



Influencing Government: The Rules of the Game

LESLIE GARDNER: Good afternoon. The Association of Corporate Counsel and SmartPros Legal and Ethics welcome you to today's broadcast: Influencing Government: The Rules of the Game. First, please check your audio settings. If you're calling in using a telephone, please check the "use telephone" option on the control panel. And if you're using your computer's microphone and speakers, please check the "use mic and speakers".

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Our presentation today will be moderated by Kimberly White. She is a Director of Business Ethics and Senior Corporate Counsel at Underwriter's Laboratory, Inc. And now, I'll turn it over to Kimberly.

KIMBERLY WHITE: Thank you, Leslie. I want to thank everyone for attending this afternoon on behalf of the Association of Corporate Counsel and also the Committee on Compliance and Ethics. I want to introduce our speakers, who are going to be walking us through and presenting us the rules of the game.

First, we have Scott Thomas, who is of counsel with Dickstein Shapiro. Scott is a former chairman of the Federal Election Commission and practices in campaign finance, ethics and lobbying compliance. Also with Scott, we have Michael Spencer. Michael is Associate General Counsel of WalMart and practices in the areas of corporate affairs and government relations. And with that I am going to pass it back to Leslie for our first poll question.

LESLIE GARDNER: Thank you, Kimberly. First I'd like to give out the first verification code for any attorneys who are applying for CLE. Please write this code down, as you'll need it when you retrieve your certificate. Our first code is NJ7446. That is N as in Nancy, J as in Jane, 7,4,4,6. Again, that's NJ7446.

And now I would like to launch the first poll. Does your company have, or is it in the process of developing a lobbying compliance program? Please choose one. Simply click on the buttons: yes or no.

The audience is voting. We'll give it a few more seconds, and I'll be closing the poll in five, four, three, two, one.

Forty-one percent said yes and 59% said no. Kimberly, back to you.

KIMBERLY WHITE: Thank you, everyone. It gives us an idea of who is in our audience today. I think for those of you who have a compliance program, you're going to find the information useful. For those who don't have a program but are thinking of considering having a program, I think you will also find it very interesting. We also have an info pack on this very topic of campaign finance and also a leading practice report that I think you'll also find very interesting. Now I am going to ask Scott to lead us in the discussion of talking about campaign finance law.

SCOTT THOMAS: Thank you, Kimberly. Welcome to all of you. We're going to cover a fair amount of content today, but the three main components are campaign finance law, and lobbying disclosure law and gift law. These are all areas of law that many in-house counsel run into just

because, in the course of their company's business, they end up having to deal with government officials.

I did want to emphasize briefly that the content we'll be covering is in an info pack that is now available on ACC's website to members. It covers about 50 pages of description and detailed information about these rules we'll be dealing with. We have also prepared three different 50-state charts that cover these same three major topics at the state level. They are not as detailed, but they do give you a good chance to sort of get some of the basic rules and get you started on finding out where those other related rules can be found.

The first thing we'll be talking about is federal campaign finance law. This is an area of law that has been developing over the years.

Of most importance is a broad prohibition on the use of corporate resources to make a contribution or an expenditure in connection with a federal election. These laws, at the federal level, are enforced civilly by the Federal Election Commission [FEC] and then for serious and substantive matters, the Department of Justice can prosecute a matter. This is an area where you do have to pay attention. The FEC itself not long ago extracted a \$3.8 million civil penalty from one of our big corporate giants in this country, and it's something we'll talk about a little bit later in terms of what was involved. But the Department of Justice also has been fairly active in pursuing campaign-finance-type violations where they perceive a knowing and willful and substantial amount of activity being in violation of the law, and they can weave in conspiracy theory and false statement counts as well to make a prosecution an even more serious prospect. So, this is an area where you want to beware.

Now, as I said, we start with a broad prohibition, and the definition of what is a contribution is quite broad. It's basically any kind of direct or indirect payment or even a loan, or even an advance of any kind of money or services or anything of value. So, you're starting with a very broad definition of what is a contribution.

Now, the expenditure concept is more complicated, and we'll be talking a little bit more about that, where you're talking about non-coordinated messaging. There are some specific rules that we'll cover in that non-coordinated area.

Next slide, please. The first area that we'll talk about that's of most importance is this concept of what is really an in-kind contribution. I mean, the prohibition on its face, first of all, picks up the obvious, which is if a corporation were to try to cut a check that would be a form of contribution. But what more often comes into play for corporate counsel is some sort of providing an in-kind support to help a federal candidate or some federal political committee. This kind of in-kind support is within the definition of a contribution, so you have to be careful. And the FEC has furthered this with its rules on what it calls "facilitating the making of contributions." In essence, this facilitation restriction covers providing any kind of services of value when a candidate is trying to raise money or when some other federal political committee, whether it's a PAC [political action committee] of some sort of a different company or whether it's a party committee. If it's at the federal level and it's a political committee, this facilitation rule kicks in.

Now, Michael, you might want to sort of help folks understand a lit bit about how this

facilitation restriction works.

MICHAEL SPENCER: Thanks, Scott. Along those lines, one of the issues that companies seem to face happens when the employer might receive political fundraising e-mails at work and are asked to forward such things to their contacts. If the employee is acting in their volunteer capacity and meets other requirements, such as being able to perform their normal workload, and 2) the activity does not increase overhead and 3) the activity is not performed under coercion, then that activity would be considered permissible. This is articulated under 11 C.F.R. § 114.9; that Safe Harbor provision.

