

## Avoiding Corporate Political Activity Pitfalls This Election Year

By **Robert Kelner, Dana Remus and Andrew Garrahan** (September 6, 2024, 3:54 PM EDT)

With Election Day fast approaching, corporations face increasing pressure from both internal and external forces to make legal decisions about political activities.

This can be a fraught area of law, with little understood, highly technical regulatory issues that vary significantly across jurisdictions.

Corporate counsel should be mindful of common — and sometimes complicated — political law traps.

Below is a high-level primer on key issues for corporations to monitor, and best practices for corporations to pursue, in an election year.

### Executive Fundraising and Corporate Resources

Campaigns often call on company executives to raise money from their networks. Because use of corporate time and resources can be a contribution to the benefiting candidate, and corporations cannot make contributions in federal and some state elections, this is a risky area if not handled with due care.

Executives may permissibly use corporate resources to solicit contributions to federal campaigns from the corporation's "executive or administrative personnel" (a term of art defined in federal election and labor law), stockholders and their families.

Executives raising money beyond this restricted class may not do so using corporate resources — they must do so through entirely volunteer, personal efforts. Executive fundraising may trigger contribution issues under state law as well, and even in states where corporate contributions are permissible, they may be subjects to limits.

### Contribution Reimbursement

Almost every jurisdiction prohibits contributions that are made in the name of another. Therefore, a corporation, or any other person, should never fund a contribution made by one of its employees or any other person, whether through reimbursement, advance, bonus or other funds given with an understanding or expectation they will pay for a contribution that has or will occur.



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Doing so exposes a company and its executives to criminal penalties. Corporations have sometimes inadvertently reimbursed employees' political contributions through the corporate expense reimbursement system, and care should be taken to ensure that such systems do not allow for expensive of contributions.

For example, company reimbursement policies should expressly prohibit reimbursement of political contributions, and accounting teams and others processing expenses should be informed that contributions are not reimbursable.

### **Corporate Contributions to 501(c)(4)s and Super PACs**

Corporations may be solicited for contributions to tax-exempt 501(c)(4) social welfare organizations and to super PACs and they are increasingly making these types of contributions.

Corporations generally may give unlimited amounts to these entities, but risks remain, and we recommend carefully vetting all such contributions before they are made to ensure that contributors understand the consequences of their contributions.

For example, many of these contributions or donations will be disclosed, even though 501(c)(4) organizations sometimes promote themselves as vehicles for nondisclosed contributions.

A contribution to a state or federal super PAC will be publicly disclosed by the super PAC.

Some jurisdictions require 501(c)(4)s and other organizations to disclose their funding if they receive or spend funds to influence elections.

In some states, corporate spending could also lead the corporation itself to have to file registration or disclosure reports, such as under California's major donor rules or state lobbying laws. Some states even require advertisements to feature the names of top funders of the ad's sponsor.

In recent years, state regulators and attorneys general have increased their efforts to exert jurisdiction over these groups and their activities. If an organization is not monitoring its activities or the laws in the jurisdictions where it is active, it may inadvertently violate these laws or trigger disclosure requirements.

Corporations cannot assume that these outside groups active in elections are necessarily attentive to their own disclosure obligations under applicable campaign finance and lobbying laws.

### **Prohibited Contributors: Government Contractors, National Banks and Foreign Nationals**

Companies should remain cognizant that federal law bars foreign nationals from engaging in certain activities in connection with any federal, state or local election, with criminal penalties for violations. A foreign national is an individual who is not a U.S. citizen and is not lawfully admitted for permanent residence, green card holder, and also includes foreign corporations and other foreign entities.

The law prohibits foreign nationals not only from making a contribution, donation, expenditure or disbursement in connection with any election, but also from participating in the decision making of any other person in any election-related activity, which is undefined but includes at least those financial decisions.

Foreign nationals also may not participate in the management of a political action committee or campaign,

and it is illegal to knowingly solicit or accept contributions and donations from foreign nationals.

For corporations, this means that foreign nationals should not be involved in any corporate activities related to raising or spending money in elections, including planning, budgeting or soliciting contributions, or operating the PAC. Corporations and their PACs must also be careful not to solicit contributions from foreign nationals.

Federal statutory law also prohibits federal government contractors from making contributions to any federal political party, committee or candidate. This prohibition generally extends to the federal contractor only, and not to its PAC or to its employees. Companies are often unaware of their federal contractor status and are surprised to learn that they do have such contracts, so thorough review is required before making a contribution to which the ban applies.

Corporations that are, or own, national banks should be aware that national banks are prohibited from making any contribution or donation in connection with any U.S. election, whether federal, state or local. A national bank may, however, form a federal PAC. Similar restrictions apply to certain corporations created by authority of Congress.

Some state laws include similar bans, such as reiterating or strengthening the foreign national ban, or prohibiting contributions by certain types of entities like banks, insurance companies, or other regulated industries.

### **Pay-to-Play Prohibitions and Disclosures**

Pay-to-play laws restrict contributions by persons doing business with governments, beyond the federal contractor ban outlined above.

Federal pay-to-play laws are rules and regulations applicable to companies that engage in or seek to engage in certain types of financial services work with state and local governments.

For example, the U.S. Securities and Exchange Commission pay-to-play rule subjects registered investment advisers to a two-year ban on doing business with a state or local government entity after a contribution is made by the investment adviser or a covered associate to state and local officials with the authority to select or influence the selection of investment advisers, or who have the authority to appoint those who do.

The Financial Industry Regulatory Authority, the Municipal Securities Rulemaking Board and the Commodity Futures Trading Commission have similar rules.

The rules can also extend to soliciting and coordinating contributions. Any company providing financial services should be aware of these rules and how they apply to the company and its employees.

At the state level, pay-to-play rules vary widely but generally prohibit or require disclosure of contributions in the state by persons with certain types or amounts of state contacts. These can extend not only to contributions by the company but also by the company's PAC, employees and even the family of employees.

A best practice is for government contractors and others covered by pay-to-play rules to adopt a compliance program, which might include a pay-to-play policy, a requirement for preapproval for

contributions and training to prevent violations.

The preapproval process for contributions will require that the company track existing government contracts, as well as government contracts that are being sought by the company. Often, companies find this tracking process to be challenging, especially if they do not already have systems in place to keep track of government contracts for other reasons.

### **Foreign Agents Registration Act**

The Foreign Agents Registration Act is an area of increased attention over the last decade. At its most basic, it applies to anyone who acts on behalf of a foreign principal within the U.S. to, among other things, influence the U.S. government or public on U.S. policy or the policies or interests of a foreign government or political party, act as public relations counsel or political consultant, or collect and spend funds on behalf of the foreign principal.

A foreign principal includes any non-U.S. individual or organization, not just foreign governments. Given the broad coverage of the law, acting on behalf of any foreign principal, even potentially a foreign parent company, to influence an election carries the risk that registration as a foreign agent will be required. Failure to register can result in criminal penalties.

While registration may satisfy the company's legal obligation, there are reputational and commercial risks associated with being labeled a foreign agent.

### **Policies Around Voting**

Any company policies regarding voting and elections should be reviewed to ensure they are consistent with current laws concerning political activity. For example, voter registration drives can be subject to complicated state regulations. Providing gifts or other things of value to encourage voting may raise issues under federal and state laws meant to prohibit vote buying or influence.

Additionally, some state employment and labor laws, such as California's Labor Code, include restrictions on an employer's efforts to influence employee political behavior. Corporations that do not already have compliance policies governing corporate and employee political activity should consider adopting such policies now.

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