

Government Relations

Contributing editor
Charles L Landgraf



2019

GETTING THE
DEAL THROUGH 

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Charles L Landgraf
Arnold & Porter Kaye Scholer LLP

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This article was first published in February 2019
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Published by
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Tel: +44 20 3780 4147
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First published 2018
Second edition
ISBN 978-1-912228-88-1

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Preface

Government Relations 2019

Second edition

Getting the Deal Through is delighted to publish the second edition of *Government Relations*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Mexico.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Charles L Landgraf of Arnold & Porter Kaye Scholer LLP, for his continued assistance with this volume.

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London
January 2019

United States

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Arnold & Porter Kaye Scholer LLP

Form of government

1 Constitution

What is the basic source of law? Describe the scope of, and limitations on, government power relevant to the regulation of lobbying and government relations.

The United States is ruled through a federal system of government, where the central government and local governments share lawmaking power. As a result, the United States has several basic sources of law, including the United States Constitution (the Constitution), state constitutions, federal and state statutes, common law, case law and administrative law. Although the Constitution protects lobbying as free speech and a way to petition the government under the First Amendment, there are limitations to these rights. Therefore, while lobbying is a constitutionally protected right, it is subject to federal and state regulation.

Because regulatory powers are split between the federal government and state governments, the United States has complex lobbying rules that require extensive public disclosure on lobbying activities. Generally, federal regulations are created by Congress and signed into law by the President. These regulations govern federal lobbying activities, including lobbying before Congress and federal agencies. In recent years, some presidents have issued executive orders to limit or prohibit their appointees' lobbying activities. Similarly, state and local governments regulate state and local lobbying activities within their jurisdictions. Consequently, different rules and regulations may apply depending on what government entity is being lobbied and whether it is a federal or local government entity.

2 Legislative system

Describe the legislative system as it relates to lobbying.

As stated, the United States is ruled through a federal system of government, where the Congress, the President and the federal courts share powers reserved to the federal government, in accordance with the Constitution. Any powers not expressly reserved to the federal government fall within states' power. As a result, both the federal government and each of the 50 states have independent legislative systems that vary in structure and scope. For the sake of simplicity, only the federal legislative system is discussed here.

As noted, the federal government shares governance power equally between the legislative, executive and judicial branches. The legislative branch is charged with making laws. It is made up of the Congress and government agencies that support the Congress. Congress is a bicameral legislature, consisting of the House of Representatives and the Senate. The House of Representatives is made up of 435 representatives, five delegates and one resident commissioner, and the Senate is made up of 100 senators. Both chambers are elected directly, but governors may fill Senate vacancies through appointment. House vacancies are filled only by special election.

While Congress is the primary legislative body, Congress has delegated rule-making authority to many federal, quasi-independent and independent agencies. As a result, these agencies, which are generally under the President's control, are able to legislate by promulgating regulations.

Unlike members of Congress, agency officials are either appointed by the President or career civil servants.

3 National subdivisions

Describe the extent to which legislative or rule-making authority relevant to lobbying practice also exists at regional, provincial or municipal level.

While the Supremacy Clause of the Constitution provides that states may not enact laws in direct conflict with the Constitution or federal law, the 10th Amendment of the Bill of Rights states that: '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' Therefore, the federal government has limited and enumerated powers, and the states have the presumption of power unless the Constitution expressly states otherwise. In addition, the federal and state governments have concurrent authority over taxing, procurement, infrastructure and environmental issues.

4 Consultation process

Does the legislative process at national or subnational level include a formal consultation process? What opportunities or access points are typically available to influence legislation?

State and local legislatures have their own legislative rules and procedures. With the exception of the state of Nebraska, every state has a bicameral legislature. Ten states have full-time legislatures and 26 states have legislatures that are considered to be more than part-time but not quite full-time. The remaining 14 states have part-time legislatures. Depending on the size and scope of state legislatures, there may be opportunities to influence legislation through interaction with government or parliamentary staff. However, most of the legislative work in state legislatures is done through the committee process. Similar to Congress, proposed legislation is examined and reported out by the committee of jurisdiction before the full legislature acts. Typically, interested parties can influence legislation through the committee process.

5 Judiciary

Is the judiciary deemed independent and coequal? Are judges elected or appointed? If judges are elected, are campaigns financed through public appropriation or candidate fundraising?

