CORPORATE GOVERNANCE

POLITICAL RISK MANAGEMENT IN THE "SARBANES OXLEY" ERA

*By Sonia Fois**

Introduction

The Sarbanes-Oxley Act of 2002 (SOX)[1] raised the bar for corporate governance by creating new standards for corporate accountability, as well as new penalties for acts of wrongdoing. It changed how corporate boards and executives interact with each other and with corporate auditors. Essentially, SOX forced companies to develop a structured approach to managing risk. Although the act does not specifically say anything about better risk management (beyond its internal controls for financial reporting), businesses are nevertheless opting for more rigorous risk management structures in order to provide assurance to anxious audit committees, and to CEOs and CFOs who must now certify financial statements pursuant to SOX.

Just as businesses have to manage their financial risks, they similarly must try to minimize the political risks that accompany their interactions with government decision-makers. Most business executives already understand that engaging the nation's lawmakers with respect to the adoption of key laws and regulations is a fact of doing business—the success or failure of which will have an enormous impact on all aspects of business structure and operations, including company reputation.

What may come as a surprise to even the most savvy business executive, however, is how expansive and heavily regulated the political marketplace is becoming. What this means is that an executive's interactions with all levels of government officials, and not just policymakers, are now captured in the ever-expanding web of regulated contacts. Accordingly, in an increasing number of jurisdictions, routine business contacts made in the context of selling goods and services to a state agency (procurement activity), applying for licenses and permits, or seeking business incentives before an economic development board or commission are now considered lobbying activities and regulated as such. Once an executive or employee is deemed a lobbyist, a series of restrictions beyond lobbying

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1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (codified as amended at 15 U.S.C. § 7201).

disclosure apply, such as those pertaining to permissible political contributions and entertainment of public officials.

In short, what SOX has done (via a single landmark Act of Congress) to inspire a more vigilant risk management climate for the financial community, the new strictures in the "political law area" may accomplish for corporate governance of political activities—albeit on a piecemeal, jurisdiction-by-jurisdiction basis. Accordingly, businesses must take heed, get ahead of the trend, and establish appropriate internal controls for government relations activities. In other words, they should evaluate political risk management to as high a priority as other business risks.

This article discusses the varying legal requirements to which businesses are subject under lobbying, ethics and campaign finance laws (at the federal, state and local levels) with respect to: (1) the types of contacts the company may make with such officials and how these interactions are disclosed ("lobbying"); (2) whether and how business executives may entertain public officials ("gift-giving/ethics") and how such activity is reported and by whom; and (3) the degree to which companies and their employees may support the candidacies of these policy-makers ("campaign finance") and communicate such support ("corporate political speech"). The article concludes by offering some "best practices" that businesses would be prudent to adopt as a means of minimizing their political risk.

Lobbying and Ethics Laws

The federal government, and all fifty states plus the District of Columbia, has a law governing contacts between private entities and public officials. Increasingly, localities are also adopting their own lobbying laws.[2] Because of the constitutional protection of free speech, the lobbying laws are disclosure-oriented, rather than restrictive, requiring private parties to "register" with governing authorities as lobbyists and file periodic reports on their lobbying activities. The jurisdictions differ quite dramatically as to: (1) how broadly "lobbying" is defined and thus what types of activities are covered; (2) who is a "lobbyist;" (3) whether the employer/client of the lobbyist has accompanying filing obligations; (4) the level of detail required in the reports (and the frequency of such reports); and (5) what types of activities are excluded from the lobbying law's purview. In addition, a number of states have extended their jurisdiction over lobbying beyond disclosure, thereby restricting certain activities undertaken by lobbyists and their employers/clients. These issues are discussed in more detail below.

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2. *See* Chicago, Ill., Mun. Code § 2-156-010 *et. seq.*; Miami-Dade County, Fla., Code § 2-11.1 et seq.; New York City, N.Y., Admin. Code § 3-211 *et. seq.*

1. *How are "Lobbying" and "Lobbyist" Defined?*

The trend in recent years has been to expand one's lobbying law to cover not only legislative activity, but also contacts with the executive branch. Thus, the vast majority of jurisdictions, including the federal government,[3] now define "lobbying" to cover any attempts to influence executive and administrative action, as well as legislative efforts. Only a minority of states (for example, Maine, New Hampshire and Nevada, among others)[4] cover only contacts with the legislative branch. Even states with more narrow lobbying laws historically, such as Georgia, Louisiana and Tennessee,[5] recently have expanded their lobbying definitions to include the executive branch. This trend is likely to continue. For instance, effective in 2007, North Carolina's lobbying law will extend to executive branch contacts.[6] And, in another recent development, Pennsylvania law was broadened to cover executive branch lobbying.[7] While this change was made by executive order, and is currently a voluntary system, over 600 persons have already filed as executive branch lobbyists, likely in anticipation of mandatory requirements down the road.