But if the employee is acting in their official capacity, then the issue of impermissible facilitation arises. Some companies have decided to, in advance, value that time and effort and then determine, if this individual has done so, what they can do to have this payment or this money prepaid to the PAC from the company. So, when you're in that type of situation at least the advance payment has already been done so the corporation would not be viewed as impermissibly facilitating. And then the later stage, once individuals start engaging in this type of activity, under their work umbrella, then what they can do is say to the PAC, "OK. This is what we've done, and the PAC can keep an accounting, so there is not an impermissible facilitation on behalf of the company, but, in fact, the resources are being used by the PAC and paid for in advance by the PAC.

SCOTT THOMAS: Thanks, Michael. Now that's an important thing to keep in mind. You know, these rules that in some cases require advance payment for the value of, say, use of a company's mailing list or use of the company's staff when they're being directed to perform a function to help with the fundraiser. Those kinds of expenses you have to value and, in those cases, pay in advance. So, that's why that approach Michael alluded to can come in very handy.

OK. Well, let's move on to the next slide. The concept of coordinated communications is very important. This is where, in essence, if there is what the Federal Election Commission defines as coordinated communication it becomes an in-kind contribution. And the FEC has some rather obtuse regulations, I am afraid to say. But they boil down to basically requiring that, first of all the content of the message has to be of a certain type. And, in its broadest reach, it picks up, in essence, any kind of message that contains a reference to a federal candidate, and that is run sufficiently close to that person's upcoming election.

Now, in the case of House and Senate candidates the current version of the [regulation] puts that at a 90-day time frame. So, within 90 days of that person's election, you're going to have satisfied the content test for this coordinated communication rule. And then for conduct, basically, you're looking for something that would be, in a general sense, referred to as coordination. And the broadest of those, really, is where there would be a request or suggestion from a candidate or a party committee's operatives that is leading to the creation or the production or distribution of the message in question.

So, those are fairly broad concepts, when you think about it. And some companies often have to be careful when, for example, they're thinking of presenting some grass-roots lobbying ads that they think are just focusing on an upcoming legislative battle. If they are thinking of making reference to a candidate, and they're going to be coordinating with that person, who might

happen to be a member of Congress, and a candidate at the same time, you start bumping into this coordinated communication rule. So, you might want to think twice about maybe not including a reference to the candidate, or just make sure that, when you're setting up that grass-roots lobbying effort, you either do it completely independently or you don't deal with anyone who would be deemed any kind of agent of that person's campaign.

OK. Let's move to the poll.

KIMBERLY WHITE: OK. Our next poll question?

LESLIE GARDNER: The second poll is: Is your company a nonprofit corporation? Please select one: yes or no.

And the votes are coming in. We'll close the poll very shortly in five, four, three, two, one. With 95% of our audience voting, 86 % say: No, their company is not a nonprofit, and 14% say: Yes, their company is a nonprofit. Back to you.

KIMBERLY WHITE: OK. That's very helpful, because as we go through we have some special things that we're going to talk about with respect to nonprofits, but it seems like a lot of the folks on the line are for-profit corporations, so perhaps we don't need to go into too much detail on it. But as we start talking about these communications, it'll be interesting to hear a lit bit about those special allowances that are available for nonprofits. So, I am going to turn it back to Scott, for a little bit more amplification on these corporate paid messages.

SCOTT THOMAS: Great. Thank you, Kimberly. Well, here what we're talking about are the non-coordinated messages that a corporation might be thinking about paying for. The federal campaign finance law has evolved in this area to a point where there are kind of parallel rules and definitions that you always have to be thinking about. The broadest of the rule and the one that's a little bit longer—in longer standing—is basically the ban on any kind of corporate paid message that would be deemed “express advocacy”. And the Federal Election Commission—as Michael will explain in a moment—has a definition there. But I would note: you'll see in the slide there's a reference to the pending Supreme Court case; it's the *Citizens United* case. We can mention this a little bit more as we move along, but that case potentially will address whether or not that non-coordinated express advocacy ban for corporations should be deemed unconstitutional.

Now, because of the complications of defining what is an express advocacy, Congress passed what they call the Electioneering Communication Test, and this relates to radio or TV ads that are run within, say, 30 days of a primary or within 60 days of a general election that simply refers to a candidate. And with the current spin on that it would basically involve something that a reasonable person could only interpret as equivalent of express advocacy. But the bottom line is: This is another prong of non-coordinated messaging that you, as in-house counsel, have to think about when you're planning your messaging.

Now, the Supreme Court decision might also resolve whether or not the existing restriction is unconstitutional. Let me turn it over to Michael here, because I think he has some insight on how these standards actually work in real life.

MICHAEL SPENCER: Thanks, Scott. With reference to the FEC [regulations], specifically 11 C.F.R. § 100.22, they use the reasonable interpretation test to define things such as express advocacy. The [regulations] do specifically spell out examples of express advocacy, such as “vote against Old Hickory.” But also uses the reasonable interpretation test as a catch-all, meaning: Reasonable minds could not differ as to whether an ad encourages actions to elect or defeat one or more clearly identifiable candidates.

In the context of electioneering communications, the same reasonable interpretation standard is used, as defined by the principle opinion of Justices Alito and Roberts in the Wisconsin *Right to Life* cases. But here, too, there are also safe harbor provisions pursuant to 11 C.F.R. § 114.15(b). This provision is rather nuanced, but in essence it allows electioneering communications that do not mention any election, party, opposing candidate, or voting to the general public and does not take a position on candidates, and, essentially, either focuses on a candidate and their position on an issue, or urges public adoption of a position and contact the candidate. Based on those two umbrellas—meaning express advocacy and electioneering communications—I think that, in a nutshell, what you need to take from that is that they seem to, even though they are two different sections, use a reasonable interpretation test. And that seems to be what the court has been focusing on and what the [regulations] focus on. But, as Scott had said, the Supreme Court might throw that out based on the *Citizens United* case. We’re just not sure where they’re going to go with that.

