

Compliance & Ethics Professional[®]

June
2017

A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

www.corporatecompliance.org

Meet Sheryl Vacca

Senior Vice President/Chief Risk Officer
Providence St. Joseph Health
Irvine, CA

See page 16

25

**Unlocking the Triforce:
Compliance, HR, and
Ethics are stronger together**

Sarah Putney and
Jonathan Gonzalez

31

**Political law compliance:
Considerations and
strategies**

Melissa Miles and
Patricia Zweibel

37

**Implementing
deferred prosecution
compliance
agreements**

MaryEllen O'Neill

47

**High-risk
partners require
outside-the-box
compliance**

Jason N. Golub

by Melissa Miles and Patricia Zweibel

Political law compliance: Considerations and strategies

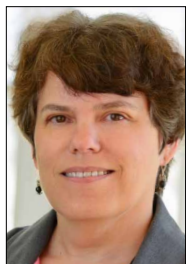
- » Contributions and other payments should always be reviewed for any indicia of linkage to a government decision.
- » After assuring that there is no linkage, the payment should be analyzed under specific laws that may apply, including ethics/gifts, campaign finance, pay-to-play, and lobbying.
- » In addition to having policies specific to lobbying, political contributions, and gifts to officials, companies may wish to institute a charitable contribution policy and pre-clearance procedures.
- » Lobby, gift, and personal political contribution policies and procedures should be periodically updated and communicated to employees.
- » Political law compliance programs should be structured to suit the company's size and activities.

Federal, state, and local ethics laws affect companies' interactions with US public officials at all levels of government. Compliance with these laws is important not only to avoid violations, but also to minimize any appearance of impropriety and



Miles

reputational risk. Moreover, even when activity may be permissible under an applicable ethics law, government investigators and prosecutors are increasingly relying on general fraud statutes, such as honest services fraud, to bring cases. Relying on these statutes, prosecutors in recent cases have successfully won convictions based on the theory that these fraud provisions merely require a showing of linkage between the thing of value provided to an official and an official action. In such cases, a quid pro quo is not required in order to find a violation.



Zweibel

Companies' political law compliance programs should include

policies and procedures covering not only the usual trifecta of political compliance laws (i.e., campaign finance/pay-to-play, lobby, and gift/entertainment), but should also take into account the risks under these fraud statutes. The following discusses the issues and some compliance strategies.

Legal analysis

The first step in pre-approving any payment to a public official or to a third party (such as a charity) at the request of a public official is to ensure that there is no linkage between the payment and an official action or decision. Linkage concerns may be raised by political contributions or gifts and entertainment to public officials or their families and also by charitable donations made at the request of a public official. The determination of whether a payment to or at the request of a public official may be viewed as impermissibly linked to a government decision is generally based on the totality of the circumstances, including the timing and

amount of the payment and the reasons for having made the payment. If the payment is made near in time to a government official's discretionary decision that will affect the company, that may be an indicia that it is linked to a benefit to be provided to the donor. Once it is determined that there is no linkage, the payment should then be vetted under the jurisdiction's campaign finance, pay-to-play, and gift/ethics rules (including lobbying), as applicable.

Although most Compliance departments are familiar with campaign finance, gift/ethics, and lobbying laws, pay-to-play laws may be a bit more obscure. Pay-to-play laws generally restrict or prohibit companies from doing government business or being awarded a government contract if contributions or payments, either by the company or its employees, are made to certain officials in the jurisdiction. These laws are strict liability laws, meaning that a violation can occur without bad intent or evidence of linkage. Typically these types of laws ban government business for anywhere between a few months to a few years after a prohibited contribution or gift.

Campaign finance, gift/ethics, and lobbying laws are generally easy to locate in a jurisdiction's state or municipal campaign finance or public ethics code, but pay-to-play laws may in some cases be found in other sections, such as in procurement or public contracts codes. Moreover, certain financial services companies, including registered

investment advisers, municipal advisors, municipal bond underwriters, broker-dealers, and "swap dealers"¹ engaging in government business are subject to federal pay-to-play rules that apply to political contributions to state and local officials and to candidates in all 50 states, the District of Columbia, and U.S. territories.

Some laws may overlap. For example: In addition to a jurisdiction's general ethics

and campaign finance laws, some jurisdictions' lobbying laws also contains restrictions on gifts or political contributions from lobbyists/lobbyist employers.

Most pay-to-play laws concern political contributions, but some also cover gifts.

If the company is covered under a federal pay-to-play

rule, do the pay-to-play analysis under both the federal rule and any applicable state or local pay-to-play law.

Regarding political contributions, the policy should set forth the criteria under which the company will make corporate political or charitable contributions, and the procedures for requesting such contributions.

Policies and procedures tailored for the company

It is important for a company to implement and maintain a political activities policy that addresses political contributions/pay-to-play, gifts and entertainment, and lobbying in order to ensure compliance in these areas. Regarding political contributions, the policy should set forth the criteria under which the company will make corporate political or charitable contributions, and the procedures for requesting such contributions. Further, if the company has government contracts, the policy should require pre-clearance for

personal political contributions made or solicited by covered employees in certain jurisdictions pursuant to applicable pay-to-play laws.

For companies that have dealings with the government (e.g., have lobbyists, or are government contractors), it is also important for the policy to require pre-clearance (or prohibit) for gifts and entertainment provided by employees to government officials. In addition, the policy should also require employees to seek pre-clearance prior to engaging in lobbying activities in jurisdictions where they are not registered and require pre-clearance prior to hiring an outside consultant.

In executing such pre-clearance, some companies choose to require centralized pre-clearance, whereas others with a large geographical footprint may choose to train local compliance officers to handle pre-clearance of subordinates. Alternatively, some companies may carve out limited exemptions for gifts or government communications in certain jurisdictions that do not require pre-clearance. This may be useful for jurisdictions where, for example, the business unit's activities do not trigger lobby registration or for certain small *de minimis* types of gifts in jurisdictions where small gifts are permitted.

Regarding pay-to-play compliance, given the general scope of coverage under pay-to-play laws, it may not be necessary to require all employees to pre-clear their personal political contributions. Rather, depending on

the structure and the size of the company, its activities, and the company's risk tolerance, it may be advisable to cover only officers, senior management, lobbyists, and those employees involved in soliciting government contracts.

Companies should institute periodic training for employees on compliance with the policies and procedures, and highlight any relevant or notable changes from prior years. Policies and procedures should be easy for employees to locate on smartphones, tablets, or computers. Legal or Compliance should update the policies and procedures periodically (at a minimum, once a year) to account for changes in the laws.

Companies should institute periodic training for employees on compliance with the policies and procedures, and highlight any relevant or notable changes from prior years.

Conclusion

Companies face a number of compliance challenges when they interact with the government. Having robust compliance policies and procedures helps to ensure such interactions are permissible under applicable law and mitigates the risks raised by employee non-compliance, whether intentional or in error. An essential component of any political law compliance program should include policies and procedures that either restrict or require pre-clearance for political contributions, gifts to officials, and lobbying. *

1. See Commodity Futures Trading Commission: Final Rules Regarding Further Defining "Swap Dealer," "Major Swap Participant" and "Eligible Contract Participant" Available at <http://bit.ly/swap-dealer>

Melissa Miles (mmiles@skadden.com) and *Patricia Zweibel* (patricia.zweibel@skadden.com) are both Counsel at Skadden, Arps, Slate, Meagher & Flom LLP in Washington DC.