Even the branches themselves have lobbying laws that define "covered officials," *i.e.*, those officials with whom lobbying contacts potentially trigger lobbying registration obligations. In most states, all officials and employees of the legislative branch are covered.[8] But this uniformity does not exist for the executive branch. Many states, for instance, include everyone up and down the chain of command in state government, including all officers and employees of state agencies, boards, commissions, advisory committees and public authorities.[9] Some laws also include municipal officers and employees.[10] By contrast, under the federal lobbying law,[11] and other states such as Illinois,[12] only top-level officials are covered. For example, the federal Lobbying Disclosure Act (LDA) essentially covers appointed policymakers within the Administration, and not

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3. *See* Lobbying Disclosure Act of 1995, Pub. L. 104-65 (codified at 2 U.S.C. § 1602(3),(8)).

4. *See* Me. Rev. Stat. Ann. tit. 3, § 312-A; Nev. Rev. Stat. Ann. § 218.912; N.H. Rev. Stat. Ann. § 15:1.

5. *See* Ga. Code Ann. § 21-5-70(5); La. Rev. Stat. Ann. § 49:72; Tenn. Code Ann. § 3-6-301.

6. *See* 2005 N.C. Sess. Laws 456 (defining executive action as "the preparation, research, drafting, introduction, consideration, modification, amendment, approval, passage, adoption, tabling, postponement, defeat, or rejection of a rule, regulation, executive order, resolution, or other quasi-legislative action by the executive branch or by a member or employee of the executive branch acting or purporting to act in an official capacity.").

7. *See* Pa. Exec. Order No. 1980-18 Rev. 4 (2006).

8. But a few states, such as Illinois, cover contacts only with the elected officials and not their staffs. *See* 25 Ill. Comp. Stat. Ann. 170/2(e).

9. *See e.g.*, N.Y. Leg. Law § 1-c(l).

10. *See e.g.*, N.Y. Leg. Law § 1-c(l)(v).

11. *See* 2 U.S.C. § 1602(3).

12. *See* 25 Ill. Comp. Stat. Ann. 170/2(e).

career bureaucrats.[13] Illinois's lobbying law covers the following officials: the Governor, Lieutenant Governor, Secretary of State, Attorney General, State Treasurer, State Comptroller; the chiefs of staff of these individuals; Cabinet members of any elected constitutional officer (including directors, assistant directors and chief legal counsel or general counsel); and Members of the General Assembly.[14]

Jurisdictions also differ as to the types of contacts and activities that are encompassed within the definition of lobbying. Many jurisdictions, like federal law and a number of states, require "direct" contacts with covered officials, meaning you have to either visit them in person, or phone, e-mail or fax them.[15] Others sweepingly define lobbying to mean any direct or indirect attempt to affect official action, whether or not direct contacts are made.[16] This would include behind-the-scenes activities such as strategy sessions.

In addition, some states, such as Illinois and Florida,[17] (but not the federal LDA), also regulate activity beyond trying to attempt to influence specific official action (whether through direct or indirect communication) by capturing within their definitions of lobbying so-called "goodwill" efforts. "Goodwill lobbying" means spending money on a public official, such as treating him or her to a meal or a sports event, without any effort to influence any particular governmental action. The theory is that you are engendering the official's goodwill for future lobbying efforts. Thus, your contacts are part of your overall attempts to influence official action.

There also are a number of jurisdictions[18] (but again, not the federal government) that also define lobbying to encompass "grassroots" activities — that is, urging or soliciting others to contact their public officials on a policy issue via a mass-mailing or an advertisement, for example.

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13. *See* 2 U.S.C. § 1602(3).

14. *See* 25 Ill. Comp. Stat. Ann. 170/2(e).

