

Insights **Skadden**

Excerpted from *2014 Insights*. The complete publication is available at www.skadden.com.

2014

A COLLECTION OF COMMENTARIES ON THE CRITICAL LEGAL ISSUES IN THE YEAR AHEAD

Government Affairs and Government Procurement: Pressure to Comply Continues to Grow in 2014

CONTRIBUTING PARTNERS

Kenneth A. Gross / Washington, D.C.

Ki P. Hong / Washington, D.C.

COUNSEL

Matthew Bobys / Washington, D.C.

Patricia M. Zweibel /
Washington, D.C.

ASSOCIATES

Charles M. Ricciardelli /
Washington, D.C.

Tyler Rosen / Washington, D.C.

With increased attention to transparency in corporate political spending, disclosure of so-called “dark money” and a new rule for municipal advisors, corporations and other organizations active in government affairs or government procurement will need to work hard to ensure a high level of compliance in 2014.

Shareholder Activism

A major issue surrounding corporate political activity is the extent to which a corporation must disclose its political contributions, lobbying and related activities to its shareholders and the general public. The Center for Political Accountability and activist shareholders have pressed for greater transparency of corporate political spending over the last decade by submitting proxy proposals on these topics to selected companies. This effort intensified in the wake of the U.S. Supreme Court’s ruling in *Citizens United v. FEC*, which allowed corporations to make unlimited independent expenditures for federal, state and local candidates. Since that 2010 decision, resolutions requiring disclosure have garnered a majority of the shareholder vote on several occasions. Proposals that did not receive majority support would have restricted political activity or required increased lobbying disclosure. The timing and thoroughness of lobbying and political expenditure disclosure raises significant political and public relations issues with a corporation’s investors, competitors and the public at large.

“Dark Money” Disclosure

Additionally, states likely will increase disclosure requirements in 2014. New York Attorney General Eric Schneiderman adopted regulations requiring nonprofits that file with his agency and make certain election-related expenditures to disclose those expenditures and their larger donors. The new regulations, which primarily target 501(c)(4) organizations that use so-called “dark money” to attempt to influence elections, took effect on June 5, 2013. Nonprofits and their donors — especially those who expect their contributions will not be disclosed publicly — should take these regulations seriously. In addition, while it does not address disclosure, the IRS has issued proposed new rules on the political activities of 501(c)(4) organizations.

Pay-to-Play Laws

Increasingly restrictive pay-to-play laws continue to emerge at the federal, state and local levels as a reaction to various scandals involving public officials. At the state and local levels in 2013, this included amended pay-to-play laws in Maryland, Michigan and New Hampshire. Recently adopted federal pay-to-play laws, including SEC Rule 206(4)-5 impacting investment advisers and CFTC Rule 23.451 affecting swap dealers, are challenging for companies to implement. This year it is likely the Municipal Securities Rulemaking Board (MSRB) will propose a new federal pay-to-play rule for municipal advisors, which will add further complexities to the pay-to-play landscape.

Municipal Advisor Rule. The compliance dates for the SEC rule defining and requiring permanent registration of “municipal advisors” under the Dodd-Frank Act (the Rule) were delayed by the SEC until July 1, 2014. Subject to certain exclusions and

exemptions, the Rule defines a “municipal advisor” as a person, other than a municipal entity or an employee of a municipal entity, who:

- provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms and other similar matters concerning such financial products or issues; or
- solicits a municipal entity or obligated person on behalf of certain unaffiliated third parties for the purpose of obtaining or retaining an engagement for or in connection with municipal financial products, the issuance of municipal securities or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity.

Registered municipal advisors are subject to a fiduciary duty of care to clients and to all applicable MSRB rules. The MSRB recently released Proposed Rule G-42, which sets forth proposed standards of conduct for municipal advisors.

Forthcoming Pay-to-Play Rule for Municipal Advisors. The Rule’s adoption will prompt the MSRB to resubmit to the SEC for final approval its previously withdrawn pay-to-play rule for municipal advisors, the former MSRB Proposed Rule G-42. Based on the text of the initial proposal, once adopted, the new pay-to-play rule is expected to be modeled after and largely mirror existing SEC and CFTC pay-to-play rules.

SEC Rule 206(4)-5 Implications. In 2012, the SEC extended the compliance date for SEC Rule 206(4)-5’s restrictions on using third-party and affiliated entity solicitors until nine months following the “compliance date” of the Rule. Given the various compliance dates contained in the Rule, it is not clear when these placement agent restrictions will go into effect. In its June 2012 release extending the placement agent compliance date, the SEC stated that it will issue the compliance date for this restriction in a notice once the Rule has been finalized.

* * *

Because of the ever-increasing risk of enforcement action as well as negative media attention in the event of legal violations, corporations in virtually every industry continue to develop and refine compliance programs to address laws regulating government affairs and government procurement activities. Common elements among these programs include implementing tailored policies, preclearing certain activities, providing protocols to ensure registration and ongoing reporting requirements are met, training programs for certain officers and employees, and procedures for keeping abreast of the latest developments in this area of law.