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ISSUES TO CONSIDER

Efficacy & Ethics

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Disclosure

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Tax

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Campaign Finance

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Advertising

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Grassroots lobbying—encouraging members of the public to contact their elected or appointed officials to ask them to take a certain action—can be a very powerful tool in a successful lobbying campaign. This primer provides an overview of the legal issues you should consider when designing and implementing a grassroots campaign.

EFFICACY & ETHICS OF GRASSROOTS TECHNIQUES

Officials have called into question some grassroots campaigns that they believe resulted in communications from the public that were not “authentic” expressions of grassroots support for a position. For example, Members of Congress expressed skepticism about the communications they received on healthcare reform and climate change legislation. Some of the concern focused on the methods used to generate the communications and some focused on whether the communications were even real. Skeptics often refer to such efforts as “astroturf” lobbying to imply that they are not driven by legitimate grassroots activists, but rather by corporate interests. Even the appearance of an illegitimate grassroots campaign can harm your organization’s goodwill and reputation among policymakers, ultimately undermining the ability to effectively advocate on behalf of the issues your organization cares about. There are several steps your organization can take to ensure that its grassroots campaign is both successful and authentic.

Will officials view the communications from constituents as legitimately driven?

Whether a grassroots communication is “legitimate,” “authentic” or “real” depends on the answers to three questions:

1. Was the communication specifically authorized by the person identified as the author of the communication?
2. Was the communication based on accurate facts and analysis?
3. What role did the organization play in facilitating the communication?

As described below, your organization must implement policies and procedures to prevent outright fraud and deception in its grassroots campaign. Less straightforward, however, is determining what role your organization will play in the campaign. Will it simply fund efforts to reach out and inform the public, or will it actively coordinate campaign activities? The more an organization—be it a corporation, trade association, or nonprofit charity—controls and/or directs the grassroots activities, the less genuine the resulting communication may appear in the eyes of the official and public. A grassroots campaign, although organized by an association, company, or coalition, should allow for genuine interaction with members of the public. Your organization must carefully consider how to strike the appropriate balance between facilitating grassroots participation and overreaching.

Are the communications real?

Your grassroots campaign must be monitored and verified to prevent fraudulent or deceptive grassroots outreach. Fraudulent or deceptive grassroots outreach include sending communications from a person or group that does not exist, signing or otherwise authenticating a communication on behalf of a person or group who did not specifically authorize such communication, or knowingly submitting false information to an official. While this may seem obvious, the risk of fraud in grassroots campaigns—in particular larger campaigns involving professional vendors—is real. In the past few years, Members of Congress have received fraudulent letters on climate change and the Commodities Futures Trading Commission has received fake comments. In both cases, the letters were submitted by a contractor, bearing the names of real people and organizations, who had not signed the letters.

Your organization should take the following steps to prevent fraud:

- Implement policies and procedures for employees and vendors.
- Establish verification procedures.
- Require all communications generated through the campaign to be sent directly from the individual writing the letter or email to the official (in other words, do not send the communications on the individual's behalf).
- Require your vendors and employees to report any potential occurrences of fraud immediately.
- Spot check petitions, letters, etc. to confirm validity of the individuals' names.

- Do not compensate vendors or employees on a per-communication basis.
- Do not provide incentives to individuals to contact public officials.

Is your message fair and truthful?

It is important that your grassroots campaign is based on truthful and not misleading facts, analysis, and information. The information you disseminate to educate and inform the public will be scrutinized by public officials and your opponents alike. Using unbiased, peer-reviewed sources minimizes the probability that the accuracy of your information will be called into question. Similarly, you should be completely transparent with the public regarding the identity of the source of the data or study you rely on. In particular, if your organization provided financial support for the development of the data or study, it should be disclosed.

Finally, you should avoid using scare tactics to motivate the public to get involved. This is particularly important if your supporters come from vulnerable segments of the population. As demonstrated during the health reform debate, any short-term benefits could be outweighed by long-term harm to your organization's credibility. Scare tactics would include inflated claims about the impact of legislation or a regulatory decision that are not supported by legitimate facts or studies, or an appeal to concerns that are not addressed or impacted at all by the legislation or regulation.

DISCLOSURE OF GRASSROOTS ACTIVITY

Federal and state lobbying disclosure

Various federal and state laws require organizations that fund or participate in grassroots lobbying to disclose their grassroots lobbying activities.

