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Ethical Interactions with Government & Elected Officials

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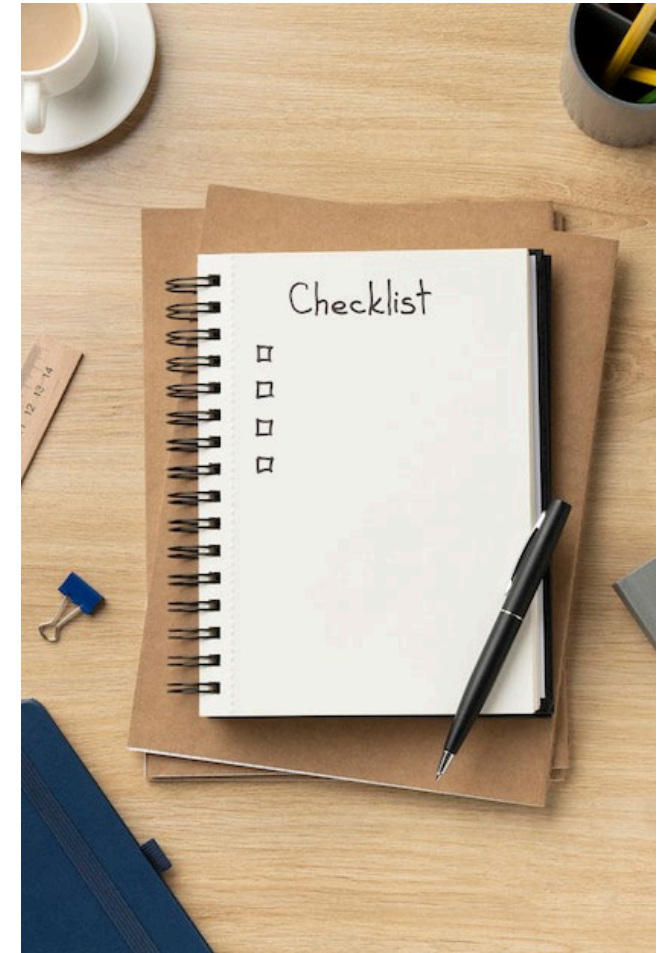
Rebecca Moll Freed

Why are We Here Today?

- In recent years, we have seen an increase in corporate political activity
- Companies and their officers, shareholders and employees are often interested in:
 - Participating in the political process
 - Lobbying
 - Providing gifts or entertainment to Government & Elected Officials
- Companies and individuals are not necessarily willing to sit on the sidelines (so that means that in-house counsel cannot sit on the sidelines either!)

Why are We Here Today?

- Not all activity is the same and one misstep can have consequences such as:
 - Loss of government contracting opportunities
 - Civil and criminal penalties
 - Reputational Risk
- It is easy to put political activity and lobbying compliance on the back-burner; however, smart companies know that having the right protocols and procedures in place will help protect the company and minimize risk



An Attorney's Role

Rule 2.1 of the ABA Model Rules of Professional Conduct focuses on a lawyer's role as a Counselor and provides:

- In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.
- In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social and **political** factors that may be relevant to the client's situation.



An Attorney's Role

- When providing advice, a lawyer must keep in mind that a client is entitled to your honest assessment even when your client may be disinclined to listen.
- Purely technical legal advice can sometimes be inadequate.
- It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.
- Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.



An Attorney's Role

- When it comes to complying with lobbying laws, gift rules and campaign-finance and pay-to-play laws, many attorneys comment that they “know just enough to be dangerous!”
- Our goal today is to make sure you are not one of those attorneys by providing:
 - A high-level overview of the law; and
 - General Strategies for compliance
- All while keeping our ethical obligations as attorneys in mind!



Lobbying Registration and Disclosure

Overview: What You Will Learn

- Lobbying Registration
- Lobbying Disclosure
- Compliance with Gifts Rules



Lobbying Registration: Why Do I Care?

Significant Penalties for Violations...

- Penalties apply to any violation of federal lobbying laws
 - Criminal: Imprisonment up to 5 years and/or fines
 - Civil: Penalty up to \$200,000
 - Reputational
- **How to avoid requirements for you or your company:** Know the rules *before* talking with the government on your company's behalf!
- “*Washington Post*” Standard applies regardless of the law



Federal Lobbying Disclosure Act: Am I a Lobbyist?