In the United States, the judiciary is deemed independent and coequal. The President nominates federal judges for lifetime appointments and they are confirmed by the Senate. The federal bench has more than 600 district court judges, almost 200 court of appeals judges and nine Supreme Court justices. However, most cases are resolved by state judges. The majority of state judges do not have lifetime appointments and in 39 states judges are elected by the public. In recent years, spending in judicial election campaigns has risen dramatically and most campaigns depend on candidate fundraising. Two states offer public financing for Supreme Court candidates, but candidates must agree to a single-donor contribution limit to qualify for funding.

Regulation of lobbying

6 General

Is lobbying self-regulated by the industry, or is it regulated by the government, legislature or an independent regulator? What are the regulator's powers?

In the United States, lobbying is regulated by federal and state governments in attempt to balance the tension between the right to petition the government and the regulation of access to and power over policymakers. At the federal level, lobbyists must report lobbying activities to the Secretary of the Senate and the Clerk of the House of Representatives, who refer acts of non-compliance (or suspected non-compliance) to the Department of Justice, specifically the US Attorney for the District of Columbia. The law does not allow the Secretary or the Clerk to write substantive regulations or make definitive opinions on the interpretation of the law, but they have occasionally issued guidance on registration and reporting requirements. The US Attorney's Office for the District of Columbia has the power of enforcement as in other matters, and, in general, it offers lobbying registrants the opportunity to take corrective action before taking further action. If a registrant fails to correct the non-compliance issue, prosecutors can levy civil penalties of up to US\$200,000 per violation and up to five years' imprisonment.

At the state level, all states require lobbyists to report on certain activities, but have a range of different rules relating to reporting requirements, campaign finance rules and ethics. For example, in some states lobbyists can give certain gifts to lawmakers whereas in other states (and the federal government), gifts are highly limited. To lobby a state legislature, it is typically necessary for an individual to register with the state entity that oversees state lobbying activity. In addition, states levy a variety of different penalties for non-compliance or violations of lobbying regulations.

7 Definition

Is there a definition or other guidance as to what constitutes lobbying?

The United States does not have a single definition for lobbying. For federal lobbying, the Lobbying Disclosure Act of 1995 (LDA), which governs federal lobbying, defines lobbying activities as any oral, written or electronic communication made to an executive or legislative branch official on behalf of a client with regard to:

- the formulation, modification or adoption of federal legislation;
- the formulation, modification or adoption of a rule, regulation, executive order or any other programme;
- the administration or execution of a federal programme or policy; and
- the nomination of a person subject to confirmation by the Senate.

Any preparation or planning activities and research that is intended to be used in lobbying activities is also included in the definition.

The same statute defines a lobbyist as an individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities make up less than 20 per cent of the time engaged in the services provided by such individual to that client over a three-month period.

8 Registration and other disclosure

Is there voluntary or mandatory registration of lobbyists? How else is lobbying disclosed?

The lobbying reporting requirements have changed historically based on the way lobbying has been practised and perceived in US society. In general, reporting requirements have been implemented to allow Congress to enhance transparency and disclosure of lobbying activities while avoiding infringing on Americans' right to petition their government. Federal law mandates that lobbying firms and organisations must register and file reports of lobbying activities with the Secretary of the Senate and the Clerk of House of Representatives. Lobbyists are required to register a client and each registrant must file a quarterly activity report disclosing the amount of income from a client. The report must provide specific details of which governmental bodies

were lobbied, and on what issue and topic. Lobbyists and special interests are also required to report political donations on a semi-annual basis. Lobbyists representing the interests of a foreign country or entity must also make periodic disclosures regarding the relationship, related activities and finances to the Department of Justice.

9 Activities subject to disclosure or registration

What communications must be disclosed or registered?

Oral and written communications are not disclosed on an individual basis, but lobbyists are required to report quarterly which offices of the executive and legislative branches of government have been lobbied. As a result, there is a growing concern, including from the non-partisan Office of Congressional Ethics, that 'shadow lobbying' exists under the currently regulatory scheme. Shadow lobbying is where lobbyists might choose not to register under the LDA or to report discussions with governmental officials despite their active attempts to influence public policymaking.

Documents controlled by the federal government are subject to disclosure in certain circumstances. Under the Freedom of Information Act, the public has the right to request access to federal agency records and information unless the records are exempt from disclosure. Exemptions exist for sensitive information that may be classified, invade a person's privacy, or cause other harm. The Freedom of Information Act only applies to the executive branch of the federal government. Congress and private citizens are not subject to the statute. Therefore, communications made to executive branch agencies may be subject to disclosure if a person files a Freedom of Information Act request with that agency.

10 Entities and persons subject to lobbying rules

Which entities and persons are caught by the disclosure rules?

