Reuters Legal News

Stealthy political law issues — ignore at your own peril

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MARCH 6, 2024

There are areas of risk that receive less attention from political law professionals even though the consequences can be draconian. It may be the result of the laws in these areas being criminal and thus appearing to fit within a white-collar paradigm, or in the case of the Foreign Agents Registration Act ("FARA") or shareholder proposals targeting government relations activity, there being as many national security and corporate governance practitioners weighing in as there are political lawyers.

However, given that the scope of political law encompasses any law governing a company's interactions with the government or the political process, it is essential for its practitioners — both in-house and external — to focus on these laws to the same degree as campaign finance, lobbying, and gift laws. The following highlights these areas — honest services fraud; "dark money" and other legal issues created by giving to, or working with, 501(c)(4) organizations — "social welfare organizations" under the tax law that are permitted to engage in political activity as long as it is not their primary activity; considerations when dealing with shareholder requests regarding political activity; and FARA — a criminal statute requiring certain persons acting on behalf of non-U.S. principals to register and file reports with the Department of Justice (DOJ).

Hold that thought, it may be a felony

In the prosecution of Jack Abramoff and his colleagues in the mid-2000s, the DOJ dusted off the (up to that point) rarely used honest services provision of the mail and wire fraud statute and has not looked back since. Prior to this, the DOJ was limited in U.S. government corruption cases to using the bribery statute, which requires an express agreement to enter into an exchange of a thing of value for a government action, making such cases difficult to prove. In contrast, honest services fraud prohibits a scheme to deprive constituents of their intangible right to the honest services of a public official.

Capitalizing on such vague language, the DOJ has obtained convictions and guilty pleas on the basis of evidence merely demonstrating a link between contributions or other benefits given to a public official and specific government decisions/assistance. For example, simply discussing political contributions and a government decision in the same text chain or email thread can serve as evidence of a violation. Moreover, as the District of Columbia U.S. Circuit Court of Appeals affirmed in *U.S. v. Ring*, a violation can be one-sided where merely linking the two in one's own mind can result in a violation.

Accordingly, when a company is making a political contribution, providing a gift or favor, or even contributing to a charity at the request of a public official, it must not only look to technical limits under campaign finance or gift laws. Rather, the company must also consider the surrounding circumstances and communications to ensure there is no indication of prohibited linkage.

For companies establishing 501(c)(4) organizations, "dark money" risks can arise any time the organization engages in activity requiring it to be disclosed, such as on lobby reports or Federal Communications Commission "paid for by" disclosure requirements.

Training employees is more important than ever with the rise of casual modes of written communications, including texts and messaging apps. Indeed, just as employees should be instructed never to discuss fundraising while lobbying, they should be cautioned against absent-mindedly merging communications regarding contributions to an official with those discussing specific policy issues that may be before her.

Dark money, bright orange jumpsuit?

501(c)(4) organizations are playing an increasing role in the political process, getting involved in not only candidate elections but also lobbying activity and issue advocacy. Part of the appeal of these organizations is that they are generally not required to disclose their donors. However, establishing or merely contributing to these organizations can present a myriad of legal issues that must be considered, including, but not limited to, tax, campaign finance, lobbying, and pay-to-play laws. One of the more pernicious but often ignored risk relates to "dark money."

The term "dark money" is typically used by transparency advocates who dislike the legal regime that permits a 501(c)(4) to engage in political activity without identifying its funders. However, contributing to a 501(c)(4) can go from merely an appearance risk to creating criminal legal exposure if the 501(c)(4) is serving as a conduit to shield the identity of the donor. For example, if there is an agreement or understanding that the donor's funds will be transferred from the (c)(4) to an organization required to identify its donors, like a Super PAC, and only the (c)(4) itself is identified as the contributor (as opposed to naming the original donor), this can violate ubiquitous criminal laws against making contributions in the name of another person.