- Two threshold requirements that the *same* employee must meet
 - **Two Lobbying Contacts** (over any time frame)
 - **20%** of your work time on **Lobbying Activities** in a calendar quarter
- Do I need to register?
- Exceptions



Lobbying Contact: Definition is Broad

- The term “lobbying contact” means *any* oral or written communication to a covered official (any employee of Congress and senior executive branch officials) that is made on behalf of your employer with regard to action on—
 - Federal legislation;
 - any Federal rule, regulation, Executive order, or any other program, policy, or position of the U.S Government;
 - the award, administration or execution of a Federal contract, grant, loan, permit or license; or
 - the nomination of anyone subject to Senate confirmation.

Lobbying Activities: Much Broader than Lobbying Contacts

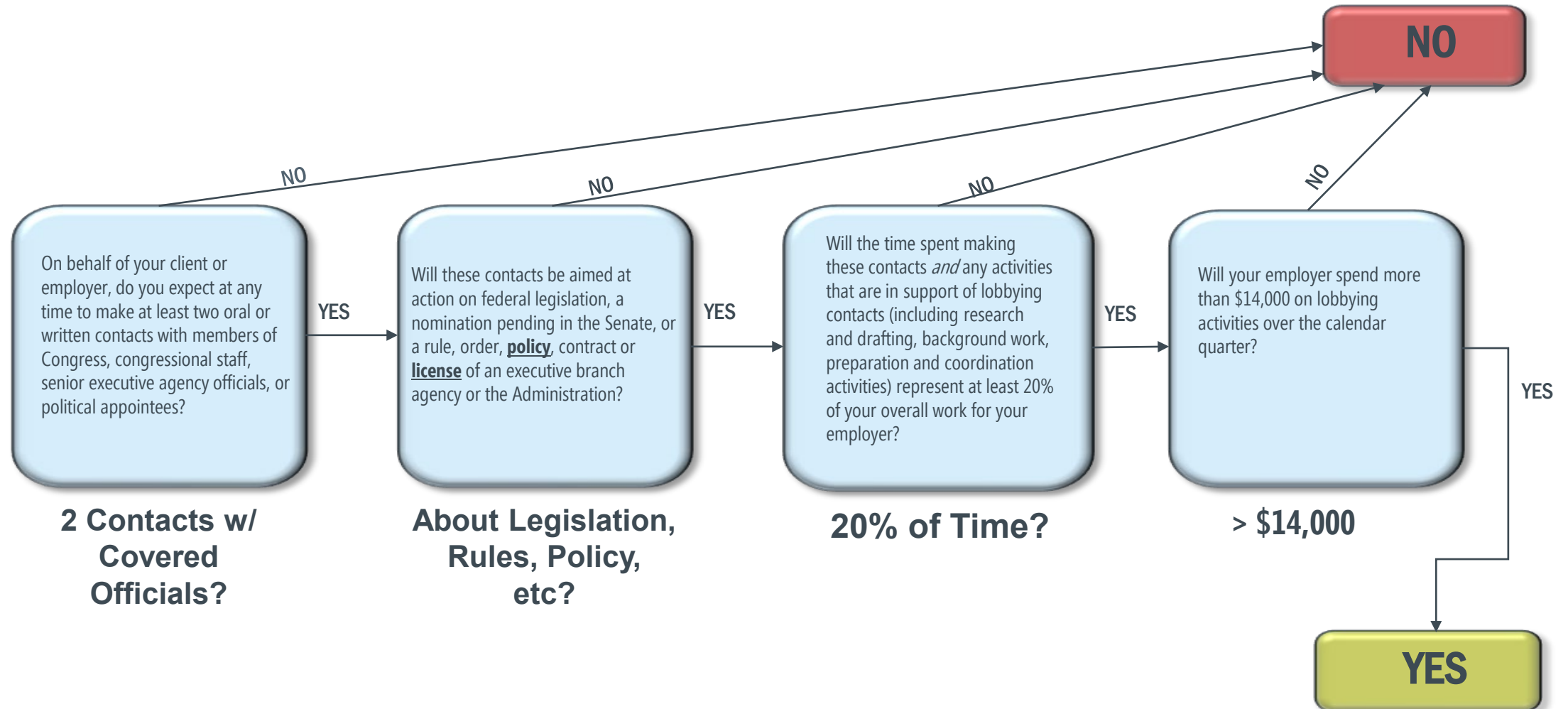
- “Lobbying activities” are defined to include all “lobbying contacts and efforts in support of such contacts, including the **preparation and planning of activities, research and other background work** that is intended at the time it is performed for use in making such contacts, and **coordination** with the lobbying activities of others.”