In general, the lobbying rules in the United States are crafted to capture professional lobbyists and to not include grass-roots lobbying efforts and other lobbying activities that are done on a pro bono basis. There is no distinction in terms of reporting requirements between persons that lobby on behalf of themselves and for those that lobby third parties. Lobbying firms are required to file a separate registration for each client. A lobbying firm is exempt from registration for a particular client if its total income from that client for lobbying activities does not exceed US\$3,000 during a quarterly period. The registration requirement is triggered when either: (i) the date the employee or lobbyist is employed or retained to make more than one lobbying contact (and meets the 20 per cent threshold for time engaged); or (ii) on the date the employee or lobbyist makes a second lobbying contact.

11 Lobbyist details

What information must be registered or otherwise disclosed regarding lobbyists and the entities and persons they act for? Who has responsibility for registering the information?

Lobbyists are required to file a quarterly lobbying report that discloses a number of different items, including information about the client, income or expenses, specific lobbying issues, governmental bodies lobbied and the name of each individual who acted as a lobbyist that quarter. In addition, individuals are required to disclose whether they served in an official position prior to working as a lobbyist. Separate to a lobbying disclosure report, lobbyists, lobbying firms and organisations are required to report any federal campaign contributions of US\$200 or more to organisations or candidates including candidate committees, leadership political action committees (PACs) and party committees. Lobbyists who act on behalf of foreign countries or entities must also file periodic disclosures with the Department of Justice.

12 Content of reports

When must reports on lobbying activities be submitted, and what must they include?

Lobbyists must report their activities on a quarterly basis, and lobbying firms adopt different reporting practices depending on their internal procedures and controls. Lobbying reports require lobbyists to identify the general issue lobbied on through a lobbying issue code

Update and trends

During the 2016 presidential election, questions arose regarding the influence of foreign countries in the United States' elections. In response to these questions, Congress has held hearings and is looking into disclosure requirements for political advertisements that are placed on social media. Concerns regarding foreign interference in the 2016 election also resulted in an independent counsel investigating the role that Russia may have played in the election. To date, the independent counsel has issued indictments based on lobbyists failing to file FARA disclosures. The independent counsel has exposed loopholes in FARA, which may result in updates and changes being made to it.

and to elaborate on specific lobbying issues by writing a description of their activities. Lobbying reporting does not require lobbyists to report which officials were contacted, only the overall body they are a part of, such as the chamber of Congress or an executive agency. Some lobbying firms make an effort to be overly inclusive in reporting their activities by listing specific issues and legislation that were lobbied on, where as other firms might provide a summary that makes their activities opaque. Lobbyists are required to report income or expenses rounded to the nearest US\$10,000 of all lobbying-related income from the client over the amount of US\$5,000.

13 Financing of the registration regime**How is the registration system funded?**

The United States' lobbying registration system, the Lobbying Disclosure Act Database, depends on public financing and is managed by the Secretary of the Senate and the Clerk of the House of Representatives.

14 Public access to lobbying registers and reports**Is access to registry information and to reports available to the public?**

The Senate and House Offices of Public Records receive, process and maintain lobbying reports received through the Lobbying Disclosure Act Database. The Database is internet-accessible and the public can look up quarterly lobbying reports based on a number of different criteria including client, lobbying firm and lobbyist. Separately, the Federal Election Commission maintains a database that keeps track of political donations. Consequently, some non-profit organisations, such as OpenSecrets, have successfully created a platform that allows the public to view a companies' lobbying activities and the donations made by a given company's PAC or employees in one searchable database.

15 Code of conduct**Is there a code of conduct that applies to lobbyists and their practice?**

The code of conduct that applies to lobbyists and their practice more generally is established by the House and Senate Committees on Ethics. The Committees establish a mandatory code of conduct that members, officers and employees of Congress must adhere to and, by extension, the lobbyists who interact with them. For example, under both the House and Ethics rules, members and employees are not allowed to accept any gift from a registered lobbyist, foreign agent or an entity that employs or retains a lobbyist. In addition, members and employees are unable to attend events or meals held by lobbyists unless it meets certain criteria, which are established by the Ethics Committees.

16 Media**Are there restrictions in broadcast and press regulation that limit commercial interests' ability to use the media to influence public policy outcomes?**

There are no restrictions in broadcast and press regulation that limit commercial interests' ability to use the media to influence public policy outcomes.

