indeed, while sloppy management of a PAC can result in campaign finance law violations, such as misreporting or inadvertent mixing of corporate funds in a PAC account, generally PACs are the safest vehicle for corporations to participate in the federal campaign finance arena.

Congress actually authorized PACs as a kind of legal safe harbor for corporate political activity. Since the McCain-Feingold campaign finance reform law took effect in 2003, banning corporate "soft money"

donations to national political parties, PACs have become an even more important vehicle for corporate political activity. When corporations run into serious trouble with the Federal Election Commission (FEC), it is rarely because of their PACs and much more often because of non-PAC fundraising activities of lobbyists and executives.

For example, when a corporation's lobbyists solicit corporate executives to make political contributions, it is all too easy to run afoul of the FEC's strict ban on corporate "facilitation" of contributions. Consider the following familiar scenario. The head of a major corporation's Washington, D.C. office develops a strategic plan for the corporation's lobbying efforts for the year. It includes a list of Congress members with whom the corporation is seeking to build relationships, such as members who serve on key committees or in the congressional leadership.

The head lobbyist then calls or emails a number of senior executives back at corporate headquarters to encourage them to make contributions to the campaign of one of the listed members, perhaps in connection with a fundraising event for that member. He or she enlists the CEO's help, and the CEO in turn asks a number of executives to contribute. A few of the executives agree to contribute, including the CEO. So far, so good, because FEC rules generally permit a corporation to solicit voluntary, unreimbursed campaign contributions from its executives.

But then things go awry. Neither the CEO nor the other senior executives have the time, patience, or inclination to deal with physically getting their checks to the candidate. The CEO hands his check to his secretary and asks him or her to deal with it. The secretary sends it to the company's Washington, D.C. office, and a lobbyist there sends it on to the member, using a courier service that is paid for by the company.

Meantime, several of the other executives who said they would contribute have failed to do so. The head lobbyist asks his assistant to contact the assistants for the executives in question. She does so, and one of the executives' assistants offers to collect the checks for the group and to send them off to the Washington office. Being an organized person, she makes a record of all the checks she collected. And the entire series of events is amply recorded in various e-mail exchanges.

The FEC would conclude that the corporation in this scenario, and perhaps the individual executives as well, have engaged in illegal corporate facilitation of campaign contributions. The secretaries should not have collected the checks and sent them on to Washington. The Washington office lobbyists should not have transmitted the checks to the candidate. Nor should they have used a company courier to

transmit the checks. The record created by the secretary and the related emails all neatly memorialize the violation.

The FEC has imposed civil monetary penalties on corporations for scenarios similar to this one. Two recent FEC cases — the Westar Energy and Freddie Mac cases — are good examples. In both cases, lobbyists collected checks from corporate executives and delivered them to federal candidates. In Westar, the FEC even went a step further and fined an outside lobbyist for the company, because the outside lobbyist delivered personal political contribution checks for Westar’s executives. The FEC has also repeatedly

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treated involvement of executives’ secretaries in fundraising projects, including collection of personal checks, as prohibited facilitation.

Proper compliance training for lobbyists, and clear company policies and procedures regarding fundraising, could easily have avoided the facilitation in the above example. If the head of the Washington office had asked the CEO and other executives to send in their own checks, ideally from home, there would have been no violation (assuming the executives followed instructions).

The line between permissible solicitation and illegal corporate facilitation is a fine one, but it is a line that a strong compliance program can effectively police. The same is true of personal fundraising by an executive — if the executive is taught the basic “do’s and don’ts,” they can avoid a world of trouble.

LOBBYING DISCLOSURE AND GIFT RULES

The federal Lobbying Disclosure Act of 1995 (LDA) imposed reporting requirements on corporations that employ in-house “lobbyists” (as defined in LDA), as well as on lobbying firms. For the first ten years of the Act’s existence, there was zero enforcement. In 2005, the first enforcement actions were announced, all of which ended with minor penalties. But the new federal lobbying reform legislation would raise the stakes considerably.

The legislation imposes criminal, rather than merely civil, penalties for violations of the LDA. It increases the maximum fine for corporations to \$500,000 per violation. And it requires corporations that are registered under the LDA to sign more

detailed certifications regarding the activities of their lobbyists, which, if deemed to be intentionally false or misleading, could result in criminal exposure.

Finally, and perhaps most significantly, the new legislation would, for the first time, impose on corporations and their lobbyists liability for giving gifts to members of Congress and staff in violation of congressional gift rules. Currently, the congressional gift rules are purely disciplinary rules of the House and Senate.

This marks a sea change in the regulation of lobbyists at the federal level. Corporations will be required to certify that their lobbyists have not given any prohibited gifts. Given the complexity of the congressional gift rules (House and Senate ethics manuals are hundreds of pages long), extensive effort will be required to ensure compliance and to enable lobbyists to sign the new certifications.

All this assumes that the corporation is registered under the LDA in the first place. But there likely are still companies that have failed to register, either because they are unaware of the Act or because of a mistaken impression that only their outside lobbyists need to register, which will sometimes but not always be the case.

At the same time that Congress is clamping down on lobbying practices at the federal level, some states are tightening their own campaign finance, lobbying disclosure, and gift rules. In a few cases, states are imposing so-called “pay-to-play” restrictions, which prohibit campaign contributions to state candidates by corporations, executives, directors, their families, and possibly PACs, if the corporations are doing business with the state.

Keeping track of these laws — and, for that matter, keeping track of contracts that the corporation may have with various state agencies — is going to be a major challenge, especially for corporations that have a national presence.

At the moment, regulation of lobbyists and the political process is in great flux. It remains to be seen whether there is a backlash against excessive regulation, as there has been in response to Sarbanes-Oxley. But, for now, the need for politically active corporations to revamp their compliance programs is clear. Lobbying is no longer just a “headline risk.” It’s the real thing.



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