

## Political Activities and the Law: Mitigating Risks for Corporations and Nonprofits

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Over the past few years, the political law landscape has changed dramatically for those engaging in political activities, including for-profit corporations, nonprofit entities, and their principals. Mismanagement of these activities can cause considerable harm to individuals and organizations in the form of criminal penalties, civil fines, and reputational damage. As we enter the final weeks of the 2014 election cycle, it is crucial that engaged individuals and organizations remain attentive to the political laws that may affect them on the federal, state, and local levels. The checklist below offers key takeaways to help identify and mitigate risks associated with political activity.

### Identifying Potential Risks

For-profit corporations, nonprofit entities, and their principals should catalogue the risks presented by their political activities. For example, politically active entities and individuals should be aware of all laws that apply to their activities in this heavily regulated field, including:

- Campaign Finance Rules
  - Disclosure requirements necessitate registration/reporting by most contributors to political candidates and committees, as well as some sponsors of independent election advertisements.
  - Contribution restrictions may limit or outright prohibit campaign contributions by certain individuals or entities (e.g., lobbyists, government contractors).
  - Board approval may be required to disburse corporate treasury funds for political purposes.
  - PAC rules obligate an organization to solicit for and operate a PAC in a specific manner.
  - "Pay-to-play" laws may impose special restrictions or disclosure obligations on government contractors/bidders and on their employees.
- Lobbying Rules impose registration and reporting requirements on those who interact with elected officials and on certain salespersons who interact with government procurement personnel.
- Tax Rules require organizations to consider disclosure requirements and deductibility for certain activities.

Support of election campaigns and lobbying initiatives, even if lawful, may attract negative attention from media outlets and the general public. The following events helped raise the general profile of political activity:

- "Super PACs," social welfare organizations (501(c)(4)), and trade associations (501(c)(6)), which may accept corporate contributions, have played prominent roles in the 2010, 2012, and 2014 election cycles.
- Reform: Due to the public and media attention that corporate political activity has received, outside groups and shareholders have begun to press for reform.
  - Advocacy Groups like Common Cause, etc., have engaged in sustained public petition and letter-writing campaigns targeting major corporations regarding their political spending and disclosure policies.
  - Center for Political Accountability has issued the CPA-Zicklin Index of Corporate Political Accountability and Disclosure, a multi-factor ranking of all S&P 100 companies on their disclosure and oversight processes.
  - Increased corporate responsibility and governance movement (e.g., Corporate Board Political Spending reports).
  - New York State Comptroller, CalPERS, labor unions, and other large investors are active in negotiating political spending reforms or introducing shareholder proposals.
  - Shareholder proposals regarding political spending and support for those proposals have increased (e.g., a record 21 percent of shareholder proposals in 2013 involved political disclosure and shareholder surveys show 88 percent of respondents supporting more corporate political disclosure and 60 percent favoring board oversight).

## Mitigation Measures

Without a doubt, political activity can be beneficial to an organization by helping to elect candidates to public office who support its positions, build relationships with officeholders to make the organization's voice heard, and inform policymakers about the organization's issues. However, the "deregulation" of the political law arena by the U.S. Supreme Court has produced additional legal options, which means that corporations, nonprofits, and their principals must confront questions and issues they have never before encountered. Here is what you need to know now to reduce your risk of non-compliance:

- Have a management and Board process in place to approve all political- and candidate-related activity.

- Memorialize policies and processes to prevent loss of institutional knowledge when personnel changes occur.
- Create a written policy to protect the organization if an employee engages in unlawful or controversial activity that violates the policy. Detailed procedures provide greater uniformity and help avert unwitting mistakes by corporate personnel. The policy should be distributed to all employees and new hires.
- Conduct an audit of the organization's current policies and practices.
- Regularly review and update existing policies to ensure they are in line with changes in political law.
  - *McCutcheon* overturned federal “aggregate caps” on the total amount donated by one individual.
  - *Citizens United* decision allowed corporate treasury contributions to groups that sponsor independent advertising.
- Provide training for all employees, especially senior management.
- Organizations should be aware of the campaign contributions being made by their executives, and be familiar with the candidates and organizations receiving those contributions.
- Be transparent about lobbying efforts with outside groups such as Super PACs, social welfare organizations, and trade associations, and be prepared for disclosure of contributions even if confidentiality is promised.
- Decide whether to post the policy on your public website and/or private intranet.

[Caplin & Drysdale's Political Law Group](#) counsels for-profit corporations, nonprofit entities, and their principals on these and other matters relating to political law compliance. We work collaboratively with in-house personnel to craft tailored political activity policies and programs. If you have questions concerning this Alert or for more information, please contact:

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