BNA's
Corporate Counsel Weekly
CORPORATE PRACTICE SERIES

VOL. 21, NO. 8 62-64 FEBRUARY 22, 2006

Corporations Need to Adopt Effective Policies, Procedures to Address Political, Lobbying Activity

BY MARTHA L. COCHRAN,
ROBERT S. LITT,
AND RONALD A. SCHECHTER

Organizations whose interests are affected by government action must engage with decisionmakers at all levels of government in the United States. It is a simple fact of doing business.

Large corporations often have Washington, D.C., and regional and state offices, staffed with government affairs employees and supported by large numbers of outside lobbyists. The government affairs operations of smaller companies are more modest. But, whatever their size and scope, an organization's government affairs activities are subject to strict and varying laws and rules at the federal, state, and local levels, which dictate:

- Whether, how, and within what limits corporations and other organizations and individuals may contribute to candidates for public office;
- Whether, how, and within what limits a private party may confer meals, entertainment, or other benefits upon government officials; and
- Whether and how those who communicate with government officials about legislation or executive action must disclose those communications and related expenditures.

Martha L. Cochran, Robert S. Litt, and Ronald A. Schechter are partners at Arnold & Porter LLP, based in Washington, D.C. Ms. Cochran counsels clients on campaign finance, lobbying and government ethics compliance; and represents clients before the Federal Election Commission. Mr. Litt specializes in white collar defense and corporate internal investigations and compliance, including representation of clients before the FEC. Mr. Schechter counsels clients on government contract compliance issues and has represented contractors in fraud and suspension and debarment proceedings. Mr. Litt and Mr. Schechter formerly served in the U.S. Department of Justice. Ms. Cochran served at the Securities and Exchange Commission and in U.S. Senate and House senior staff positions. Contact Ms. Cochran at (202) 942-5228; Mr. Litt at (202) 942-6380; and Mr. Schechter at (202) 942-5160.

Those who fail to follow the rules face potential civil and criminal consequences. The requirements are even more complex for companies that sell goods or services to the government and risk losing existing government contracts and being barred from new ones if they fail to comply.

Until recently, some lawmakers, executive branch officials, lobbyists, and business organizations have winked at the rules and assumed lax enforcement. But now, perhaps more than any time in recent memory, it is clear: The cops are on the beat. Federal prosecutors have shown that they will not hesitate to target those in the private sector, as well as those in government, who violate these rules. Increasing numbers of state prosecutors also have targeted both government officials and private entities engaged in political corruption.

What are the Relevant Laws?

Those with responsibility for the organization's government affairs activity should be aware of key areas of the law, violation of which could subject the organization to potential civil and criminal liability.

Lobbying Registration and Disclosure. The Federal Lobbying Disclosure Act (LDA) requires private par-

 ISSN 0886-0475

ties to register and file reports when they engage in specified types of contacts with congressional and covered executive branch officials, including certain communications regarding government contracts. Failure to comply with the law can lead to civil enforcement by the Department of Justice—which announced its first cases under the LDA last year—or potential criminal liability for knowing and willful false statements in filings required under the law.

The lobbying laws of states, counties, and municipalities often require far more detailed information than the LDA. In some jurisdictions, a single meeting between a state legislator and a corporate executive or outside consultant may trigger a lobbying registration obligation. Some jurisdictions also require reports of each meeting held with a covered official or each meal or other gift conferred upon a government official.

Gifts to Government Officials. Federal and state anti-bribery and anti-gratuity laws make it a criminal act to give anything of value to a government official with intent to influence an official act or in return for or because of an official act. The Justice Department also uses wire and mail fraud statutes to prosecute private parties for corrupt payments to federal, state, and local officials on the theory that the payment has defrauded the public of the ''honest services'' of the public official. Apart from these criminal statutes, other federal and state laws and rules, such as the congressional and executive branch ethics rules, specify numerous and varied limits on the value of *permissible* gifts, meals, and entertainment that may be given to government officials—creating what appear to be safe harbors within which benefits may be provided. Even so, prosecutors may view certain gifts, because of their size or frequency, or the circumstances under which they are offered, as illegal gratuities or bribes, subjecting the giver, as well as the recipient, to criminal liability.

The laws of many states and localities may be more stringent and provide fewer exceptions. Government

(continued on page 62)

(continued from back page)

contractors with state and federal agencies are subject to additional restrictions, violations of which could result in criminal prosecution, civil penalties, termination of a contract, and suspension or debarment for the contractor/donor.

