

# BUSINESS LAW TODAY

## Corporations in an Election Year and Eight Tips on Legal Compliance

By [Jan Witold Baran](#)

A presidential election year is an interesting and exciting time. Citizens follow and often support candidates, political parties, and platforms. Campaigns engender debate and raise the great issues of the day. When businesses, employers, employees, and stockholders become involved in election campaigns they must be aware that political involvement is not only a civic responsibility, it also is a regulated activity. Politics, like any other large endeavor in society, can be and often is subject to laws. The following tips explain how campaign activities can trigger specific legal compliance issues.

### 1. Remember That Anything of Value Can Trigger Campaign Finance Laws

Most people equate money with contributions to political campaigns. Checks to campaign committees certainly are contributions. However, the laws that define contributions or expenditures usually encompass “anything of value,” which can include a variety of goods and services. Lending a storefront to a candidate for signage or for use as a campaign office without charge is a contribution. Allowing a campaign worker to use a company vehicle or paying individuals to work on a campaign will usually be a contribution. If anything of value is be-

ing used for a candidate or to disseminate information about a candidate, campaign finance laws may apply.

### 2. Know Whether Federal Laws or State Laws Apply

Campaign finance laws operate at the federal and state levels. Federal laws govern campaigns for president, the Senate or the House of Representatives. State laws govern campaigns for statewide office, such as governor, attorney general, or state supreme court justice. Local laws can govern local races such as mayor and city council. Some federal laws may apply to all election campaigns at every level of the country. For example, foreign nationals (including companies chartered or headquartered outside the United States) may not make contributions to any candidates for any elected office. The same is true of companies that have been chartered as a result of an act of Congress, which include national banks. In the same manner, some state laws will have special provisions that may affect certain industries (utilities, railroads, or state banks for example) or certain groups (government contractors). Before making a contribution to any candidate or political committee, confirm whether the recipient

is subject to federal law or state law and verify how the contribution will be treated.

### 3. Know How Contributions Differ from Expenditures

A contribution is money or “something of value” that is given to a candidate’s campaign or to a political committee. On the other hand, expenditures are usually treated as spending by an individual or entity, and the spending is not controlled by the candidate. If a candidate requests or collaborates in the spending, the expenditure will be treated as a contribution in-kind, also known as a “coordinated” expenditure. However, if the spending is done without the request or substantive involvement of the candidate the expenditure is deemed “independent.” The difference between a contribution and an independent expenditure has constitutional significance. The Supreme Court of the United States has repeatedly ruled that contributions, while a form of speech, may be limited in amount. However, independent spending cannot be limited under the First Amendment. Consequently an individual or entity must know when it is making a contribution and when it is engaged in independent spending. The difference will determine how the law regulates the activity.

#### **4. Know Applicable Contribution Limits and Prohibitions**

Under federal law, contributions to federal candidates and political committees are subject to contribution limits. For example, in the 2016 election cycle an individual may not contribute more than \$2,700 per election to any presidential candidate. Most, but not all, states have adopted contribution limits on donations to candidates for state office. In addition, some contributors are prohibited from making any contributions. Under federal law, no corporation or labor union may contribute to a candidate for federal office or to a federal political committee. Federal law allows incorporated entities and unions to form political action committees or PACs which may make limited contributions from funds voluntarily donated by employees or union members respectively. In contrast, 30 states allow contributions by corporations and 43 states allow union contributions to state candidates. Increasingly restrictions have been placed on government contractors as well as entities and individuals involved in financial services to government entities. All applicable laws should be checked for limits on the size of any contribution and for any prohibitions on contributions from any sources.

#### **5. Executives And Lobbyists Must Be Careful About Fundraising**

Fundraising for the candidate of one's choice is common and takes many forms. While online electronic communications and online donations are increasingly common and efficient, candidates still must rely on fundraising events and volunteers who solicit additional donations from friends and colleagues. When raising funds for a campaign, all the rules about contributions, limits, and prohibitions must be observed. In addition, fundraising "at the office" presents special hazards. Under federal law, corporations may not contribute money, goods, or resources to a campaign for federal office. When any employee uses corporate resources for the benefit of a candidate, it automatically raises the possibility of an illegal corporate contribution (there are a few exceptions for fundraising among

colleagues). Accordingly, employees including executives and lobbyists should not fundraise for candidates from corporate facilities and should avoid using corporate resources or other company employees for such activity. Lobbyists also should be aware that raising over a certain amount of money for a federal candidate will trigger disclosure as a "bundler." In addition, registered lobbyists under the Lobbying Disclosure Act must report personal contributions on a semiannual lobbying report.