On the federal side, disclosure may be required under the Federal Lobbying Disclosure Act ("LDA"). The LDA requires an organization to report lobbying activities if one or more of its employees spends more than 20% of his time on lobbying activities. Grassroots lobbying, however, does not fall within the LDA's definition of lobbying, and thus does not have to be reported on your organization's LDA report *unless* you elect to track and disclose lobbying expenses using the Tax Code's definition of lobbying. Under the LDA, an organization can track and disclose lobbying expenses on their LDA reports

using either the LDA's definition of lobbying or the Tax Code's. As discussed below, the Tax Code's definition of lobbying includes grassroots lobbying.

A majority of state lobbying disclosure laws define lobbying to include grassroots or "indirect" lobbying. In some states, you must register and report grassroots lobbying conducted in that state, regardless of whether you are registered for conducting direct lobbying. In other states, grassroots must be reported only if you already are registered for direct lobbying. Grassroots lobbying aimed at influencing federal policy does not have to be reported to the states.

Tax issues

The Tax Code imposes different reporting rules depending on whether your organization is a trade association, 501(c)(3) charity, or business. It also imposes limits on the amount of lobbying a 501(c)(3) may do.

Trade Associations: Trade associations may participate in lobbying, but are required to tell their members what percentage of dues are nondeductible. Similarly, businesses may engage in lobbying, but are prohibited from deducting lobbying expenses as a business expense. Under Section 162(e) of the Tax Code, which applies to associations and corporations, lobbying is broadly defined as "[a]ny attempt to influence the general public, or segments thereof, with respect to elections, legislative matters, or referenda." Under this definition, trade associations and for-profit corporations must track grassroots lobbying expenses as lobbying expenses.

501(c)(3): Organizations exempt from taxation pursuant to section 501(c)(3) of the Internal Revenue Code are subject to stringent restrictions on the amount of lobbying activity in which they may engage. Section 501(c)(3) permits lobbying (which includes direct lobbying and grassroots lobbying) as long as it is not a "substantial part" of an organization's total activities.

There are two options for 501(c)(3)s when it comes to determining what constitutes lobbying. They can use the general "facts and circumstances" test to determine whether their lobbying activities are a substantial part or they may make the 501(h) election. This election provides more clarity on what is and is not lobbying, and provides a specific dollar limit on how much lobbying an organization may conduct.

Under Section 501(h) of the Tax Code, grassroots lobbying is defined as any communication to the public that:

- refers to specific legislation;
- reflects a point of view on the legislation; and
- encourages the recipients to *take action* with respect to the specific legislation by contacting their legislators.

The costs of researching, drafting, planning, reviewing, and mailing—including any amount paid in compensation for an employee’s work on any of these activities—are considered lobbying expenses. For more information on the 501(h) election, please click [here](#).

CAMPAIGN FINANCE CONSIDERATIONS

In the recent U.S. Supreme Court case, *Citizens United v. FEC*, the Court struck down a federal ban on “independent expenditures” and “electioneering communications” made by nonprofit and for-profit corporations. Independent expenditures are payments made to fund communications, such as television ads, that expressly advocate the election or defeat of a specific candidate for federal office. Electioneering communications are expenditures by corporations made within 60 days of a general election or 30 days of a primary election if the expenditure is used to fund a communication that is made by broadcast, cable, or satellite, and refers to a clearly identified candidate for federal office.

Under *Citizens United*, your organization has new tools for conducting grassroots outreach. For example, you can now pay for print, internet, radio, and television advertising; place endorsements on your organization’s website; and place advertisements on your organization’s website. Such activities, however, may trigger disclosure requirements under campaign finance law. Moreover, the *Citizens United* decision did not impact direct giving (“contributions”) to candidates, PACs or political parties, which is still prohibited. As such, expenditures may not be coordinated with a candidate, which would change the expenditure into an in-kind contribution. The Federal Election Commission (“FEC”) has issued a complicated framework for determining what is considered to be “coordinating,” which is outside the scope of this primer.

While the Supreme Court overturned a number of restrictions, it did uphold certain disclosure obligations that apply to electioneering communications and independent expenditures.

Therefore, to the extent your organization spends over \$10,000 during any calendar year to fund communications through broadcast, radio, satellite, or cable that refer to clearly identified candidates within 30 days of a primary election or 60 days of a general election, it will have to file disclosures with the FEC revealing (1) the corporation making the communication, (2) the amount spent, (3) and certain contributors.

Expenditures for express advocacy must be reported to the FEC when they aggregate more than \$250 for an election. This includes information about the amount of the expenditures and information about contributors who gave more than \$200 if the contribution “was made for the purpose of furthering the reported independent expenditure.” If the independent expenditures exceed \$10,000, then reports must be filed with the FEC within two days of the expenditure (one day for expenditures that exceed \$1,000 made within 20 days of the election).