Lobbying Activities: Examples

- **Lobbying activities that support contacts include:**
 - Preparation
 - Research and White Papers
 - Specific Monitoring
 - Strategy Sessions
 - Drafting One-Pagers
 - Follow-Up to Contacts
 - Coordination with Others



Do I Need to Register?



Does an Exception Apply?

- Administrative Request (such as scheduling a meeting or asking on status of a contract)
- Made in writing in response to a request by a covered official for specific factual information
- Congressional testimony
- *Also...* many others



Selected Exceptions (LDA)

- a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include any attempt whatsoever to influence a covered official
- required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency, including any communication compelled by a Federal contract, grant, loan, permit, or license
- made in response to a notice in the Federal Register or other similar publication soliciting communications from the public and directed to the designated agency official
- made in compliance with written agency procedures regarding an adjudication conducted by the agency
- a written comment filed in the course of a public proceeding or any other communication that is made on the record in a public proceeding

Registration and Reporting Considerations

- **New Registrations (LD-1)**
 - Employer registers new lobbyists: quarterly report covering the period in which registration triggered

- **Disclosure Reports:**
 - Lobbying Activities, Expenses – Quarterly (LD-2)
 - Includes contacts, as well as activities that support contacts by outside third parties that your employer supports (trade associations, non-profits)
 - Political Contributions, Gift Rule Certification – Semi-annually (LD-203)

Lobbying – How to Track Lobbying?

- Classify lobbying appropriately
- Flag expenses as related to lobbying
- Keep records of who you met with and what you discussed (e.g., bill numbers)
- Assistants: work with those who lobby to help manage these records
- Cheat sheets can assist record keeping
- Report when prompted each quarter
- Standard is “good faith” compliance


Lobbying – State Variations

- Today we covered federal lobbying standards and requirements
- Keep in mind that variations exist at the state level and often from state to state
- Although the federal standards are often a good benchmark, if your company is lobbying at the state or local level, it is important to familiarize yourself with applicable state and local laws **before** engaging in **any** activity that *might* potentially constitute lobbying

Compliance with Gifts Rules

Why House & Senate Gift Rules Matter?

- Gift compliance matters because of potential criminal liability from a federal lobbying registrant:



8. CERTIFICATION AND SIGNATURE

☒ I certify that I have read and am familiar with the provisions of the Standing Rules of the Senate and the Standing rules of the House of Representatives relating to the provision of gifts and travel. I have not provided, requested or directed a gift, including travel, to a Member of Congress or an officer or employee of either House of Congress with knowledge that receipt of the gift would violate rule XXXV of the Standing Rules of the Senate or rule XXV of the Rules of the House of Representatives during this filing period.

Gift Prohibition/Limits

- For **Non-Lobbyists**, the general rule is a **gift limit**, not a ban: Members and staff may not accept any single gift of \$50 or more, and all gifts from the same source must total less than \$100 in aggregate value in the same calendar year.
- For **Lobbyists and Companies that Employ or Retain Lobbyists**, gifts are **prohibited** unless specifically excepted.



Selected Gift Exceptions – House & Senate

- **Items of nominal fair market value:** t-shirts, ball caps, greeting cards – or anything under \$10 (except food and drink in a one-on-one setting); the “no cup of coffee” rule
- **Reimbursement:** Anything for which the Member or legislative employee pays the market value or promptly returns (note: FMV is universal exception across jurisdictions)



Selected Gift Exceptions – House & Senate

- **Reception exception:** Food or refreshments of nominal value not offered as part of a meal and not taken in a one-on-one setting, such as appetizers and drinks at a reception, or coffee, fruit and donuts at a large breakfast meeting
- **Widely attended gatherings:** 3-part test (diverse and numerous, official duties, sponsor must invite)
- **Informational materials:** (e.g., books)

Selected Exceptions – Personal Friendship

- Must be based on a *real* friendship
- History of reciprocal gift-giving
- Gift paid for with personal funds – not the corporation
- Special authorization can be granted



Travel Rules / Site Visits

- Generally, Members and staff may not accept expenses for travel from companies that employ or retain lobbyists.
- However, paying for “one-day” events may be permissible.
- Lobbyists can’t travel on any segment of trip with Members/staff and can’t plan/organize the trip.
- Generally, can’t pay for “local” travel.
- Pre-clearance & post-travel disclosure.