#### **6. Know the Difference Between a Superpac and a Tax Exempt Group**

Recent elections have seen the rise of super PACs. These are political committees that are primarily engaged in politics and must register with the Federal Election Commission. They do not make contributions to candidates but rather finance independent expenditures. Because of its limited mission, a super PAC may accept donations from any source (other than a foreign national, government contractor or federally chartered institution) regardless of amount. Corporations and unions, as well as individuals, may donate to a super PAC unless they fall within one of the prohibited donor categories. Super PACs publicly disclose donations and expenses on reports to the FEC. Various tax exempt organizations also engage in independent expenditures. Such groups usually are "social welfare" organizations or trade associations under the Internal Revenue Code. Unlike super PACs, they do not spend their funds primarily for independent expenditures, are not political committees and consequently do not register with the FEC. They do disclose publicly any independent expenditure. Corporations that donate to a super PAC or a tax-exempt organization should first undertake a measure of due diligence to confirm the purpose and status of the organization.

#### **7. Corporations Can Spend Money at National Party Conventions**

Both political parties will convene quadrennial national conventions to nominate their candidates for president and vice president in the summer of 2016. While federal law

generally prohibits corporate contributions in connection with primary or general elections, there are several exceptions in connection with national conventions. First, a corporation may spend funds to host social events in conjunction with the conventions. (If government officials are invited to these events, applicable ethics or gifts laws should be consulted to ensure compliance with those rules.) Second, certain goods and services may be donated to a political party if the donor receives "promotional consideration." For example, an auto manufacturer may provide vehicles for use by convention attendees in return for recognition as the official provider of transportation at the convention. Individuals and PACs (but not corporations or unions) also may donate money to a party's convention fund to defray convention expenses. Finally, each convention city has a host committee that may help defray certain expenses related to the convention such as transportation and security. Of course these expenses are in addition to any expenses incurred by company officials who travel to and stay at the city. A corporation may not pay travel and housing expenses of any convention delegate.

#### **8. Finally, the Inauguration**

Once the votes are counted and the winner is declared, there will be an inauguration of a president on January 20, 2017. The swearing-in of a president will be accompanied by several days of special events, balls, and a parade. As at a party convention, a corporation may host its own events and also donate funds to an inaugural committee. Donations to an official inaugural committee will be disclosed after the inaugural by the committee. In addition, the Lobbying Disclosure Act requires companies that are registered under that law to disclose donations to an inaugural committee. Other than that, the campaign finance laws do not apply and participants may literally dance the night away.

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*laws and the First Amendment and represents them before the Supreme Court of the United States, lower courts, the Federal Election Commission, state agencies, and the ethics committees of Congress. His Supreme Court cases include Citizens United v. Federal Election Commission in which he represented the U.S. Chamber of Commerce. Mr. Baran is the author of The Election Law Primer for Corporations. The recently published sixth edition is available for purchase from the ABA.*

## ADDITIONAL RESOURCES

For other materials related to this topic, please refer to the following.

### ABA Web Store

#### The Election Law Primer for Corporations, Sixth Edition

This book covers the fast-changing landscape of campaign finance and lobbying laws. It begins with a discussion about campaign finance rules, political action committees (PACs), and campaign communications and activities by and at the corporation. Also addressed are lobbying laws, tax considerations, and enforcement.

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### Business Law Basics

#### **Internal Investigations Under the New DOJ Guidance (Access PDF, audio, and video [here](#))**

A new U.S. Department of Justice memo (the “Yates memo”) sets out guidance aimed at enhancing DOJ’s ability to prosecute individuals for corporate wrongdoing. The panel considers the practical and

legal implications of the Yates memo, including the challenges for corporate internal investigations, protection of privileged information, and whether the new guidance might result in fewer, rather than more, corporate settlements in criminal cases.

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### Business Law Section Program Library

#### **How Business Can Ethically and Legally Interact with Government (PDF) (Audio)**

Presented by: Government Affairs Practice, Corporate Compliance, Private Equity and Venture Capital  
Location: 2015 Annual Meeting

#### **Campaign Finance Update for the Business Lawyer (PDF) (Audio)**

Presented by: Government Affairs Practice, Corporate Counsel  
Location: 2014 Annual Meeting