

wiley

ACC NCR

**Government Relations Compliance for
Government Contractors: Mid-term
Election Year 2022**



Presented by:

D. Mark Renaud

Ogechi Muotoh

George E. Petel

Mara Motherway

June 8, 2022



Speakers



D. Mark Renaud
Partner
Wiley Rein LLP
mrenaud@wiley.law



Ogechi Muotoh
Corporate Counsel
VMware
omuotoh@vmware.com



George E. Petel
Associate
Wiley Rein LLP
gpel@wiley.law



Mara Motherway
Senior Vice President
Government and Customer
Relations
Peraton
mmother@peraton.com

Today's Ambitious Agenda

- Federal Campaign Finance Prohibition for Federal Contractors
- State Pay-to-Play Laws and Rules
- Top-Level Federal PAC Rules
- The Federal Lobbying Disclosure Act (LDA)
- The Byrd Amendment
- Federal Acquisition Regulation Cost Principles

Federal Government Contractor Contribution and Expenditure Prohibition

Federal Contractor Contribution and Expenditure Ban

- It is unlawful for a Federal contractor “to make, either directly or indirectly, any contribution or expenditure of money or other thing of value, or to promise expressly or impliedly to make any such contribution or expenditure to any political party, committee, or candidate for Federal office or to any person for any political purpose or use. This prohibition does not apply to contributions or expenditures in connection with State or local elections.” [11 C.F.R. § 115.2](#); see also [52 U.S.C. § 30119](#).

Ban on Super PAC Contributions

- Federal contractors **are still prohibited** from making contributions to independent expenditure only committees including Super PACs.
- The FEC continues to vigorously enforce this prohibition.
- MUR 7450, AshBritt, Inc. (Jul. 20, 2021): \$125,000 fine for contributions by federal contractor to Super PAC.
- MUR 7568, Alpha Marine Serv's Holdings, LLC (July 22, 2020): \$17,000 penalty for \$100,000 contribution to Super PAC CLF.
- MUR 7099, Suffolk Construction Company, Inc. (Sep. 20, 2017): \$34,000 fine for \$200,000 in cumulative contributions to Super PACs Priorities USA Action and Priorities USA.

Ban on Super PAC Contributions

- MUR 7843, *Marathon Petroleum Company LP* (Feb. 17, 2022): FEC fined Marathon Oil Company \$85,000 for making \$1.5 million in Super PAC contributions while a small unit of the company was negotiating a contract with the federal government (unbeknownst to the attorneys performing the due diligence for the contributions).

Ban on Super PAC Contributions

- In MUR 6726, Chevron Corp. (Mar. 11, 2014), the FEC declined to proceed on allegations that Chevron had violated the bar on political contributions and expenditures by Federal contractors because Chevron had not been a Federal contractor at the time of its contributions to a Super PAC, and the contributing entity was sufficiently distinct from its subsidiaries who were Federal contractors.
- Emphasis on Chevron's status at the time of the contributions, rather than the impact of *Citizens United* and its progeny, suggested continuing enforcement of bar on contractor independent expenditures and contributions to Super PACs.

Ban on Super PAC Contributions

- The FEC has been reluctant to pursue enforcement of the contractor bar against contributions by non-contractor parent companies with subsidiaries who hold federal contracts. See [MUR 7180, GEO Corrections Holdings, Inc., Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor III \(Oct. 13, 2021\)](#).
- Republican Commissioners also recently noted “substantial doubt about the constitutionality of any limits on Super PAC contributions” by contractors in the wake of *Citizens United* and *SpeechNow.org*. They expressed “skept[ic]ism of the Commission’s ability to identify a sufficient anticorruption interest in limiting government contractor contributions made to fund independent expenditures,” and suggest[ed] “future litigation will test that skepticism.” [Id.](#)

Ban on Independent Expenditures

- Independent expenditures are expenditures for communications that expressly advocate the election or defeat of a candidate and are not made in coordination with any candidate, candidate committee, or political party committee. 11 C.F.R. § 100.16.
- 11 C.F.R. § 115.2 bars independent expenditures by federal contractors in addition to contributions by federal contractors.
- This aspect of the ban is violated less frequently than the ban on contributions to Super PACs.