Entertainment & Educational Events

- Personal hospitality permissible in limited circumstances.
- Offsite entertainment at ticketed events not permissible.
- Charitable events okay if invite from sponsor.
- Nominal food and refreshments at educational briefings okay if not paid by lobbying registrant.

Federal Executive Branch

- Executive Branch employees may not accept a gift from a “Prohibited Source” – those seeking official action, conducts activities regulated by the agency, has interests that may be substantially affected by the performance/nonperformance of the official’s duties, or doing business or seeking to do business with the agency – unless an exception applies.
- No *additional* restrictions on registered lobbyists under U.S. Office of Government Ethics (“OGE”) gift rules which are generally applicable to agency employees.
 - *But note: ethics pledge for political appointees*

Gift Rules – Executive Branch



Exceptions:

- De Minimis value: \$20 per gift or a \$50 annual limit from a single source
- Modest items of food and drink other than as part of a meal (“soft drinks, coffee and donuts”)
 - Does not count toward annual limit
- Widely attended gatherings (note: the attendee must secure a “determination of agency interest” from the agency ethics officer *prior* to attending)
- Items with little intrinsic value (greeting cards, plaques, certificates, etc.)
- Opportunities, benefits, discounts, rewards or prizes available to the general public

Biden Ethics Pledge – Executive Branch Officials

- Biden Ethics Pledge regarding gifts further restricts OGE rules for **political appointees only**
- Prohibits political appointees from accepting gifts from lobbyists or employing organizations, subject to limited exceptions
 - *Exceptions not included: \$20 de minimis; awards and honorary degrees; gifts from employee's outside business; gifts in conjunction with political participation; widely attended gatherings; social invitations; food, refreshments and entertainment in a foreign area.*
- Does not cover employers who retain *outside* lobbyists; only covers lobbying firms/in-house lobbying operations

States/Localities Have Many Different Regimes

- For both lobbying disclosure and gift rules, states, cities, and counties have varied rules.
 - Some states require lobbying registration prior to engaging in lobbying activity.
 - Some states have separate lobbying disclosure regimes for legislative and executive branches; some only require registration and disclosure for work on legislative matters.
 - Gift rules can apply differently between legislative and executive branches. Different rules for particular agencies, such as Treasurer's offices and pension funds, often apply.

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Pay-to-Play Restrictions

Campaign-Finance vs. Pay-to-Play Laws: Overview

- Campaign finance laws were enacted to provide accountability and transparency to the election process and to limit the influence of money in politics
- Campaign-finance laws typically impose contribution limits and set strict disclosure and reporting requirements on political campaigns and other political recipients
- Pay-to-Play laws impose reduced contribution limits and heightened disclosure requirements on companies that hold or seek to hold government contracts

Pay-to-Play Laws: Overview

- In the world of government contracting, “pay-to-play” is generally known as the practice of an individual or business making a political contribution with the hope of “buying” access for consideration for a government contract.
- It is always illegal to make a contribution with the intent or understanding that the contribution will result in the award of a government contract; however, it is not illegal to participate in the political process without any such intent or understanding.



Pay-to-Play Laws: Overview

- Pay-to-play laws sit at the intersection of procurement and campaign-finance laws and may impose reduced contribution limits on contributions by government contractors & certain associated individuals.

- In short, “pay-to-play laws”:
 - Seek to prevent businesses
 - Including some individuals
 - From making or soliciting certain political contributions (the “pay”)
 - If they have been awarded or are seeking government contracts (the “play”)

Pay-to-Play Laws: Federal

- Federal government contractors may not make federal political contributions
- In practice:
 - This restriction primarily applies to sole proprietors
 - Corporations cannot make direct contributions at the federal level, so this restriction is most relevant if a federal government contractor organized as a corporation wants to contribute to a federally registered Super PAC
 - If a federal government contractor is organized as a partnership or LLC (with no corporate members), no federal contributions may be drawn upon the account of the partnership or LLC)
 - Individual officers of a corporation or members of a partnership or LLC with federal government contracts may still contribute with personal funds via a personal check or credit card

Pay-to-Play Laws: State

- Some states (counties, cities and municipalities) have enacted pay-to-play laws
- These laws usually take one of two forms:
 1. Prohibition Law (restricts eligibility for government contracting opportunities)
 2. Disclosure Law (applies on a pre-contract, annual, bi-annual or quarterly basis)
- A relationship with a government entity may be subject to a Disclosure Law, but may not necessarily be subject to a Prohibition Law