Campaign Finance. Federal law prohibits the use of corporate funds and corporate facilities in support of candidates for federal office, except in limited circumstances. Corporate executives should understand that civil and criminal charges may follow an executive's use of company personnel for federal fundraising activities, or any reimbursement by the company, by bonus or otherwise, of an employee's campaign contribution. The Bipartisan Campaign Reform Act of 2002 increased civil and criminal penalties for federal election law violations, and the Justice Department has said that enforcement of the law is a priority. Prosecutors may view otherwise legal campaign contributions, in light of relevant circumstances, as bribes or illegal gratuities.

States and municipalities in most cases impose limits on the dollar value of contributions, may prohibit corporate contributions, may require reporting of contributions by donors, and also may limit or prohibit contributions facilitated by lobbyists or made at times when the legislature is in session.

Heed the Warning

The willingness of prosecutors and other enforcement officials to seek criminal, civil, and contractual penalties for violations of these laws should serve as a warning to any politically active company: A compliance program for government affairs is just as important as a program for insider trading, antitrust, environmental law, or other areas of potential organizational liability.

The Department of Justice guidelines used by prosecutors in determining whether to bring criminal charges against corporations for the acts of their employees, known as the ''Thompson Memorandum,'' cite ''[t]he existence and adequacy of the corporation's compliance program'' as an important factor in deciding whether to prosecute. Similarly, the Securities and Exchange Commission in its ''Seaboard Report'' and statements of policy has emphasized the importance of an effective corporate compliance system in the commission's evaluation of whether to bring an enforcement action against, or seek substantial civil fines from, a corporation. The Federal Acquisition Regulation, which governs virtually all federal government procurements, identifies whether a contractor had ''effective standards of conduct and internal control systems in place'' as a key factor in deciding whether to suspend or debar the contractor based upon wrongdoing by its employees.

The U.S. Sentencing Guidelines for organizations provide for a substantial reduction in a corporation's sentence if the corporation has an effective compliance and ethics program. The guidelines emphasize the importance of commitment by senior management and the board of directors to the program. Although the Supreme Court last year in *United States v. Booker*, 543 U.S. 220 (2005), held that the guidelines were no longer mandatory, most federal judges continue to afford them great weight in sentencing, and the guidelines' discussion of compliance programs remains influential.

Elements of Program

No single compliance program can be effective in all companies and all situations. However, the sentencing guidelines identify seven elements to determine whether a compliance program is sufficiently effective to justify mitigation of sentence. In the government affairs context, these criteria provide important guidance in developing a governmental affairs compliance program.

First, establish standards and procedures to prevent and detect criminal conduct.

The first step is to identify the legal requirements that govern the company's business. As discussed above, the key areas of law governing most organizations' government affairs activities in the U.S. are lobbying laws, ethics and gifts restrictions, and campaign finance laws. Government contractors also must comply with broad and detailed procurement-related laws and rules.

A company's policy statement typically would state—in strong and unambiguous language—its policy of complying with all relevant federal and state laws and regulations and its policy on key issues. It may address, among other things, corporate policy on activities that may be legal in some jurisdictions but prohibited under company policy (or permitted only with specified approval), such as

  CCW ISSN 0886-0475

whether corporate funds may be used to provide benefits or other gifts to government officials or to charities designated by them, and whether corporate funds may be used for campaign contributions in states where such contributions are legal.

The company should develop written procedures that employees must follow. An informal ''practice'' is no substitute for written procedures. Such procedures might require written approval by specified individuals or require submission of a form confirming that appropriate legal review has been conducted in connection with any request for payment of expenses for an event attended by government officials. The procedures also might call for employee ''checklists'' or other mechanisms to capture information required for filing accurate lobbying activity expenses with a government agency.

Although the size and formality of the government affairs compliance program may vary with the organization, what is important is that *some* program be designed to prevent violations, that it be implemented and followed, and that it be memorialized in writing.

Second, provide appropriate oversight.

The sentencing guidelines state that a company's board of directors should be knowledgeable about, and exercise oversight over, the organization's compliance program, and that high-level personnel must be assigned overall responsibility for it. Specified individuals must be delegated day-to-day responsibility and given adequate resources for the program, reporting periodically to high-level personnel and to the board.

The appropriate level of board and senior management oversight of the company's government affairs compliance program will differ, depending upon the scope of the company's government affairs activity and the risks it may present. However, someone must be accountable for day-to-day compliance responsibilities. Ideally, this should be someone who does not have line responsibility for the success of the government affairs efforts. The legal department constitutes an important component of the organization's government affairs compliance infrastructure.