Ban on Electioneering Communications

- An Electioneering Communication is any broadcast, cable, or satellite communication that:
 - Refers to a clearly identified candidate for federal office;
 - Is publicly distributed within 60 days before a general election for that office, or within 30 days before a primary or nominating convention for that office; and
 - Is targeted to the relevant electorate (in the case of Senate and House elections). 11 C.F.R. § 100.29
- 11 C.F.R. § 115.2 also bars electioneering communications by federal contractors.

Practice Tips

- Make sure the due diligence covers all aspects of the company's operations.
- Focus on the parent entity or a lower-level subsidiary when looking for entities without government contracts (and with revenues that are not entirely from subsidiaries with federal government contracts).
- These bans can affect the company's grassroots lobbying if on TV and radio in election years.

State and Local Pay-to-Play Laws and Rules

Pay-to-Play Basics

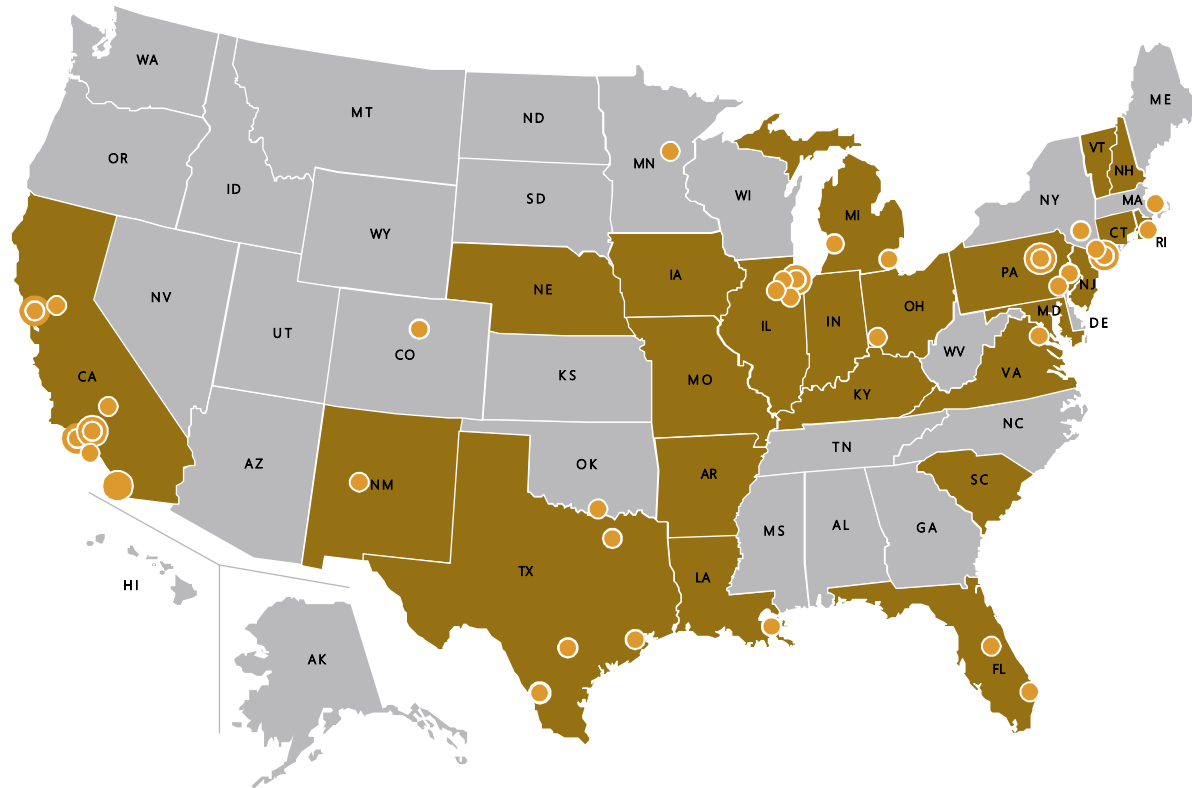
- **What are “pay-to-play” laws and rules?**
 - Laws that prohibit or limit “paying” (which is making or soliciting political contributions) in order to “play” (which is receiving a government contract).
 - Adopted because of the difficulty in proving *quid pro quo* necessary under the bribery laws.
 - These bans and limits are prophylactic in that they go **beyond** bans on quid pro quo activity and bribery.
 - **Strict liability** – no intent necessary.
 - Some laws only require disclosure of contributions made by government contractors or prospective contractors.
 - The conduct regulated is **in addition to** other campaign finance restrictions such as contribution limits and blackout periods for lobbyists and lobbyist employers.