ADVERTISING LAW ISSUES

Television & Radio

All television and radio advertisements must identify the sponsor of the advertisement and include certain specified disclaimers.

If the communication involves candidates, then there are additional FEC rules that apply. Communications not authorized by the candidate, as would almost certainly be the case for an independent expenditure or electioneering communication not coordinated with the candidate, must (1) provide a name and address (or web address) for the entity making the communication, (2) state that the communication is not authorized by any candidate, and (3) include the following audio statement: “___ is responsible for the content of this advertisement.” If transmitted through television, this statement must also appear on screen in accordance with specifications set forth in FEC regulations.

Email

The use of email to communicate with constituents regarding public policy unlikely triggers CAN-SPAM issues. However, to the extent that the emails contain any message advertising or promoting a commercial product or service, the email may be subject to the statute's requirements.

Messages that fall under the "commercial" category are subject to three key requirements: (i) provision of an electronic opt-out mechanism that recipients can use to refuse future e-mail solicitations (opt-out requests must be honored within 10 days of receipt), (ii) prominent disclosure of the fact that the e-mail contains an "advertisement" or "solicitation" (unless the recipient has provided his or her "affirmative consent" to receive commercial e-mails from the chamber), and (iii) inclusion of the sender's valid physical postal address.

Phone

Under the Federal Communications Commission's rules implementing the Telephone Consumer Protection Act, "robocalls" to cellular telephones are prohibited without the prior express consent of the called party. Several courts have found that this prohibition extends to text messages. Such calls to residential telephone numbers are permissible to the extent they do not contain any commercial content.

CONCLUSION

A successful grassroots campaign can be an important part of a lobbying effort, particularly if it is done well. Should you have additional questions about grassroots campaigns, please contact **Ron Jacobs** at 202.344.8215 or rmjacobs@venable.com, **Alexandra Megaris** at 212.370.6210 or amegaris@venable.com, or **George Constantine** at 202.344.4790 or geconstantine@Venable.com.

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POLITICAL LAW QUICK FACTS

Attorneys with extensive political and practical experience including attorneys who have served as

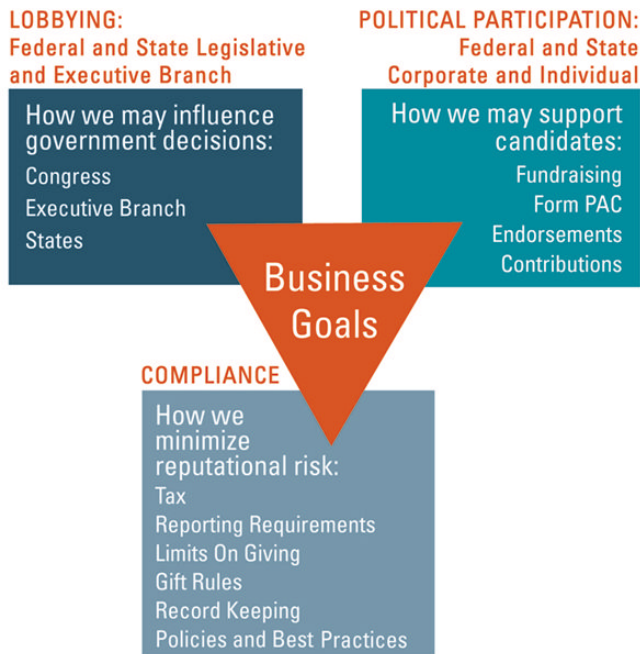
- agency ethics officials
- campaign staff
- lobbyists
- nonprofit management
- treasurers of Political Action Committees (PACs)

POLITICAL LAW

successfully navigating your interaction with the government

You want to be involved in the political process—or maybe you already are—by lobbying, making political contributions, issuing endorsements, generating grass-roots communications or influencing the nomination process for yourself or someone else. Whether it's planning a charitable event with a member of Congress; starting a Political Action Committee (PAC), advocacy group or coalition; taking a staffer to lunch; or making a campaign contribution; there are many rules that restrict what you can do, how you can do it and how you can pay for it.

We help clients navigate this minefield to accomplish their goals at the federal, state and local levels. Whether you are designing your own lobbying and electoral strategy or having Venable help, we work with you to make sure the options you choose won't land you in trouble—or even in the press.



We can help with your political law needs at every step of the process. Whether you are an old hand, a newcomer who needs to understand what the rules are or someone who is facing an investigation, we can help.

We make participating in the government as simple as possible. We strive to give clients comfort in knowing they are complying with election and lobbying laws, while doing an effective job of making their views and needs known to legislators and agency decision makers.

How can we help you? To find out, please contact us at 1.888.VENABLE or www.Venable.com