SCOTT THOMAS: Right. The court heard the argument on that on September 9th [2009] and so we’re all waiting with bated breath to figure out what the Supreme Court has decided to do. I would just note that even though that is the case that most who sat in on the argument—myself included—feel is likely to result in declaring these two provisions unconstitutional.

But there are alternative grounds for disposition. And one of them relates to the topic that I’ll cover now very briefly.

You’ll see in your outline we’ve got a reference to: there’s a special allowance for certain nonprofit corporations. Those of you who are in that nonprofit corporate world might not be aware of it, but there is a constitutional exception that the Supreme Court had carved out over the years which allows certain nonprofit etiological corporations that function as C-4s essentially, to undertake express advocacy or even electioneering communications that would otherwise be prohibited simply because they are that special kind of nonprofit etiological corporation that takes the C-4 form. One of the main points though here is that it has to be a nonprofit that either takes no business corporation monies at all or at least can prove that it has a policy of not taking any such business corporation money.

If you’re that kind of nonprofit corporation, these prohibitions I have referred to—on express advocacy and electioneering communications—would not apply. The only caveat there is: If, all of a sudden, that kind of group could be said to have moved over such that its primary purpose becomes that kind of express advocacy it’s conceivable the Federal Election Commission at that point could say, “Well, it’s become a ‘political committee’ rather than a 501(c)4 social welfare organization.

But, anyway, those are some of the nuances that those involved with nonprofit corporate status

might be wanting to check out. Those nonprofit corporation regulations are part of Part 114.10 of the FEC rules.

KIMBERLY WHITE: OK. So, let me just ask a quick question here with respect to that before we move off this point. So that those of us who may fall into that category, if they were structuring their program or their compliance program around that they should be aware of this and actually have some guidance, would you suggest, in terms of any types of activity under this exception?

SCOTT THOMAS: Sure. If you are in a position where you think you might be able to work with this qualified nonprofit corporation status you would want to sort of do a quick run-through of the FEC's regulations, because there are some other conditions that you would want to be aware of and make sure you can qualify, but yes. Once you do that, you do suddenly have a lot more flexibility, and again, the only caveat would be you'd want to caution people in your organization to make sure they don't cross over such that their primary purpose could be said to be election influencing or express advocacy.

KIMBERLY WHITE: OK. Should we move on to the next slide?

SCOTT THOMAS: Sure.

KIMBERLY WHITE: OK.

SCOTT THOMAS: Now, here is where we get some good news, for those who are weary of hearing about the broad corporate prohibition. The law does contemplate several different allowances for use of actual corporate resources.

The first of these is the allowance for internal communications. As long as you are communicating to what is referred to as the "restricted class" of your corporation—even if it's express advocacy or even if it's being coordinated with some candidate—it can be considered exempt from the prohibition.

Now, one nice opportunity is that you can set up what are called "candidate appearances." As long as you only have in essence your stockholders or your management employees in the room, you can invite a candidate to come and appear and make a presentation about why they're the best candidate, and it can involve a discussion of company officials can involve express advocacy even in reference to endorsing this particular candidate, as long as it's just restricted class this kind of arrangement is permissible, because it's within the internal communication allowance.

Also, there is the ability for a corporation to pay for what I refer to as nonpartisan activities. You can actually pay for candidate appearances to all of the employees—not necessarily just the management folks—as long as you make it a nonpartisan effort. In other words, you offer a similar opportunity to each candidate who might request [it]. There is also the chance to pay for what are referred to as voting records, where you just sort of lay out what the members of Congress that you are tracking have voted for as members of Congress.

Voter guides are also OK, although you want to be careful here; you don't want to include

anything that would be deemed such bias that it would rise to the level of express advocacy under that test that Michael outlined. And also you can help pay for his voter registration and get out the vote activity, as long as it's in the nature of nonpartisan activity and that you're not focusing or helping a particular candidate or coordinating with a particular candidate or party.

Now, another interesting allowance is what Michael alluded to: the ability to use company facilities if you, as an employer, are undertaking volunteer activity on behalf of some candidate or party committee, for example. And this basically requires, though, that you be doing this on your own time. This is not where you're being directed by some superior to do this, and, as Michael noted, there has to be some effort to track whether there is an increase in overhead, because if there is, that amount would have to be valued and paid back by the employee to the company. Michael, did you want to sort of—

MICHAEL SPENCER: Well, I guess [there are] two points that I'd like to make. One of the big things is: If you have the opportunity to do some type of voter registration guide—as far as WalMart is concerned, WalMart has created an external website for only its associates, where it laid out who your representatives are in a particular area, so that you would have a better understanding of who they are and, more than likely, what they're doing as far as being your representative in Congress.

Also, as it's previously articulated, [in] dealing with company facilities, one of the big things—as Scott alluded to—was dealing with whether or not individuals are acting in their volunteer or company capacity. A failure to make sure that you're making this distinction and making those advance payments could lead to different types of criminal as well as civil fines against the organization, so it's really important that you are able to make that type of distinction when you're using the occasional use of company facilities, but it is also recommended that you have someone guide you as far as making sure that you are seeing it's an occasional use and it, in fact, is.