State and Local Pay-to-Play Laws

- Only this one layer for non-financial firms.
- Laws and Rules vary by jurisdiction:
 - Contribution Bans
 - Contribution Restrictions
 - Contribution Reporting
- Laws may apply to contributions from, or fundraising by, the contractor and/or its subs, officers, directors, employees (and in some jurisdictions, spouses and minor children).
 - Can include “in-kind” contributions such as goods or services provided for a campaign (e.g., hosting an event, providing contact lists, etc.)
- Violations could result in losing contracts, being barred from future contracts, public disclosures, fines, or other penalties.

States/Localities with Pay-to-Play Rules That Apply to Executives and/or Employees

June 2022



Arkansas
California (only agent in proceeding)
Connecticut (including town committees)*
Florida
Illinois*
Indiana
Iowa
Kentucky (state and local office)*
Louisiana
Maryland (state and local office)
Michigan
Missouri
Nebraska
New Hampshire
New Jersey (state and local office)*
New Mexico (state and local office)*
Ohio
Pennsylvania (state and local office)*
Rhode Island*
South Carolina*
Texas
Vermont
Virginia

Albuquerque, N.M.
Allentown, PA*
Cambridge, MA
Chicago, IL*
Chicago Ridge, IL*
Cincinnati, OH
Cook County, IL
Culver City, CA
Dallas, TX*
Dallas County, TX
Deerfield Beach, FL
Delaware County, PA
Denver, CO*
Detroit, MI*
DuPage County, IL
Glendale, CA
Grand Rapids, MI
Holyoke, MA
Houston, TX
Houston Independent
School District
Jefferson Parish, LA
Kane County, IL*
Laredo, TX
Lehigh County, PA*
City of Los Angeles, CA
Los Angeles County, CA*
Nassau County, NY
New York City, NY
Oakland, CA
Orange County, FL
Orange County, FL School Dist.
Orange County, NY
Pasadena, CA

Philadelphia, PA
Providence, RI*
Rockland County, NY
St. Paul, MN
San Antonio, TX*
San Diego County, CA
City and Co. of San Francisco, CA
Santa Ana, CA
Washington, D.C.
West Covina, CA

Pay-to-Play Law Developments

- The District of Columbia rules were set to go into effect December 4, 2020. However, due to insufficient funding, the City Council amended the applicability date to make the law effective when the implementation costs are included in an approved budget. Will now be effective Nov. 8, 2022.

Pay-to-Play Law Developments

- Cincinnati passed an anti-corruption law that has pay-to-play elements, especially for developers. This law just became effective.
- Delaware County, Pennsylvania, in December 2021 adopted a pay-to-play reporting ordinance that became effective in April 2022.

Insights into State and Local Pay-to-Play

- Cover directors, officers, and other employees – varies by jurisdiction
- Spouses, domestic partners, and unemancipated children are covered in many jurisdictions
 - Very limiting given independent political activity
 - Kane County, Illinois, purports to cover extended family members with its contribution limit
- Lookback periods often means a national playing field
 - Even if your company is not doing business in a given area now, it may not want to foreclose future business activity
 - New Jersey – as bad as 5.5 years
 - Kentucky – during term of elected official

Practice Tips

- If state and local contracts are material to the company, the company needs a pay-to-play preclearance policy and process.
- Remind those covered by your policy of their obligations – at least several times a year – more in election years.
- Make sure your sales department is forwarding all contract addendum and documents to legal so that they do not certify compliance with the pay-to-play rules when no due diligence has been done.