Political finance**17 General****How are political parties and politicians funded in your jurisdiction?**

Most political campaigns are privately funded. Qualifying presidential candidates can receive public funding, if they agree to abide by certain spending limitations. Although public funding is indexed for inflation, the spending caps have not kept up with private campaign spending and the rules are difficult to abide by. As a result, very few qualifying presidential candidates choose to accept public funding. For example, in addition to the overall spending limitation, there are spending limits set for each individual state based on the voting-age population rather than where the state's primary date falls in the election year.

18 Registration of interests**Must parties and politicians register or otherwise declare their interests? What interests, other than travel, hospitality and gifts, must be declared?**

Political candidates must register with the Federal Election Commission as soon as they receive contributions or make expenditures of at least US\$5,000. Candidates must file a Statement of Candidacy to authorise a principal campaign committee to raise and spend funds on their behalf. Thereafter, the campaign must report its receipts and disbursements regularly.

Congressional candidates, members of Congress and certain congressional staff must file periodic financial disclosure reports that include information about the amount and source of income, and certain financial transactions. These documents are accessible through the Senate and House websites.

19 Contributions to political parties and officials**Are political contributions or other disbursements to parties and political officials limited or regulated? How?**

Individuals may contribute up to: US\$2,700 per election to a political candidate; US\$5,000 per year to a federal political action committee; US\$10,000 per year (combined) to local, district and state party committees; US\$33,900 per year to national party committees; and US\$101,7000 per account per year to additional national party committee accounts, which include the presidential nominating convention, election legal proceedings and national party headquarters buildings. Individuals may make unlimited contributions to independent expenditure-only political committees, which are often called super PACs.

20 Sources of funding for political campaigns**Describe how political campaigns for legislative positions and executive offices are financed.**

Public funding is available for qualifying presidential candidates, but spending caps that have not kept up with abundant private campaign donations and a rigid regulatory framework have led to very few candidates opting to use public funding. Candidates for congress do not have access to a public funding system.

Most presidential candidates and all congressional campaigns are funded from individual donations, political action committee donations and party donations. Super PACs can also spend money on behalf of a candidate's campaign, provided that the spending is not coordinated with the campaign. There is disagreement on whether super PAC spending is helpful to candidates. Some candidates have reached agreements with their opponents to discourage outside spending in their races in an attempt to combat uncontrolled and sometimes radical super PAC advertising.

21 Lobbyist participation in fundraising and electioneering**Describe whether registration as a lobbyist triggers any special restrictions or disclosure requirements with respect to candidate fundraising.**

Registered lobbyists must report aggregate contributions of US\$200 or more to any federal candidate or officeholder, leadership PAC or

political action committee semi-annually. Registered lobbyists must also report the names of all political committees established or controlled by them semi-annually.

22 Independent expenditure and coordination

How is parallel political campaigning independent of a candidate or party regulated?

Parallel political campaigning independent of a candidate is generally unlimited, provided that the communications are not coordinated with the candidate. If an individual or political committee pays for a coordinated communication, the communication is considered an in-kind contribution and is subject to federal campaign finance law. Public communications that qualify as an independent expenditure must display a disclaimer that contains the full name of the sponsoring committee along with any abbreviated name used by the committee. Communications that are not authorised by a candidate must contain a disclaimer to that extent. Social media messaging has been subject to little regulation, but since the 2016 election, Congress has started to look into social media advertising disclosure requirements.

Ethics and anti-corruption

23 Gifts, travel and hospitality

Describe any prohibitions, limitations or disclosure requirements on gifts, travel or hospitality that legislative or executive officials may accept from the public.

Federal ethics rules prevent House and Senate members and staff from accepting gifts from lobbyists, foreign agents or organisations that retain lobbyists unless the gift meets a very narrow set of criteria. In addition, members and staff are strictly limited in terms of the travel and hospitality they may accept from the public. The ethics rules are generally interpreted to allow members and their staff to accept free attendance at receptions and events widely open to the public. The ethics committees approve attendance at 'widely attended events' if it fits the following criteria:

- there is a reasonable expectation that at least 25 people will attend the event;
- the event is open to individuals throughout a given industry of professionals or those who represent a range of individuals interested in a given matter;
- the invitation came from the sponsor of the event; and
- the attendance of the member of their staff is related to his or her official duties.

For the executive branch, the Office of Government Ethics also establishes standards of conduct for the executive employees.

24 Anti-bribery laws

What anti-bribery laws apply in your jurisdiction that restrict payments or otherwise control the activities of lobbyists or holders of government contracts?