15. *See* 2 U.S.C. § 1602(8)(A); *see also*, Del. Code Ann. tit. 29, § 5831(a)(5); Cal. Gov't Code § 82039(a); Me. Rev. Stat. Ann. tit. 3, § 312-A(9).

16. *See e.g.*, N.Y. Leg. Law § 1-c(a).

17. *See* Fla. Stat. § 112.3215(1)(f)(defining lobbying as "seeking, on behalf of another person, to influence an agency with respect to a decision of the agency in the area of policy or procurement or AN ATTEMPT TO OBTAIN THE GOODWILL OF AN AGENCY OFFICIAL OR EMPLOYEE)(emphasis added); Ill. Admin. Code tit. 2, § 560.100(defining lobbying as "communication with an official of the executive or legislative branch of State government as defined herein for the ultimate purpose of influencing executive, legislative or administrative action" and defining influencing as "any communication, action, or reportable expenditure . . . used to promote, support, affect, modify, oppose or delay any executive, legislative or administrative action or TO PROMOTE GOODWILL WITH OFFICIALS.")(emphasis added).

18. *See e.g.*, Conn. Gen. Stat. Ann. § 1-91(k)(defining lobbying as communicating directly OR SOLICITING OTHERS TO COMMUNICATE with any official or his staff in the legislative or executive branch of government or in a quasi-public agency, for the purpose of influencing any legislative or administrative action)(emphasis added).

Finally, as noted in the introduction, more and more states are broadening their lobbying laws to include procurement activity and other routine governmental tasks. In New Jersey, lobbying now means attempting to influence any "governmental processes," which is defined broadly to include:

> promulgation of executive orders; rate setting; development, negotiation, award, modification or cancellation of public contracts; issuance, denial, modification, renewal, revocation or suspension of permits, licenses or waivers; procedures for bidding; imposition or modification of fines and penalties; procedures for purchasing; rendition of administrative determinations; and award, denial, modification, renewal or termination of financial assistance, grants and loans.[19]

Under New Jersey law, lobbying includes not only attempts to influence, but also efforts to simply obtain information about such processes from government officials. Similarly, New York State recently amended its laws, effective in January 2006, to capture under its lobbying definition attempts to influence government contracts and also to limit the contacts that may be made with government officials during the course of a procurement.[20]

The lesson here is that businesses have to broaden their views of what activities may constitute regulated lobbying. Accordingly, before applying for grants for employee training or business expansion/relocation, or for a sales, or use or real property tax exemption, or a tax credit or undertaking efforts to obtain contracts with a state or locality, an employer must assess whether such activity meets the definition of lobbying under that jurisdiction's laws.

It bears noting, however, that even once a person engages in lobbying as defined by state law, registration and reporting obligations may not necessarily arise in those jurisdictions that set monetary or time thresholds on lobbying activities. Under federal law, for example, persons must meet the following criteria in order for lobbying registration requirements to be triggered. The first test is what some have referred to as the "warm body" test. A company or lobbying firm must register under the act only if: (1) at least one employee receives compensation to make more than one lobbying contact on behalf of the company or outside client, and (2) during a six-month period, the individual spends at least twenty percent of the time spent working for the company (or outside client) engaged in lobbying activities. The second test is that the company must spend, or expect to spend, more than $24,500 (or more than $6,000 for lobbying or law firm in income from the client) for lobbying activities during a six-month reporting period.[21]

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19. N.J. Stat. Ann. § 52:13C-20(u).

20. *See e.g.*, N.Y. Leg. Law § 1-c(a).

21. *See* 2 U.S.C. § 1601 *et. seq.*].

Finally, even if statutorily set thresholds, if any, are satisfied, the lobbying law's requirements may not apply because the activity at issue falls under an exception within the law. Typical exceptions include public testimony[22] and the provision of technical or professional services where no actual contacts are made.[23] A number of states additionally carve out the lobbying activities of in-house employees whose primary duties do not include governmental affairs and, thus, do only an incidental amount of lobbying.[24] You cannot, however, rely on such carve-outs in many states. Moreover, even in states with such exceptions, in-house employees whose primary duties include government affairs are still covered by the law.