Top-Level Federal PAC Rules

Federal PACs as Exceptions to Ban

- All corporations, including federal contractors, are prohibited from making corporate contributions to federal candidates.
- However, federal law allows a corporation to sponsor a “separate segregated fund”—more commonly referred to as a political action committee or “PAC.”
- Corporations, including federal contractors, are allowed to use corporate funds to pay for the establishment, administrative, and solicitation costs of their corporate PACs. See [11 C.F.R. § 115.3](#).

Solicitations for Federal PAC Contributions

- A corporation may make unlimited solicitations to members of its “restricted class.”
- Solicitations may be oral or written.
- Disclaimers must be included on written solicitations.

What is a “Solicitation”?

- “Solicitation” is broadly defined and can include:
 - Straightforward request for contributions for the PAC
 - Information on how to contribute to the PAC
 - Publicizing the PAC’s right to accept unsolicited contributions
 - Statements encouraging support of the PAC or facilitating contributions to the PAC
- Solicitations can be oral or in writing.
- Each PAC solicitation must be accompanied by the required notices and disclaimers. Oral solicitations should be accompanied by written materials containing the required notices and disclaimers.

What is NOT a “Solicitation”?

- Communications that:
 - Announce the existence of the PAC
 - Explain law applying to the PAC
 - Provide statistical information about the PAC
 - Simply listing candidates supported without suggesting that supporting the PAC will help elect those candidates
 - Don’t encourage support for the PAC
 - Don’t explain how to make contributions to the PAC

Required Notices and Disclaimers for Corporate PAC Solicitations

- The following notices and disclaimers must be included on all corporate PAC solicitations and be clearly readable:
 - An IRS disclaimer, informing potential contributors that contributions to the PAC are not tax deductible for federal income tax purposes
 - A disclaimer informing potential contributors that their contributions are voluntary and will be used in connection with federal elections and are subject to the prohibitions and limitations of federal campaign finance law
 - Notice of the potential contributor's right to refuse to contribute without reprisal

Contributions to Trade Association PACs

- Although trade associations are not permitted to solicit contributions to their federal PACs from the federal PACs of their member companies, the member company PACs are permitted to make unsolicited contributions to the trade association PAC of up to \$5,000 per calendar year.

Contribution Limits (2021-22 Election Cycle)

D O N O R		RECIPIENT						
			House or Senate Campaign Committee	National Party National Committee (RNC/DNC)	National Party Congressional Committee (NRSC/DSCC/ NRCC/DCCC)	State, District and Local Party Committee (Federal Accounts)	Traditional Multicandidate PAC	Super PAC (Independent Expenditure- Only PAC)
		Individual	\$2,900 per election	\$36,500 per year (main acct) \$109,500/year (convention) \$109,500/year (bldg. acct) \$109,500/year (legal acct)	\$36,500 per year (main acct) \$109,500/year (bldg. acct) \$109,500/year (legal acct)	\$10,000 per year combined	\$5,000 per year	Unlimited
		Traditional Multicandidate PAC	\$5,000 per election	\$15,000 per year (main acct) \$45,000/year (convention) \$45,000/year (bldg. acct) \$45,000/year (legal acct)	\$15,000 per year (main acct) \$45,000/year (bldg. acct) \$45,000/year (legal acct)	\$5,000 per year combined	\$5,000 per year	Unlimited

Practice Tips

- Federal PACs may only be a bank account and a ledger, but they are highly regulated. Make sure your personnel are trained and assisted by informed counsel and vendors.
- Ensure a proper separation from lobbying and particularly live legislative issues when making contributions to candidates and when raising funds from your employees.

The Federal Lobbying Disclosure Act (LDA)

What is lobbying?