Some of the time things that you may face as in-house counsel [are] dealing with individuals who are saying, “It is occasional,” but, when you actually dig down into what they're actually doing, it might not be something that would be construed as voluntary or something that is occasional. So, that's just something to keep in mind.

KIMBERLY WHITE: And is “occasional” defined anywhere? Or is it just kind of a gut call about it?

SCOTT THOMAS: It is. The FEC's bottom-line definition is: You can consider some volunteer's use of facilities to be occasional if it wouldn't be such an amount of usage that it would interfere with the employee's ability to carry out his or her normal functions, and it wouldn't interfere with the company's ability to carry out its normal function. So, it's kind of a floating but substantive rule.

There is a safe harbor the FEC has built, which, first of all, basically says that: As long as the usage involved doesn't exceed one hour per week, or even four hours over the course of any one month, it will be deemed “occasional.” And so that's a safe harbor you can always work with. And the FEC also has also gone out of its way to note that use of Internet facilities—for example

the e-mail system—that, as a general concept, is something where if you're functioning as a volunteer you do have the ability to use that—the Internet facilities—almost without limit as long as, again, it doesn't interfere with your ability to carry out your job functions and doesn't interfere with the company's.

One other point I would mention here in connection with this occasional use allowance: This also is contingent in the FEC's regulations on it being in compliance with the company's own internal policies and practices. So, if your company just doesn't want to go down this road, you, of course, can have a policy that says: Despite the fact that the FEC might allow this as a matter of law, we, as a matter of company policy, will not.

Now, let me move on to the last important exception to the prohibition on use of corporate resources. And that's the ability to pay for the establishment and administration, and even solicitation costs of the company's PAC. Next slide, please.

KIMBERLY WHITE: I think we're ready for our next poll question at this point.

LESLIE GARDNER: And the final poll: Is your company a trade association or a member of a trade association? Please choose one: yes or no.

And the votes are coming in. I am going to close the poll in five, four, three, two, one.

With 87% of our audience voting: Yes, trade association or a member is 65 %. No is 35%. Thank you.

KIMBERLY WHITE: Thank you, everyone. Yes. The reason why we put this question in here is that I think it's particularly important for those of us who are members of trade associations or who are trade associations to pay special attention to this next point that Scott is going to walk us through with regard to operating the PAC, because there are specific rules with respect to trade associations and those of us who have activities in those associations. So, I am going to switch to the next slide, and I am going to ask Scott to walk us through this.

SCOTT THOMAS: Great. The slide you have before you—for the most part—is designed to deal with any kind of corporation. These rules will apply whether you're a standard business corporation or a trade association, so let me go through those, and when I get to a point that ties in with trade associations in particular, I'll do a sidestep and talk about some of the specific rules for trade associations that are unique and that you should know about.

First of all, if you are going to be setting up and operating a PAC, you have to be aware of the fact that there are contribution limits under federal law on both giving to the PAC and then on those contributions that the PAC itself can make. These are fairly generous contribution limits. You can, an individual can give up to \$5,000 per year to a federal PAC. And then the PAC itself—at least in the initial stages, before it becomes a so-called multi-candidate committee PAC—can make contributions of, as the current rule works, \$2,400 per election to a federal candidate. And so that basically means that if someone is running in the primary you can—your PAC at these early stages—can give \$2,400 for the primary and then another \$2,400 for the general.

There are also separate contribution limits on giving to party committees. For the most part that's a \$15,000 per year limit when you are giving to one of the national party committees. I won't go into those contribution limits more. You can get information about all of this in the info pack. I have laid out all of the contribution limits that are applicable and the Federal Election Commission website is a good place where you can quickly get to a nice chart that lays out those contribution limits.

One of the other things about operating a PAC is: When you are soliciting contributions for the PAC, you have to live within the solicitation restrictions. And that basically means you're soliciting only stockholders or so-called executive or administrative personnel. Essentially, that means management people at the company. And then you can also solicit the family members of those stockholders or management folks who might be living with them. Those are your solicitable class.

And this is an important thing for some companies because you have to parse this a bit. The Federal Election Commission has some regulations on this that go into a little more detail and they, in some cases, tend to rely on definitions coming out of the Fair Labor Standards Act. So, if you have a large company and you're trying to figure out whether certain kinds of managers qualify or don't qualify, you're going to end up having to do a little bit more detailed analysis and you might want to get some counsel on that.

Now, another thing in running a PAC when you are soliciting contributions, you have to be very careful about what we're calling here "notice involving voluntariness"—and we had some debate about whether that's a proper word or not—but essentially the law requires that when you are soliciting, you have to give notice to people that this is a political fund. You have to give notice that they have the right to refuse to contribute without reprisal. If you're suggesting particular amounts, you have to give additional notice to folks indicating that these are just suggestions, and again they can contribute less or nothing at all without any sort of adverse consequences. So, those notice requirements have to be given even orally as well as in writing when you are soliciting.

Payroll deduction. Now this is a nice option. This allows the company to set up a payroll deduction system to facilitate raising the PAC money. If people are willing to authorize payroll deduction, it's a nice way to get a steady stream of income.

Now, you'll note I have a parenthetical here talking about how you can use payroll deduction even for soliciting for a trade association's PAC. That's a nice allowance that the FEC built in a few years ago.