Pay-to-Play Laws: State Variations

- **New Jersey** has statewide pay-to-play laws in effect that apply to Executive, Legislative, County and Municipal contracts
 - The vendor business entity is always covered
 - Variations exist in terms of covered contributors and covered recipients
 - > 10% owners at the legislative, county and municipal level
 - 10% or greater owners of a corporation, any equity member of a P.C., officers of a corporation, equity members or equity partners of an LLC or partnership at the Executive Branch level
 - Covered recipients may contribute up to reduced limits (\$200 per election or \$200 per calendar year to a covered political recipient)
- **Maryland** does not have a pay-to-play Prohibition Law in effect at the statewide level but does have a Disclosure Law that applies on a pre-contract and semi-annual basis to business entities that have contracts totaling \$200,000 or more in the aggregate with any Maryland government entity

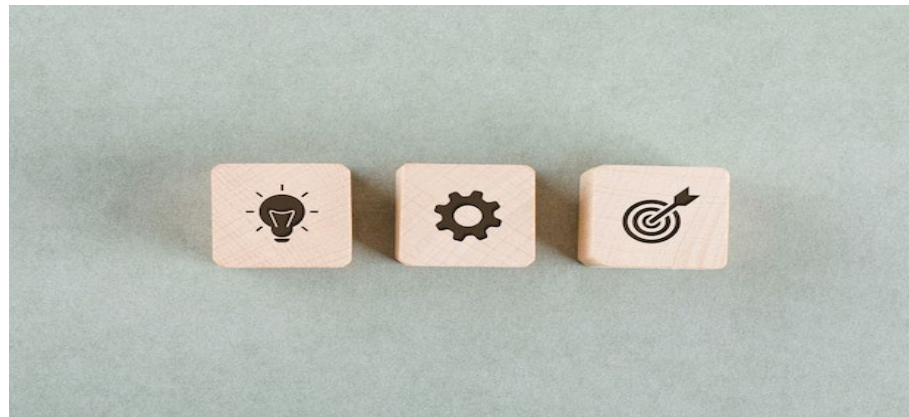
Pay-to-Play Laws: State Variations

- **Illinois** has a statewide pay-to-play law in effect that apply at the Executive Branch Level
 - The vendor business entity is always covered
 - Executive employees are covered
 - > 7.5% owners of the vendor business entity are covered
 - Absolute prohibition on contributions to state level recipients

- Neither **New York State** nor **Pennsylvania** has a statewide pay-to-play Prohibition law in effect
 - Pennsylvania has an annual statewide Pay-to-Play Disclosure law in effect
 - New York City has “Doing Business Limits”
 - Philadelphia has a stringent pay-to-play Prohibition Law in effect