- Lobbying under the Lobbying Disclosure Act (LDA) is not just talking to Congress about legislation
- It also involves
 - Direct communications
 - With covered officials in the Executive Branch
 - About covered issues

Direct Communications

- Direct Communications are those made
 - In person
 - By telephone
 - By email
 - By letter
 - By text
 - By Zoom
 - By FB messenger or similar apps

Covered Officials in the Executive Branch

- Covered officials in the Executive Branch are the following:
 - The President and Vice President;
 - Officials and employees of the Executive Office of the President (the White House, OMB, etc.);
 - Political appointees serving in Executive Level I-V positions, including cabinet officials, most sub-cabinet officials, and high-level officials of independent agencies;
 - “Schedule C” political appointees such as confidential assistants to senior officials; and
 - Members of the uniformed services serving at grade O-7 or above, such as brigadier generals or admirals.

Covered Issues

- Communications about the following subjects are covered by the LDA:
 - The formulation, modification, or adoption of federal legislation (including legislative proposals);
 - The formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;
 - **The administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or**
 - The nomination or confirmation of a person for a position subject to confirmation by the Senate

Pertinent LDA Exceptions

Not every direct communication with a covered official about contracts or programs is reportable federal lobbying activity

Communications with Non-Covered Officials: Not Reportable

- Military officers with a rank less than O-7
- Employees in the Senior Executive Service (SES) unless they are acting in a covered position (when the political appointee has not yet been confirmed)
- Career civil servants

Resources

- 2020 Plum Book
- Ask the official

Written Responses to Government Requests: Not Reportable

- It is not considered lobbying if one provides a written response to an oral or written request for information from a covered official.
- This includes the following:
 - White papers, emails, memos, printed slides
- This exception does not extend to meetings or calls held to explain the written materials.

Contractual Communications: Not Reportable

- Any communication compelled by a federal contract, grant, loan, permit, or license is not lobbying.
- This would include any communications necessary to fulfill the contract, but would not include efforts to amend, expand, or renew the current contract or to be awarded a new contract.

Under IRS Definitions, Likely Not Covered

- Registrants under the LDA have the yearly choice to use the definitions of lobbying found in the Internal Revenue Code for reporting purposes.
- Under the IRS definitions, many communications about contracts would not be lobbying since covered officials do not include military officials or employees in the Executive Branch departments other than the Secretary and his or her immediate deputy. (The White House Office and the top two employees in all other offices of the Executive Office of the President are covered, however.)

Practice Tips

- Using the IRS definitions prevents much government-contract lobbying from triggering lobbyist status for employees.
- Make sure to capture lobbying time from all employees – not just the registered lobbyists.
- Make sure to monitor those who are not registered as lobbyists as they near 20% lobbying activity in a calendar quarter.

Byrd Amendment

Byrd Amendment

- Prohibits federal government contractors from using ***appropriated*** funds to pay for lobbying for a government award
- Requires federal government contractors to file disclosure reports if they use ***non-appropriated*** funds to pay for government contract lobbying

Byrd Amendment: Prohibitions

- Covered officials: No appropriated funds for influencing or attempting to influence:
 - An officer or employee of any agency;
 - A Member of Congress;
 - An officer or employee of Congress; or
 - An employee of a Member of Congress
- Covered activity: the awarding, making, entering into, extension, continuation, renewal, amendment, or modification of any award including a:
 - Federal contract;
 - Grant;
 - Loan; or
 - Cooperative agreement.
- “Influencing or attempting to influence”: communications to or appearances before a covered official with the intent to influence.

Byrd Amendment: Exemptions

- Reasonable compensation to regularly employed employees who are communicating with covered officials for:
 - Conducting agency and legislative liaison activities not directly related to an award
 - Providing any information specifically requested by an agency or Congress

Byrd Amendment: Exemptions

- Reasonable compensation to regularly employed employees who are communicating with covered officials for “selling activities”:
 - If not related to a specific solicitation:
 - Discussing the qualities and characteristics of the contractor’s products or services, conditions or terms of sale, and service capabilities; and
 - Conducting technical discussions and other activities regarding the application or adaptation of the contractor’s products or services for an agency’s use.
 - If prior to a formal solicitation:
 - Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a contract, grant, or cooperative agreement; and
 - Conducting technical discussions regarding the preparation of an unsolicited proposal prior to the proposal’s official submission.