Now, here's where I'll give you a little side briefing on trade association solicitation. If a trade association has a PAC, it can solicit its own management people of the trade association, but it doesn't have stockholders, and so it quite often has corporate members. The federal rules require that a trade association can only solicit the stockholders and the management folks of a member corporation if the trade association gets advance approval in writing from that member corporation. So, you have to deal with a proper representative of that member corporation and get that authorization in writing in order to follow through with those kinds of solicitations. A member company can only approve this kind of solicitation by one trade association during the

course of any one year. That's a fairly restrictive rule that some folks don't know about.

Now, the member company can provide incidental assistance to help that trade association PAC raise money. It can, for example, allow use of the company's internal mail system, or—as we note here—the payroll deduction system. But importantly, the member corporation is not supposed to actually conduct the solicitation and is not supposed to pay for that solicitation. It's possible that there could be a reimbursement system worked out whereby the trade association reimburses the company for actually doing the solicitation on behalf of the trade association PAC. But that's an important little wrinkle that you should keep in mind.

OK, moving on from trade associations. I was going to talk a little bit here just about the reporting concept. Basically, a federal PAC would have to file disclosure reports under the federal system, and you can choose to file either on a monthly system or a quarterly system. Some folks tend to want to switch from one system to the other depending on whether it's the election year or not. But you can get some guidance on that in the info pack that we have prepared for you. But you end up having to disclose your donors whose contributions exceed \$200 in a year.

And then there's separate disclosure for independent expenditures, those kinds of non-coordinated express advocacy messages that a PAC might want to pay for. If, during the period before the last 20 days of the election, if those kinds of expenditures exceed \$10,000, a separate independent expenditure disclosure obligation kicks in, and you have to file a report within 48 hours of that activity. Then there is some additional disclosure of independent expenditures that's required within 24 hours if it's \$1000 worth or more just before the election in that last twenty-day period.

OK, next slide. OK. We have covered campaign finance. Now let's move into the next topic, which is the federal lobbying disclosure law. Again, we're covering here the federal laws, and then at the end we'll make reference to the various state laws, although we won't be covering them in detail. But we're trying to give you an overview of the kinds of rules that appear here, and you'll find that the state laws quite often are somewhat similar.

Now, here in a federal lobbying disclosure area we're dealing with the Federal Lobby Disclosure Act. For your purposes you should be aware that in essence it will require lobbying firms and those entities that have some in-house lobbyists to have to register and report. But there are thresholds and we'll—

LESLIE GARDNER: Please stand by. We are having audio difficulties.

MICHAEL SPENCER: We apologize for the delay. This is Michael. One of the aspects that Scott Thomas was referring to was that if you look at Slide 10 the lobbyist must spend more than 20% of their time on lobbying activities and are expecting to be dealing with at least two contacts. So, that's one of the aspects that an individual has to be concerned with when they are dealing with whether or not this individual would be construed as a lobbyist for purposes of the LDA [Lobbying Disclosure Act]. And it looks like Scott, I think, was able to get back on. Scott, are you there?

SCOTT THOMAS: I don't know what happened, but I am back. Thank you kindly for filling in. I gather you were starting to go through the definitions of lobbyists and so on that are so important on the thresholds.

MICHAEL SPENCER: Yes.

SCOTT THOMAS: Is anyone else off that we need to wait for?

KIMBERLY WHITE: No, actually I'd lost my connection, but I am back on as well.

SCOTT THOMAS: OK. Sorry, everyone out there listening, but I'll move quickly so we don't lose our pace.

In this area of the application of the federal lobby disclosure law, for those organizations that haven't yet registered and are trying to figure out if they have to, the key definition ultimately is whether someone in-house has tripped the lobbyist definition. And there's this 20% test: If it could be said that during a particular calendar quarter you're going to spend more than 20% of your time on so-called lobbying activities, then you would trip the lobbyist definition.

Again, there is a second prong that would require that there be an expectation you will make more than one so-called lobbying contact. But because of those definitions built into the lobbyist definition—"lobbying activities," and "lobbying contact"—you have to be fairly careful and go through the many exceptions that are built-in to the statute. Now, the info pack—you should consult that, because I've laid those out in some detail there. So, you can take peek and see if any of those exceptions might help you if you're trying to figure out whether or not you do not have to register because you have not got anyone who qualifies as a lobbyist.

OK, next slide. Now, the registration itself is fairly simple. It requires that there be certain identifying information to describe who the registrant is. So, if this is your company, you basically have to identify who the contact person is going to be and which company it is and address information and contact details.

One of the interesting things some folks get into these days is whether there is some affiliated organization that has to be listed. There is a specific legal test that is required. In essence, it's a question of whether or not this other organization pays in at least \$5,000 worth toward the lobbying activities of the registrant entity and also has some significant role in the planning or details about the lobbying activity. So, there's a definition there you would need to consult. Now you would also have to evaluate whether if you have any foreign entity connections, whether it's some foreign entity has a sufficient role that it should be listed as a foreign entity on this registration.

The quarterly reports themselves are a little bit more detailed. You have to go into a listing of the particular bills or executive branch matters that you're lobbying on, and you have to also work in a calculation of the dollar amount expended for lobbying activities during the reporting period. So, this gets to be an interesting exercise for some businesses trying to make this kind of a calculation. It's not necessarily easy, and you have to keep in mind that this definition of lobbying activities would pick up these functions that are performed not just by lobbyists, but by anyone at the company; those who are basically providing support to the lobbyist. Their work

and their effort and their expenses would tie into this calculation of expense. And also there is a need to sort of track your company's payments to a trade association for dues. The law is set up so that the trade association normally will notify you of the portion of your dues that should be considered to relate to lobbying activity and/or political activity and you can work with that number to add in to your company's lobbying expense total. Michael?