2. *What are the Resulting Filing Obligations?*

Once lobbying has occurred (or once you have retained a lobbyist in many states), certain filing and recordkeeping obligations will result. In almost all jurisdictions, the individual lobbyist or lobbying firm most certainly will have to "register" with the entity charged with enforcing or administering the lobbying law. In many states that entity is the Secretary of State's Office, and in others it is a special lobbying or ethics commission, or sometimes even the election enforcement body.[25] Registration statements usually require only basic information, such as the lobbyist's and his or her client's or employer's basic contact information and issues to be lobbied.[26]

Whether the client or regular employer of the lobbyist has to register as well depends on the jurisdiction. Typically, however, even in states where the clients/employers have no registration obligations per se, they still must "authorize" the lobbyist's registration.[27]

In addition to registration statements, lobbyists have to file periodic reports that detail their lobbying activities. The frequency of such reports can be as infrequent as once a year or every month. For example, the federal lobbying law requires semi-annual reporting, whereas the New York State lobby law dictates bi-monthly reporting by lobbyists.[28] Moreo-

22. *See e.g.*, 2 U.S.C. § 1602(8)(B)(vii); N.Y. Leg. Law § 1-c(c)(C).

23. *See e.g.*, N.Y. Leg. Law § 1-c(c)(A).

24. *See e.g.*, Kan. Admin Regs. § 19-62-1 (requiring registration if employment is, to a considerable degree, for the purpose of lobbying); *see also* Fla. Stat. § 112.3215; 4 Neb. Admin. Code § 6-003.04.

25. *See e.g.*, N.Y. Leg. Law § 1-d (lobbying governed by New York Temporary State Commission on Lobbying); N.J. Stat. Ann. § 52: 13C-21 (lobbying governed by Election Law Enforcement Commission); Mass. Gen. Laws Ann. ch. 3, § 41 (lobbying governed by Secretary of the Commonwealth); and 2 U.S.C. § 1605 (lobbying is governed by the Secretary of the Senate and the Clerk of the House).

26. *See e.g.*, Md. Code Ann., State Gov't § 15-703(b); 2 U.S.C. § 1603(b); Mass. Gen. Laws Ann. ch. 3, § 41.

27. *See e.g.* N.Y. Leg. Law § 1-e(c)(4)(authorization required by employer); Md. Code Ann., State Gov't § 15-702 (authorization required by employer); and Ill. Admin. Code tit. 2, § 560:220 (employers also must register).

28. *See* 2 U.S.C. § 1605; N.Y. Leg. Law § 1-h.

ver, the degree of detail required in the contents of the reports also fluctuates wildly. For example, under federal law, lobbyists need only report on issues lobbied, houses of Congress and agencies contacted and provide a good faith estimate (rounded off to the nearest $20,000) of income and expenses related to lobbying. The law does not mandate any itemization of expenses and/or listing of public officials whom the lobbyist has contacted.[29]

Filing in other jurisdictions can be much more burdensome and detailed. In Illinois, as a case in point, the lobbyist must disclose travel and lodging as well as meals, beverage and entertainment, including the names and amounts of any public officials on whose behalf any of these expenditures were made. They also must file special reports for so-called "large gatherings" (*i.e.*, that have twenty-five or more public officials in attendance) and grassroots expenses.[30]

By contrast to registration obligations, reporting by the lobbyist's principal is required at least in some for, in most jurisdictions. But such filing requirements tend to be on a less frequent basis that that required of the lobbyist, such as annually or semi-annually. In some states, such as Maryland,[31] the employing entity only needs to report if its lobbyists fail to do so.

Finally, many jurisdictions require lobbyists to maintain extensive recordkeeping of their lobbying-related materials. In Massachusetts, for a period of two years after the filing date, lobbyists must preserve all records and receipts relating to expenditures on public officials and proof of payment for any expenditure in excess of $100.[32] New Jersey law requires a lobbyist to "keep and preserve all records of his receipts, disbursements and other financial transactions in the course of and as part of his activities as a governmental affairs agent. . .for a period of three calendar years next succeeding the calendar year in which they were made."[33]

3. *What Ethics and Other Restrictions May Apply?*

The effects of qualifying as a lobbyist under a jurisdiction's law reach beyond the submission of paperwork to the regulatory entity. In most jurisdictions, lobbyists and their employers/clients incur additional restrictions or lower monetary thresholds on their gifts to public officials in the form of meals, entertainment and travel.[34] If you are also a government