Byrd Amendment: Exemptions

- Exempt regardless of whether they are performed by employees or outside consultants:
 - Reasonable payments for “professional or technical services rendered directly in the preparation, submission, or negotiation” of the award, or for meeting requirements imposed by law as a condition of receiving the award; and
 - Communications in the nature of routine and ongoing post-administration of grants and contracts.

Byrd Amendment: Reporting Requirements

- An entity that requests or receives a federal award, or a commitment to insure or guarantee a loan from an agency, is subject to special certification and reporting requirements for its lobbying activity
 - Form LLL Disclosure

Practice Tips

- Fine line between exempt and prohibited activity so meetings with covered officials should have clear boundaries
- During discussions of ongoing awards, employees must be careful to avoid attempting to influence extensions or follow-on
 - Sandia Corporation \$4.7M Settlement: employees engaged in prohibited activity by discouraging recompetes
- Disclosure is not required for employee activities, only outside lobbyists
- Consider a central government affairs office to coordinate and manage these potential issues, and ensure all relevant employees have training to spot issues, ask questions, and know when to contact office for advice and legal involvement

Anti-Lobbying Contract Clauses and Certification

- FAR 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions
- FAR 52.203-12, Limitation on Payments to Influence Certain Federal Transactions

Federal Acquisition Regulation Cost Principles

Lobbying & Political Activity Costs (FAR 31.205-22)

- General Principle: costs (direct or indirect) that are not allowable, allocable, reasonable (prudent) or in accord with contract provisions, may not be included in any proposal or billing under a cost type award
- Federal Acquisition Regulation (FAR) Part 31 contains the guiding principles for these cost allowability standards

Lobbying & Political Activity Costs (FAR 31.205-22)

- Unallowable: costs associated with federal, state, or local lobbying activities through cash or kind, endorsements, publicity or similar activities:
 - Attempts to influence elections, referendums, or legislation
 - Legislative liaison activities in support of unallowable activities
 - Attempts to improperly influence congressional or federal employees to give consideration to or act regarding a regulatory or contract matter
 - Contributions to political parties, Political Action Committees (PAC), or similar organizations

Lobbying & Political Activity Costs (FAR 31.205-22)

- Allowable:
 - Presenting technical and factual information on a topic related to contract performance *in response to a documented request from a legislative body or staff member (but cost of meals/lodging are unallowable)*
 - Activities authorized by statute to be undertaken with funds from the contract
 - Otherwise, unallowable state and local government legislative lobbying to directly *reduce* contract costs or avoid material impairment of contract performance

Lobbying & Political Activity Costs (FAR 31.205-22)

- Failure to properly (1) identify, (2) segregate and (3) exclude unallowable costs can cause severe penalties to contractors
- Penalties can include the amount of the expressly unallowable cost, plus interest on the paid portion, if any, of the disallowance
 - [Raytheon Co., ASBCA No. 57743, 17-1 ¶ 36724 \(Apr. 17, 2017\)](#) – salaries for employees engaged in activities “directly associated” with unallowable lobbying activities are “expressly unallowable” and subject to additional penalties
 - Other administrative, civil, and criminal penalties provided by law

Practice Tips

- When a contractor seeks reimbursement for indirect costs, total lobbying costs must be separately identified on the cost proposal
- Employees must assist their companies in being alert to identify and exclude unallowable costs
- Timekeeping training is essential for all employees who may be engaged in lobbying and political activity to ensure proper cost segregation
 - Special time codes for lobbying activity helps ensure proper segregation and reporting
- Lobbying costs are an audit focus area for both Defense Contract Audit Agency (DCAA) and Defense Contract Management Agency (DCMA)

Questions and Contact Information



D. Mark Renaud
Partner
Wiley Rein LLP
mrenaud@wiley.law



Ogechi Muotoh
Corporate Counsel
VMware
omuotoh@vmware.com



George E. Petel
Associate
Wiley Rein LLP
gpetel@wiley.law



Mara Motherway
Senior Vice President
Government and Customer
Relations
Peraton
mmother@peraton.com