Those with responsibility for supervision should identify all employees whose conduct or decisionmaking could lead to a violation of the relevant laws. Typically, these will be employees who have lobbying or other government affairs responsibilities in the relevant jurisdictions. If the company is a government contractor, members of the company's sales force also should be included. Someone within the company should be assigned responsibility for ensuring compliance by outside consultants.

Supervisors should have explicit responsibility for compliance with the requirements of law and company policy, and someone should be tasked with disseminating compliance materials.

Third, exclude high-risk individuals from government affairs activity.

The sentencing guidelines state that a company must use reasonable efforts to ensure that individuals who have engaged in illegal activities or conduct inconsistent with effective compliance are not allowed to exercise substantial authority within the organization. While this guideline speaks to management of the corporation generally, it offers useful guidance to those responsible for staffing a government affairs operation.

In the areas of political and procurement law, this element may be most relevant in the selection of outside lobbyists and consultants, but it also applies to any employee who may be given discretion in the conduct of any government affairs effort. Some companies delegate substantial discretion to retained lobbyists or business development specialists, particularly at the state and local levels where a national company may have inadequate knowledge of what ''buttons to push,'' or otherwise may lack the connections to reach governmental decisionmakers. It is not satisfactory simply to hire lobbyists and consultants and send them on their way. Their activities should be monitored and their expense vouchers carefully reviewed. An ''expense'' submitted for payment may actually represent an illegal gift to a government official. Employees of the organization responsible for compliance should be alert to any ''red flags'' suggesting possible illegal activity.

Fourth, periodically communicate the standards and procedures.

This may be done by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required. Managers must receive training on the legal requirements applicable to their areas of responsibility. They, in turn, must ensure that their subordinates and the company's agents understand their compliance responsibilities.

Many companies have policies relating to gift-giving, political contributions, and lobbying in their codes of conduct. However, a generalized code of conduct of a large corporation that speaks to a variety of subjects cannot address the specific procedures necessary in each area of potential liability.

Policies and procedures specific to government relations and government sales should be disseminated to those who need to know. For example, a brief description of the legal requirements governing the use of corporate resources for political activity, as well as the company's own policies and procedures, could be sent to all employees who may be in a position to violate these requirements. The company may send a notice to all employees stating that no employee may engage in political activity during his or her working hours or use corporate resources to further such activity, unless specific approval has been given by a designated individual. There should be a flat statement that no employee can expect reimbursement from the company for any political contribution; such reimbursement likely will be found to be illegal, even in jurisdictions where corporate contributions are themselves legal. Employees and agents should be asked to certify that they have read and will abide by applicable policies.

Fifth, monitor and audit for compliance, and provide and publicize a system for reporting potential or actual wrongdoing without fear of retaliation.

Some organizations ask outside counsel to audit their political action committee and other risk areas, such as their procedures for hosting candidates or government officials, capturing employee lobbying expenses, or approving corporate funding of venues or events to which government officials may be invited, such as stadium boxes or cultural events.

A key aspect of an effective reporting system lies in the company's assurance to potential whistleblowers that they will face no retribution. Even if there is no fear of organizational retaliation, if the working environment fosters unofficial punishment for the individual encouraged to report violations by fellow workers, then the system will prove unworkable. There must be a tone at the top

of the organization that encourages compliance and supports those who report improper or illegal conduct.

Sixth, provide incentives and discipline to promote compliance, including discipline of individuals responsible for the failure to take reasonable steps to prevent or detect an offense.

Employees and agents must understand in advance the consequences of noncompliance and appreciate that the same standards will be applied to offenders regardless of their position within, or their perceived value to, the company.

Seventh, respond appropriately to violations and take steps to prevent similar conduct, including modifying the program.

The program itself should prescribe measures to be taken, if an offense occurs, to review the policies and procedures and to amend them if necessary to reduce the likelihood that the offense will be repeated. Outside counsel frequently is called in at this point and may evaluate the offense and the programmatic measures that might have failed to prevent the commission or detection of the offense.

Conclusion

The program that will work for a particular company must be tailored to fit. It is essential that any politically active company have such a program, that management be fully committed to it, that high level personnel within the company be charged with responsibility for it, and that all employees and agents whose activities might lead to potential criminal liability for the organization be well-informed of their responsibilities and effectively supervised for compliance.

The key questions that a government agency will ask in assessing a compliance program that has failed to prevent a violation of law will be:

- Was this a genuine effort, to which top management was fully committed, to prevent and detect violations of law?
- Was it designed and implemented effectively? Or was it simply a paper program, pretending to encourage compliance but really condoning wrongdoing?

In the era of increased attention to political law violations, government affairs and marketing compliance should be a priority for all companies active in this area. The development and implementation of an effective program is well worth the effort.

  CCW ISSN 0886-0475