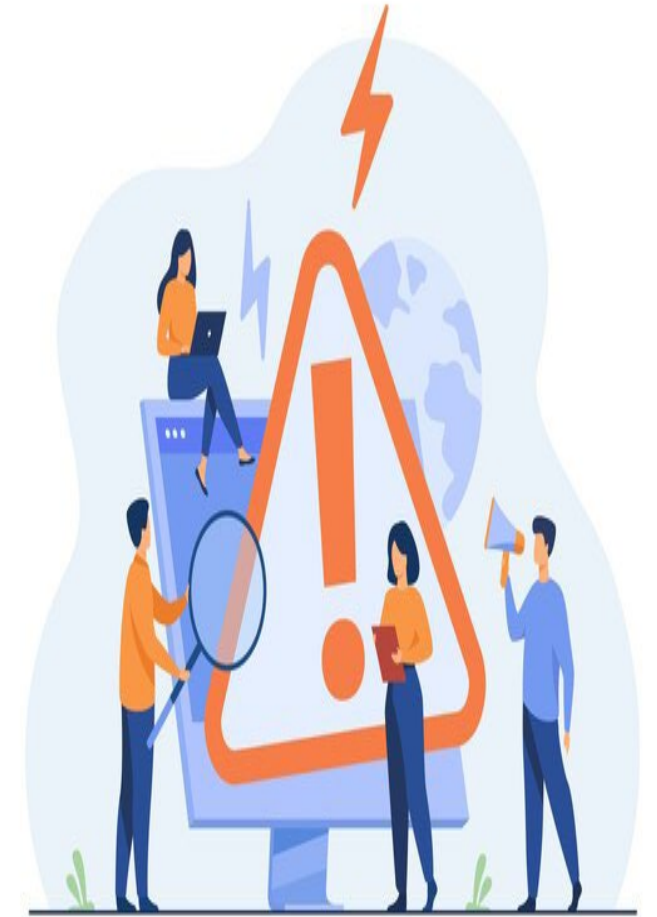
Pay-to-Play Laws: State Wrap-Up

- Pay-to-play laws vary from state to state and sometimes within a state
- Government contractors who are politically active (or have individuals within the company who are politically active) need to pay close attention to these restrictions.
 - These restrictions may also apply to spouses, civil union partners & resident children of covered individuals
- These laws are often applied as strict liability statutes



Pay-to-Play Laws: State Wrap-Up

- One contribution by the vendor business entity or by a covered individual in excess of a pay-to-play limit can lead to severe consequences, including:
 - Monetary fines and penalties
 - Breach of contract
 - Loss of government contracting opportunities in varying periods of time
 - Reputational risk
- Remember – an issue in one jurisdiction may be disclosable in another jurisdiction as part of the procurement process

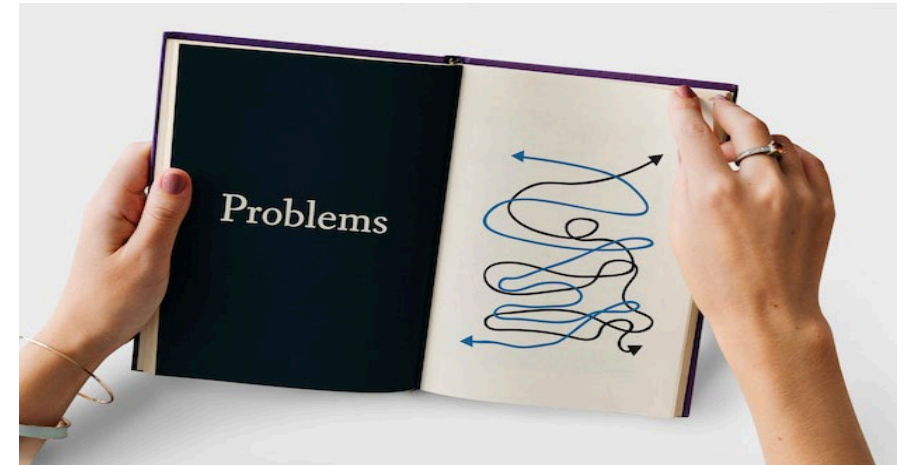


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Strategies for Compliance

Strategies for Compliance

- Failure to comply with lobbying laws, gift rules, campaign-finance and pay-to-play laws may lead to:
 - Loss of current government contracts
 - Loss of eligibility for future government contracts
 - Monetary penalties
 - Debarment
 - Reputational risk
 - Decreased employee productivity