The United States has a number of laws geared towards the prevention and prosecution of public corruption. The statutes differ in jurisdictional elements and generally require evidence of a quid pro quo agreement taking place to successfully prosecute a public official on bribery charges. The United States legal code prevents lobbyists from being able to bribe policymakers on an individual level through a quid pro quo arrangement. Furthermore, US law ensures that executive branch officials are not influenced when determining how to award federal contracts.

25 Revolving door

Are there any controls on public officials entering the private sector after service or becoming lobbyists, or on private-sector professionals being seconded to public bodies?

Public officials and staff entering the private sector after their public service are subject to a number of controls and restrictions under federal law. Federal personnel are subject to conflict-of-interest restrictions. Beyond matter-specific prohibitions or cooling-off periods, senior officials from the executive branch and some congressional staff are prevented from making contact with their former offices, departments or agencies for one year regardless of the matter. Members of Congress are required to undergo a two-year cooling-off period where they are unable to engage in lobbying activity.

Presidents have also imposed lobbying bans on administration officials by issuing executive orders. President Barack Obama banned all of his administration officials from contacting their former agencies for two years after they leave. President Trump extended the ban to five years and imposed a lifetime ban from lobbying for foreign governments for his administration officials. President Obama also blocked registered lobbyists in the preceding year from taking administration jobs. President Trump revoked this executive order and issued a restriction on allowing lobbyists to join his administration as long as they do not work on issues on which they lobbied on in the previous two years.

26 Prohibitions on lobbying

Is it possible to be barred from lobbying or engaging lobbying services? How?

There are no measures that ban individuals from lobbying or engaging in lobbying services permanently. However, as previously discussed, some executive and legislative branch employees are subject to a temporary lobbying ban after they leave government service. In some cases, individuals may agree to be barred from lobbying in return for receiving a political appointment to serve in the executive branch. Such

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rules have been established by executive order under the Obama and Trump administrations. See question 25.

Recent cases and sanctions

27 Recent cases

Analyse any recent high-profile judicial or administrative decisions dealing with the intersection of government relations, lobbying registration and political finance.

In 2010, the Supreme Court held that the Constitution's First Amendment prohibits the government from restricting independent political spending by corporations and unions in *Citizens United v Federal Elections Commission*. This landmark case reversed decades of precedent by allowing corporations and unions to finance campaign advertising. The decision led to the creation of super PACs, which can accept unlimited contributions and fund mostly political advertising without having to disclose their donors. Super PACs are not allowed to coordinate with candidates, but they can make independent expenditures in favour of or to oppose a candidate.

Four years later, in *McCutcheon v Federal Elections Commission*, the Supreme Court held that the government cannot set an aggregate campaign contribution limit for individuals. While this decision further weakened campaign finance laws, it only affected major political donors. It did not have a large impact on campaign spending because relatively few people had the motivation and means to spend more than the pre-*McCutcheon* campaign contribution limits.

In 2015, the Supreme Court held that the First Amendment does not bar states from prohibiting judicial candidates from making personal appeals for campaign contributions, as long as the restriction on speech was narrowly tailored to serve a compelling interest in *Williams-Yulee v The Florida Bar*. In this decision, the Supreme Court stressed that judicial elections are different and that judges are not politicians.

28 Remedies and sanctions

In cases of non-compliance or failure to register or report, what remedies or sanctions have been imposed?

Under the LDA, civil penalties of up to US\$200,000 may be imposed for each violation and up to five years' imprisonment may be sought for knowing and corrupt violations. The Secretary of the Senate and Clerk of the House of Representatives make referrals to the US Attorney's office for lobbyists that fail to file lobbying disclosures. The US Attorney's office offers lobbyists opportunities to take corrective action, but after four unsuccessful attempts, prosecutors may seek civil or criminal penalties.

Lobbyists who represent foreign entities and countries must make periodic public disclosures to the Department of Justice, as required by the Foreign Agents Registration Act (FARA). Failure to register or file periodic disclosures, if done wilfully, is punishable by a fine of up to US\$10,000 or imprisonment of up to five years.

While LDA and FARA penalties are rarely issued, there have been high-profile non-compliance cases that have been exposed since the 2016 election cycle. Most recently, Paul Manafort the former campaign chairman of President Trump's campaign, was indicted for failing to file FARA disclosures related to his representation of Ukraine. Tony Podesta, a prominent democratic lobbyist, was also implicated. Prior to these developments, one lobbying firm made headlines in 2015 when it agreed to pay US\$125,000 for violating the LDA repeatedly.

* *The information in this chapter is accurate as of February 2018.*

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