29. See 2 U.S.C. § 1605.

30. Ill. Admin. Code tit. 2, § 560.300 *et. seq.*

31. Md. Code Ann., State Gov't § 15-701(c).

32. Ill. Admin. Code tit. 2, § 560.395.

33. N.J. Stat. Ann. § 52:13C-24.

34. *See e.g.*, N.Y. Leg. Law § 1-m; New York City, N.Y., Admin. Code § 3-225 (this gift ban on lobbyists becomes effective December 10, 2006); and Conn. Gen. Stat. Ann. § 1-97(a).

contractor, even more stringent restrictions may apply to your entertainment of public officials.[35]

Furthermore, in a growing number of states, lobbyists, their employers/clients, and government contractors, face greater restrictions on their campaign activities than does the general public. For example, so-called "pay to play states," like New Jersey and Ohio, impose more stringent political contribution restrictions on those seeking government contracts outside the open bid process. Connecticut restricts contributions from all government contractors regardless of the type of bid process involved.[36]

The vast majority of states (but not the federal LDA) impose additional constraints in the form of bans on "contingency fee," or success fee, arrangements in which a lobbyist's compensation is tied to the successful outcome of a lobbying effort.[37] Even some localities, among which include Dade County, Florida, New York City and Chicago, have their own contingency fee bans.[38] When lobbying was defined more narrowly, it was not so difficult for businesses to comply with these constraints. Now, a business has to assess whether the sales, tax, or financial specialists it employs or retains can be legally compensated on a success-fee basis for obtaining government contracts or other economic incentives from the state or locality.

In summary, the country's lobbying laws impose a labyrinth of registration, reporting and recordkeeping obligations on businesses that direct their regular employees and/or consultants to lobby, as well as a series of restrictions on business political giving and entertainment of public officials. As the term "lobbying" is now sweepingly defined in many states, what has been commonly viewed as lobbying now must be abandoned and, instead, each jurisdiction's law must be carefully examined to assess the specific breadth of its reach. The price for noncompliance may not be cheap. New York State's lobbying law provides for fines of up to $50,000 and debarment from procurement lobbying for a second violation of the procurement lobbying rules.[39] In many states, imprisonment is an available enforcement tool for violations of the law. For example, effective July 2004, Connecticut changed the penalty for multiple intentional violations of the law from a misdemeanor to a Class D felony with a potential sentence of up to five years in prison.[40] Violations of the New

35. Fla. Stat. § 112.3148(5)(a); D.C. Mun. Regs. tit. 6, § 1803.2 (no contractor or person seeking business with the District may give any gift to a city official or employee).

36. N.J. Exec. Order No. 134 (2004); Ohio Rev. Code Ann. § 3517.13(J); Conn. Gen. Stat. Ann. § 9-333n.

37. *See e.g.*, N.J. Stat. Ann. § 52:13C-21.5; Cal. Gov't Code § 86205(f); and Conn. Gen. Stat. Ann. § 1-97(a).

38. Chicago, Ill., Mun. Code § 2-156-300 ; Miami-Dade County, Fla., Code § 2-11.1(s)(7) ; New York City, N.Y., Admin. Code § 3-218.

39. N.Y. Leg. Law § 1-o.

40. Conn. Gen. Stat. Ann. § 1-100(a).

York City ban on gifts from lobbyists carry monetary fines, and for multiple offenses a misdemeanor prosecution.[41]

Corporate Political Speech

1. *What is the General Rule Regarding Corporate Political Contributions to Federal Candidates?*

In addition to gifts to and contracts with public officials, a company's political activities are likely to entail the making of political contributions and communications. As with lobbying laws, the requirements in this area are as different as there are jurisdictions. This article, however, is focused on the *federal* law's restraints on corporate political speech.