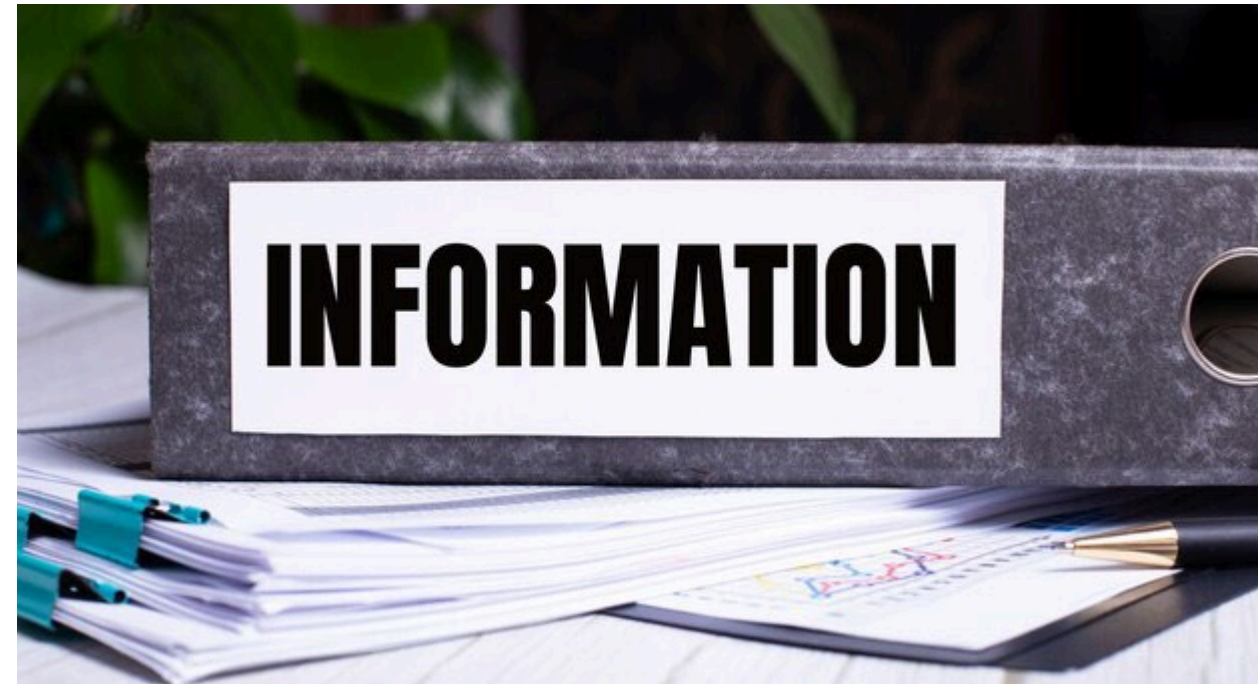


Strategies for Compliance

- Balance individual political activity with maintaining eligibility for government contracts
- Identify covered individuals and make compliance expectations clear for political activity, lobbying and gift giving
- Create and adopt a policy
- Train relevant people on the contents of the policy
- Track covered activities so you are prepared for disclosure obligations

Strategies for Compliance

- Establish Procedures and Protocols
- Put the right team in place & train relevant people
- Common themes exist but the law often varies from jurisdiction to jurisdiction – do your best to understand those variations
- Be an “informed consumer” (and an informed attorney!)



Strategies for Compliance - Wrap-Up

- Develop a Workable Policy:
 - Explains the law (at a high level)
 - Tells people why they should care
 - Establishes clear and neutral procedures
 - Establishes procedures for tracking covered activities
 - Makes compliance expectations clear



Strategies for Compliance - Wrap-Up

- Train and (re)train relevant people on the contents of your Policy.

- Remember just because everyone is trained today doesn't mean that your job is done:
 - A policy is not worth the paper it is written on if people are not trained
 - People within a company may come and go
 - People within a company may change positions
 - People may simply forget about the procedures

Strategies for Compliance - Wrap-Up

- Remind people that nobody and nothing is perfect
- If a mistake happens, it is important to deal with it head on (ignoring it won't make it go away & could make things worse)
- Learn from mistakes and continue to put your best foot forward and refine your policies and procedures as you go
- Don't be afraid to admit when there is no definitive answer – discuss the “gray” and the company's tolerance for risk (remember Rule 2.1)!

Reputation is Everything!

“It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently.”

- Warren Buffett



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Rebecca Moll Freed is a partner in the firm's Newark office and a member of the Government Contracts and Procurement Policy practice. Rebecca's practice is truly at the intersection of law, government and business. In the world of government contracting, Rebecca works hand in hand with clients to help them comply with applicable law by developing workable strategies and best practices for compliance with varying procurement, pay-to-play, lobbying, gift and ethics rules.



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Tim Peckinpaugh's practice focuses on energy, environmental, and natural resource legislative and funding issues. Tim has represented clients for over thirty years in all aspects of energy policy, including nuclear (fission and fusion), hydroelectric, coal, oil and natural gas, electricity, as well as a variety of clean technology and energy efficiency issues. He also represents major international corporations and local communities on Department of Energy nuclear waste cleanup, nuclear security, and contracting issues. In addition, Tim represents regional chambers of commerce and companies from the Pacific Northwest on appropriations, grant funding, energy, technology, natural resource, trade, agriculture, workforce, and economic development opportunities.



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Scott Nelson has spent the last two decades working at the intersection of policy, politics, and law, working as senior staff to a U.S. Senator, a Governor, a political appointee in the federal executive branch, on several political campaigns, and as a lawyer and lobbyist in private practice. His practice has most recently focused on helping clients with complex federal policy issues, including risk mitigation and tax provisions of the Affordable Care Act, international provisions and elements impacting trade in what became the Tax Cut and Jobs Act, and various environmental, energy, and infrastructure finance policy issues.

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