MICHAEL SPENCER: Yes, due to the reporting requirements of the lobbying disclosure laws, some best practices for tracking lobbying activity is to probably designate at least one individual to be the central repository for such information. That individual would probably, on a weekly or either monthly basis, send out a simple form to employees that are engaged in such activities related to federally elected officials. These individuals would then e-mail these forms back to the originator—the individual who would be the central repository—who would then compile the information and make the actual disclosures that Scott alluded to: quarterly reports and things of that nature. The alternative to this is a complicated option for the company to use tax-base calculations, and a lot of times, due to the complexity of doing the tax-base calculations, a lot of times people decide to use the former method of disclosing their actual lobbying efforts in order to comply with [Form] LD-203.

KIMBERLY WHITE: Scott and Michael, [a] question for you, because I was going through the leading practice profile, which is also included as part of this Web cast, but for a lot of us in-house counsel, one of the challenges is just getting a handle on: Who out there would be falling under these definitions and their activities, thus be categorized as lobbying activities? In looking through leading practice profiles, they had some suggestions on training and getting out communications. Do you have any insight, as to those of us who are working on our compliance programs, of how we actually start to do that and develop that process of getting a handle on these activities?

SCOTT THOMAS: My experience is that the folks who have to worry about this—and it normally starts in the counsel's office, and that person, nine times out of 10, has to seize the initiative and say to whoever up the chain is going to make this happen, "We have got to authorize someone, perhaps myself as counsel, to initiate an inquiry about which people are undertaking any kind of contact with government officials or generating communications with government officials. And we have to assess whether or not those people are, in fact, doing anything that would trip any of these lobbying activity definitions or lobbying contact definitions, or lobbyist definitions." It's something you basically have to—you find someone who will help you get authorization and you find someone who will lead the charge, but you do really need to do that sort of kind of assessment.

KIMBERLY WHITE: And we need to really do that before we actually engage in any kind of training, because that's partly where we wanted to go, was to do the training, but I think we need to do this not only for lobbying, but any other type of government contact where there's some laws involved like FCPA [Foreign Corrupt Practices Act] and other types of things.

SCOTT THOMAS: Yes, generally you sort of do an assessment of whether or not you're close to triggering the rules, and then you have a more serious assessment, "OK. Are we or are we not?" Decision made. And then you move into the, "OK. We need to sort of adopt a system and get people trained so that everybody knows what functions they have to follow through with

compliance from that point on.”

KIMBERLY WHITE: OK.

SCOTT THOMAS: OK. I think we’re ready for the next slide and we’ve got to sort of pick up the pace I see. We’ve got something to cover here which is: There is a fairly new semi-annual reporting requirement under the federal Lobbyist Disclosure Act and that basically is required of any reporting entity, and it’s also required of those folks who are listed as lobbyists on the lobby disclosure reports.

And this semi-annual report requires disclosure of those kinds of contributions that were made to federal candidates or leadership PACs or party accounts if, during the reporting period, they aggregated at or above \$200 worth. They also require a listing of payments in some fashion, honor or recognize one of the covered officials—and this generally is virtually any person, a member of Congress or a staffer on the Hill, and it would also pick up certain higher-level executive branch folks or folks who are in Schedule C political appointments—but anyway, any of these kinds of payments to honor or recognize these folks or to some entity that’s named for them, or to some entity that’s in some fashion established or controlled by them. Those kinds of payments have to be tracked. There’s some pretty good guidance that’s laid out in the info pack that comes from the Secretary and Clerk’s office that helps you figure out exactly what’s covered and what’s not.

Now, an important part of this LD-203 semi-annual report is a certification that during the period no improper gifts under the Congressional Ethics Rules have been provided. This is a, sort of a, gut check for some companies. And I’ll leave it to Michael here to sort of explain the practical side of it.

MICHAEL SPENCER: Well, due to the certification requirements under the LDA, it’s recommended that employees actually be trained. I think once you get to the point where you understand exactly what you’re doing, then you have to understand what you can and cannot give, and therefore it’s necessary to make sure your employees and associates actually understand that. I mean the general prohibition includes training, travel and meals with certain nuance exceptions related to each. So, it’s really important that you get a better understanding of exactly what types of things are actually going on out there and then also, understand what is and is not permissible. The reason for that is that the sum of the fines can go as high as \$200,000 per violation, and then there are also criminal violations, which can not only be criminal fines but imprisonment for up to five years.

SCOTT THOMAS: Thank you, Michael. On that happy thought, let’s move on to the next slide.

MICHAEL SPENCER: I’m sorry I’m not bringing joy.

SCOTT THOMAS: The reason we’re now at gifts and travel is because of what Michael just talked about. If you have to make that kind of certification on the LD-203 form, you need to really learn the gift rules, and the federal rules can be very tough. We can—we’ve gotten the speech, so we can actually move on to the next slide as well.

The basic rule you have to worry about is: If you are an entity that has to register under the LDA,

or even if you're an entity that simply retains some outside lobbying firm that registers under the LDA, or if you are a listed lobbyist, or if you are an agent of a foreign principle, you have a zero-dollar gift allowance. In other words, you cannot make what would be deemed a gift.

Now, for other persons, they can make a gift of up to \$50 per occasion and they have to make sure that that particular source doesn't go above \$100 in giving to that particular covered official during the course of a year. But in this area it's important to keep in mind there are many useful exceptions to the various gift rules and that sort of is the real art, when you're in-house counsel, is trying to figure out what are the exceptions.