By way of background, almost 100 years ago, Congress made corporate financial contributions to federal candidates[42] illegal by passing the Tillman Act.[43] In 1925, the Federal Corrupt Practices Act extended this prohibition on corporate contributions to "anything of value."[44] It also criminalized accepting, as well as giving, a corporate contribution. In 1947, the Taft-Hartley Act further restricted corporate activity by banning corporate political expenditures—that is, funds spent to express the corporation's views on election-related issues rather than to provide direct benefits to candidates.[45]

The Federal Election Campaign Act (FECA) of 1971 continued the ban on corporate contributions and expenditures, while allowing corporations some measure of participation in the federal electoral process, including through the establishment of "separate segregated funds," more commonly known as political action committees (PACs). Foreign corporations are prohibited from making contributions in connection with federal, state or local elections, although their U.S. subsidiaries may engage in certain political activities if certain rules (not discussed herein) are followed.[46]

In scrutinizing the PAC solicitation rules under FECA, the Supreme Court[47] agreed with the government's argument that the ban on corporate contributions serves two purposes: (1) to prevent corporations from exercising undue influence over legislators through "war chests" amassed under the advantages that go with the corporate form; and (2) to protect individuals who have paid money into a corporation or labor union for

41. New York City, N.Y., Admin. Code § 3-227.

42. The majority of the states, unlike federal law, allow direct corporate contributions. This article focuses only on federal law restrictions and accompanying corporate speech issues.

43. Tillman Act of 1907, 34 Stat. 864.

44. Federal Corrupt Practices Act, 43 Stat. 1070 (codified at 2 U.S.C. § 256, repealed by Federal Election Campaign Act, Pub. L. 92-225, 86 Stat. 20).

45. Taft-Hartley Act of 1947, 61 Stat. 136 (codified at 29 U.S.C. § 141 *et .seq.*).

46. 2 U.S.C. § 441b.

47. *See* FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982).

nonpolitical purposes from having that money used to support candidates that they oppose.[48]

2. *What Political Speech Rights Remain For Corporations at the Federal Level?*

Despite these restrictions, corporate speech could not be entirely stifled under the First Amendment. First, the Supreme Court has made clear that corporations have a right to speak freely on issues of general public interest.[49] Second, the wave of court cases has leaned toward protecting this right and invalidating any restrictions other than those pertaining to the "express advocacy" of a specific candidate's election or defeat.[50] Express advocacy would include for example, words such as "Vote for," "Re-elect," and "Defeat."

Consequently, as noted above, FECA allows corporations to make political contributions through their PACs, comprised of voluntary contributions from the corporation's employees.[51] This act also allows companies to make certain election-related communications to their employees. With respect to its so-called "restricted class" of employees — its executive and administrative personnel, shareholders, and their families — such communications may expressly advocate the election or defeat of a particular candidate.[52]

For example, with respect to a candidate "meet-and-greet" with the restricted class, the candidate or party representative may solicit contributions; and the corporation may endorse the candidate or party, and turn the event into a fund-raiser by asking restricted class members to make contributions to the candidate or party. The corporation may also pay the expenses of the event, as long as the candidate, the party representative, or a member of their staff, not a corporate employee, collects any contributions made in connection with the event (*i.e.*, no "bundling"). While the corporation may not hand out envelopes to assist employees in making contributions, the candidate may do so. (Other requirements, including those regarding media coverage, also apply.) Note that if the re-

48. The Court's *NRWC* opinion echoed its earlier comments in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978) and *United States v. International United Automobile Workers,* 352 U.S. 567 (1957). In short, restrictions on corporate political spending, in the words of the *NRWC* Court, "affirm[ ] the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." 459 U.S. at 560.

49. *See, e.g.,* First Nat'l Bank of Boston, 435 U.S. 765 (distinguishing spending limits in a referendum context from spending bans with respect to candidate elections).

50. *See, e.g.,* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986); Maine Right to Life Comm., Inc. v. FEC, 914 F. Supp. 8 (D. Me.), *aff'd*, 98 F.3d 1 (1st Cir. 1996) (per curiam).

51. *See* 11 C.F.R. § 114.5.

52. *See* 11 C.F.R. § 114.3.

stricted class is solicited for contributions outside the meet-and-greet context, as they properly may be, the bundling ban still applies.[53]

A corporation may also invite a candidate or party official to a meet-and-greet with all its employees (beyond the restricted class) and pay related expenses, although a number of strict rules apply, including the following: (1) Neither the corporation nor its PAC may advocate the election or defeat of the candidate in connection with the event (or encourage employees to do so) or ask attendees to make a contribution to the candidate or party (although the candidate, party representative, or their staff may do so); (2) No contributions may be accepted before, during or after the event (although the candidate or party official may leave self-addressed envelopes and other materials to facilitate transmittal of contributions); (3) No corporate employee may collect or transmit contributions to the candidate or party official in connection with the event; (4) If one candidate for a federal office is invited to such an event, all candidates for that office must be given a comparable opportunity to appear before employees upon request (slightly different rules apply to candidates for vice president or president); and (5) Certain rules regarding media coverage of these events apply.[54]