Moreover, for companies establishing 501(c)(4) organizations, "dark money" risks can arise any time the organization engages in activity requiring it to be disclosed, such as on lobby reports or Federal Communications Commission "paid for by" disclosure requirements. While these laws frequently do not require the identification of donors, if the 501(c)(4) organization is not sufficiently independent from the sponsoring company, it could be viewed as an alter ego serving to improperly hide the company's identity. Mitigating this risk requires careful consideration of the organization's governance structure and funding sources to ensure sufficient separation.

Shareholder proposals — more than meets the eye

Public companies have seen a rise in shareholder proposals seeking disclosure of and restrictions on their political and lobbying activity. Companies vary in their approaches to these proposals, but it is common to negotiate a compromise with the requestors. However, proposals that may seem straightforward and unproblematic to a corporate secretary's office or investor relations group can be surprisingly burdensome and may have hidden consequences for a company's government affairs initiatives.

As a result, it is important to ensure that the relevant stakeholders within the company are brought into the conversation early to ensure that any policy ultimately agreed upon is not overly burdensome or too restrictive in light of the company's need to engage in the policy process. These stakeholders include not only company management but also government affairs, legal, accounts payable, and the various businesses that contract with state and local governments that may have anti-ESG laws or policies.

Additionally, once a policy is adopted, it is important to ensure that the company's procedures for vetting political activity incorporate its requirements. Failure to adhere to the policy and any required disclosure can lead to additional shareholder action or depending on the circumstances, inquiries from the Securities and Exchange Commission.

FARA — the more things change ...

For decades since its passage in 1938 as a measure to counter Nazi propaganda, FARA went relatively unenforced and remained under the radar of most companies' legal and compliance teams. That ended abruptly with a number of FARA prosecutions coming out of the Mueller investigation of 2017-2019 and the subsequent release of a patchwork of advisory opinions regarding FARA's application to commercial activities.

In fact, the regulatory landscape under FARA continues to shift and is creating new risks and ambiguity, in particular for non-U.S. companies that lobby and engage in other activities designed to influence U.S. government policy.

FARA has long provided what is commonly referred to as "the commercial exemption." In reality, this refers to two separate exemptions. The first is found at 22 U.S.C. § 613(d)(1) of the statute itself exempting "private and nonpolitical" activities intended to advance a commercial interest. This covers a broad swath of commercial activity, such as engaging in buying and selling activity in the U.S., as long as the activity does not seek to influence U.S. federal government policies.

The second is a regulatory expansion of the statutory exemption at 22 U.S.C. § 613(d)(2) for "activities not serving a predominantly foreign interest." The regulation, 28 C.F.R. § 5.304(c), appears to interpret this exemption to include attempts to influence U.S. policy, even on behalf of a foreign company, as long as the activities are commercial in nature and are neither directed by nor directly promoting the interests of a non-U.S. government.

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Given that the statutory exemption applies only to activities predominantly serving a U.S. interest, there was considerable uncertainty in applying this rulemaking to a foreign company's attempts to influence U.S. policy until the DOJ affirmed and provided conditions for this interpretation in recent advisory opinions released in 2023. However, at the American Conference Institute's National Forum on the Foreign Agents Registration Act in December, Jennifer Gellie, the current acting chief of the Counterintelligence and Export Control Section and former chief of the FARA Unit, acknowledged that the rulemaking appears unsupported by the plain language of the statute and announced that forthcoming revisions to the regulations will clarify that the (d)(2) exemption applies when representing a predominant U.S. interest as stated in the law, without a special dispensation for commercial interests.

In light of these statements, coupled with congressional interest in repealing the exemption for those registered under the Lobbying Disclosure Act, foreign companies and their U.S. subsidiaries engaged in the policy arena should carefully examine their activities and closely follow these developments.

Indeed, even U.S. companies are not immune to FARA concerns. In particular, U.S. companies maintaining contacts with foreign governments, such as those with significant offshore operations, need to be particularly vigilant if their foreign contacts seek to leverage the company's government relations or public affairs apparatus to advance their interests. For example, even assisting a foreign government in setting up meetings with U.S. officials could trigger FARA under certain circumstances.

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This article was first published on Reuters Legal News and Westlaw Today on March 6, 2024.