Next slide, please.

KIMBERLY WHITE: Did that go?

SCOTT THOMAS: Not quite.

KIMBERLY WHITE: Not working here, hang on. I'm having trouble advancing my slide here. Ah, there we go.

SCOTT THOMAS: OK, great. Thank you, Kimberly. I won't go into detail here; you can sort of see how these would work out. Probably the most important one, and one that I think Michael wants to mention, is the first one. And this is something that's very big in Washington, because if the event in question is being paid by a political organization—this could be a PAC, it could be a party committee, it could be a candidate committee, it could be someone's leadership PAC—the covered official can attend and can partake in a nice meal and it's something that fits precisely within a clear-cut exception to the gift rule. Michael?

MICHAEL SPENCER: Yes, this is a different aspect in which you can, as a corporation, avoid the facilitation pitfalls that go with the FEC, by either establishing a PAC or using your PAC to help get you to a point where you can actually attend one of those types of events [that] gives you the opportunity to actually network with those members of Congress or other political entities at the federal level. So, this is that exception that Scott just alluded to that I think is very important, and is something that an organization needs to consider, because of all the restrictions on the actual corporation, to look towards the PACs to help you have those types of events in which you can engage in lobbying efforts.

SCOTT THOMAS: Right. This sort of is giving you the full picture here. This is kind of tying in the ability to pay for an event using your PAC resources, perhaps that is a fundraiser for a federal candidate, and, at the same time, it fits within the applicable gift exceptions so the value of the food and refreshments provided to the covered official don't have to be treated as a gift. And it provides that opportunity to get to know someone, and that ties in ultimately to your ability to effectively lobby government officials. So, it's kind of a nice sort of tie-it-all-together example.

These other exceptions mentioned here—again, they're explained in more detail in the info pack—and you can see if you can make use of any one of those in a proper set of circumstances.

Next slide. The executive branch rules are somewhat similar to those at the congressional level. They are phrased in terms of whether or not the person giving the gift is a so-called "prohibited

source.” That basically means whether they have some interest before the government official involved, or if it’s a gift given because of that person’s official position. That’s a fairly broad restriction. Interestingly here, unlike in the congressional area, the giver of the gift generally is somewhat insulated from potential prosecution. It would have to be something that would rise to the level of maybe an illegal gratuity before the U.S. Attorney might take an interest in something in this area; it would have to be a fairly abusive situation.

But the next slide will point out [that] many of the exceptions available here are very similar to what we see at the congressional gift level.

There is one unique exception. The gift under \$20 is helpful. That’s kind of a nice way to go to inexpensive lunch with a government official, and you can just automatically fit it in that particular allowance.

There are some official speaking opportunities. There’s the so-called “widely attended gathering” allowance. These are all rules that are very clearly spelled out by the Office of Government Ethics [OGE] in their regulations. And you can find those at Part 26.35 of Title 5 of the C.F.R.

Next slide. There are some interesting new rules from the Obama administration. They have tried to, in essence, withdraw the ability to use certain of these allowances we’ve talked about in the gift area, and you’ll see them listed there on Slide 18. It’s made it a little bit more difficult for some of the Obama appointees to come to receptions and to make use of some of the opportunities for attending what’s called a “widely attended gathering.” But there still are opportunities to have them come in for, say, a speaking engagement and, in that context, they can go ahead and accept the food and refreshment that’s offered. So, these are areas that the Office of Government Ethics has fleshed out a little bit in their guidance and you can go to their OGE website and dig up a lot of helpful information there.

OK. Next slide.

KIMBERLY WHITE: I’m trying to get to it, having trouble advancing my slides. There it is. All right.

SCOTT THOMAS: OK. We’re reaching the end here in terms of content. We alluded to the state laws in this area; there’s a great variety, obviously. Those charts that we have created for you and that are available on the ACC website will give you a head start in trying to track down the relevant laws in these topic areas we’ve covered. Michael?

MICHAEL SPENCER: One of the things that you have to be apprised of is how difficult it is to know what the state and local level laws are in dealing with things such as pay-to-play. What that really is, is a law in which a vendor to a state or locality cannot contribute to a candidate or public official. That really ties the hands of many organizations [and] corporations that are doing business with a state or locality. And then on top of that, based on these types of laws, you won’t be able to give to a certain political officer candidate for certain political office. An example of that is out of New Jersey, where a company, PAC, executive or family members cannot make contributions to a candidate for a particular office if they are, in fact, a vendor. So, those are things that it [are] really difficult, but you have to keep apprised of all 50 states, because this

could be something that you could be violating and not know it.

So, that's something that you have to keep in mind.

SCOTT THOMAS: Good. Well, I think we've covered the substance.

KIMBERLY WHITE: Yes. We have a few questions here. I have a question here from—I can't read the name—but it says here: "Would the rules apply in the same way if a corporation hires a lobbyist as an independent consultant or contractor consultant rather than an employee?" And I imagine they mean whatever the disclosure is and other types of issues.

SCOTT THOMAS: The bottom line is: If your company is relying on outside lobbyists or a lobbying firm to handle the entire lobbying task as a general concept, no, your organization itself will not trigger any of the LDA registration and reporting obligations. What I was describing really were the rules where you would have to worry about whether your own organization does have someone in-house who does trip that lobbyist definition and that does therefore trip the registration reporting requirement for your own organization.