As for other communications, a corporation may freely use its resources to communicate with members of its restricted class on any election-related issue. This includes asking those employees to vote for or contribute to particular federal candidates or political parties. A corporation may also expressly advocate the election or defeat of a candidate through a company publication or phone bank directed *only* at the restricted class. And a corporation may conduct voter registration and get-out-the-vote drives for the restricted class, provided certain minimal conditions are met.[55]

Express advocacy beyond the restricted class, by contrast, is prohibited. But corporations may engage in various other types of communications to their other employees and the public, such as providing voter information and running voter registration and get-out-the-vote efforts. These other communications may not include express advocacy and must meet certain Federal Election Commission (FEC) rules, including restrictions on the corporation's ability to discuss such efforts with the benefiting candidate.[56]

Conclusion: Adopt "Best Practices"

The vast and ever-expanding landscape of "political laws" necessitates the implementation of a compliance system designed to manage and minimize political risk. As discussed in this article, violations of these

53. *See* 11 C.F.R. § 114.3(c)(2).
54. *See* 11 C.F.R. § 114. 4(b).
55. *See* 11 C.F.R. § 114.3.
56. *See* 11 C.F.R. § 114.4.

laws can lead to legal liability in the form of fines and possible imprisonment. It also can seriously thwart a company's legislative and political objectives via debarment from lobbying or procurement activities and/or loss of business reputation. It is important to remember that these laws are applied in a political context as well as a legal one. Therefore, this is an area where one must be sensitive to appearances as well as technical arguments. Even in a situation where the legal authority arguably supports the contemplated action, businesses would be well-served to consider the "optics" if reported by a major newspaper. A bad press story can quickly serve to make a company "radioactive" with public officials. In the area of ethics in particular, where the laws are so vague and fact-specific, a common sense and practical, rather than overly lawyerly, approach may sometimes be in order.

A compliance program in the government affairs area generally should follow the seven criteria of the U.S. Sentencing Guidelines. The following "best practices" for political risk management adopts the basic spirit and gist of those guidelines:

Establish Clear and Understandable Policies and Procedures. Any compliance program must establish policies and procedures to help ensure that the company and its employees and agents comply, in a timely and accurate manner, on a jurisdiction-by-jurisdiction basis, with the types of restrictions, and reporting and recordkeeping requirements, discussed throughout this article. In some areas, the policies actually may be more stringent than the law dictates. For example, if a state has a low aggregate gift limit, a company may decide to adopt a "no gift" policy rather than attempt to track spending on public officials throughout its company and risk inadvertent violations of the law. Policies and procedures should be written as clearly and simply as possible. The goal should be for employees to learn when to ask the right questions from the proper folks within the company and identify trouble spots rather than to grasp legal nuances.

Appoint Oversight Officials. A company's government affairs compliance program should be overseen by a high-level official and preferably not someone employed solely within the government affairs sphere. This indicates that the program is a top priority of the company. Designating compliance officers by specific business or practice areas or by specific regions can facilitate and streamline compliance initiatives.

Educate and Train. Policies and procedures in this area should be widely distributed to anyone who could potentially be "lobbying" in a particular area or engaged in other political activities. As indicated throughout this article, distribution therefore should not be restricted to government affairs employees and consultants since many other employees are potentially implicated. Employees involved in procurement activities, for example, also should be reached. It is worth noting that simply circulating written materials will not satisfy compliance obligations. Employees and consultants should be educated and trained, and they should know

who to approach to have their questions answered. Requiring employees and consultants to certify their compliance with the law therefore may be prudent. This training process should be dynamic as the laws and policies evolve, and as employees come and go or their responsibilities change.

Monitor, Audit and Discipline Violators. A company should stay on top of its compliance program by conducting periodic audits. It should also establish mechanisms for employees to report violations and it should provide accompanying whistleblower type protection. (Some companies establish "ethics hotlines," for example.) Violations should be quickly remedied and violators should be made aware beforehand what disciplinary actions will result.