KIMBERLY WHITE: OK. Any other questions? Well, I actually have one question and that is really with respect to something I saw in the Leading Practice Profile that I was wondering if Scott or Michael could speak to. And it has to deal with the solicitation of information from a PAC that comes from inside the company. And apparently there's some prohibition or discussion that you have to have about sending that solicitation out only to U.S. citizens and legal permanent residents, and I didn't know if you knew anything about that or could elaborate any more, but that was the first time I'd heard anything like that.

SCOTT THOMAS: Yes, we didn't talk about it, but one of the restrictions in terms of who can be solicited is that you cannot solicit someone who is not either a U.S. citizen or a permanent resident alien. And, in essence, that means that if you are a company that has operations overseas, and you might have some employees who are not U.S. citizens and not permanent resident aliens of the United States, then you have to take certain precautions about screening the contributions that come in. And the Federal Election Commission does have some regulations that sort of spell out, in some helpful detail, the kinds of steps that you can take, in essence as a safe harbor, to show that you have adequately screened for any potential foreign national contributions, as they're referred to. And those regulations are in Part 110. I don't have the cite right here in front of me, but that's something where if you wanted to find out, you can go to the FEC website and you can find the brochure that relates to corporations and labor organizations—the campaign guide rather—and it has a little portion that relates to this foreign national issue.

KIMBERLY WHITE: OK, great. While we're waiting for more questions to come in—and we do have a bit more time for questions—I did have another question that came up as we were preparing this presentation. And it really has to center around those of us who are working on our lobbying compliance programs or enhancing our lobbying compliance programs.

Now, if you have a compliance program up and running and you're now instituting training, are there any specific areas that you would suggest that we ought to target in our training? For example: Is it contributions? Should we be looking at documentation? Should we be talking to our auditors? That's kind of a complex question, but a lot of things are coming to my mind as

you were talking about getting a handle on all of this and making certain that we've got the right communications, and we're getting the right information out and getting the right information back from the folks that have these lobbying activities. So, I was wondering if you could talk a little bit more about that from a compliance perspective.

SCOTT THOMAS: Well, my general sense in the campaign finance area is that you have to sort of deal with two different issues. One is making sure that any corporate resources are not going to be used in any impermissible way, and that's a matter of educating those folks who might, for some reason or another, think about expending corporate resources that could perhaps be deemed a contribution to a federal candidate or a federal political committee. And in that regard you've got to be careful with the so-called coordinated communications that we talked about. So, there's the being careful about use of corporate resources.

Then beyond that, there is sort of running the PAC. And, in that context, quite often the real key is right up front, selecting someone who is the treasurer of the PAC, who has some accounting knowledge or awareness, and who is just someone of good common sense who can be relied on to study the FEC's campaign finance guide, for example, that gives you all of the relevant basics about setting up and running the PAC. If you've got a good person in that role, generally the PAC operation is fairly easy to make happen.

But, you know, you always are wise to sort of have someone with legal skills at your disposal who can answer the funny nuances and quite often, in a company when they're getting started, it's a question of, "Gee, are these people within the solicitable class or not? I mean, they're managers, but maybe they're just kind of managers who supervise hourly employees only. And is that an issue?" And indeed, that is an issue. One of the rules the FEC has is that you know you can't treat someone as a solicitable manager if their only function is to supervise hourly employees. So, that's the kind of question where you end up having to make sure you ask someone with some legal awareness to check that out.

KIMBERLY WHITE: OK. Michael, do you have anything else, from your perspective?

MICHAEL SPENCER: Well, I think one of the things from being on the in-house side of things is really trying to educate the individuals who may be your top-level executives, because a lot of times they may receive calls or things directly from people in high-level offices and they might not view that as any type of—or they wouldn't construe that as being a lobbying contact or things of that nature. So, there are a lot of nuances that you need to at least make sure that the people at the top of the food chain are aware of, because if they're not aware, they might be engaging in conduct that could come back and bite the corporation at a later date.

So, what we try to do here is make sure that everyone on almost every level is educated as to what the nuances are and some of the things that they need to be aware of. If it is anything just to be able to say, "Hey, I want to do 'x'," they'll at least call and ask what our opinion is on one of those types of issues, and then we can help, hopefully, circumvent any type of issues that may come up. So, really having someone [who's] in charge of your PAC aware of that, and then really working with—if you don't have the internal knowledge—working with outside counsel who can help guide you as to who you need to talk to and exactly what they need to be aware of to make sure that you don't have, whether it be the FEC or some other organization breathing

down your neck because they think that some of the activities have crossed the line. So, those are just some things to be careful of.

KIMBERLY WHITE: OK. Great. Well, thank you for those thoughts, Scott and Michael. I want to thank you both for this very comprehensive and informational session on this whole area, because it seems that there are a lot of things to remember and to look at from the in-house counsel's perspective, and you've given us a lot to think about.

And I also want to encourage everyone on the call to make sure that they check out the info pack on campaign finance and also the Leading Practice Profiles. You can get both of them from the ACC's site. So, I just want to wrap up by thanking you both again, and on behalf of the ACC and the Compliance and Ethics committee, what a great webcast. Thank you so much.

I'm going to turn it back to Leslie for the final notes and the verification number, I think.

LESLIE GARDNER: Thanks, Kimberly.

[The instructions provided here were intended for attendees of the live webcast when it was originally broadcast for CLE Credit. CLE is not offered for this course.]

And on behalf of the Association of Corporate Counsel and SmartPros Legal and Ethics, thanks again for listening to today's program. For those users who want CLE credit, please log back in to your SmartPros account, click on the course listing on your "My Courses" page, and follow the directions there to enter the verification codes and print your certificate.

Thanks everyone. Have a great day.