



The Dos and Don'ts of Lobbying for Nonprofit Organizations

Janice M. Ryan

Counsel | +1 202.344.4093 | jmryan@Venable.com

Meredith K. McCoy

Associate | +1 202.344.4571 | mkmccoy@Venable.com

VENABLE LLP

Today's Discussion

- Tax Rules for Lobbying
 - 501(c)(3)s
 - 501(c)(4)s & 501(c)(6)s
- Restrictions for Recipients of Federal Funds
- Lobbying Disclosure
 - Federal Lobbying Disclosure Act
 - Lobbyist registration requirements
 - Quarterly and semi-annual reporting
 - State Lobbying Regulation
- Ethics and Gift Rules
 - Federal legislative branch
 - Federal executive branch
 - States
- Grassroots Advocacy Compliance
 - TCPA & State Robocall Laws
 - Digital advertising platform rules



Tax Rules for Lobbying

Overview: 501(c)(3) Lobbying

Public Charities

- Lobbying permitted, provided it is not a “substantial part” of the organization’s total activities
- NO political campaign activities permitted

Private Foundations

- Lobbying not permitted
 - Subject to excise taxes
- May fund charities that lobby, but grants may not be earmarked for lobbying
 - General support grants
 - Specific project grants
- NO political campaign activities permitted

Overview: 501(c)(4) and 501(c)(6) Lobbying

- Unlimited lobbying permitted
- Lobbying portion of dues not tax-deductible by members as a business expense
- Political campaign activities permitted, provided they are not the organization's primary activity
 - Be aware of federal and state campaign finance laws, particularly with regard to restrictions on political activities of corporations!

Section 501(c)(3) Lobbying Rules

- What is Lobbying?
 - Basic general concept—attempts to influence legislation at the federal, state, or local levels through direct or grassroots communications
- Two options for measuring compliance with (c)(3) limitation on lobbying activities:
 - No substantial part test
 - 501(h) expenditure test

Section 501(c)(3) Lobbying Rules

501(h) expenditure test

- Lobbying activity measured solely by the amount of money spent on lobbying
- Lobbying will not be considered “substantial” provided organization does not exceed expenditure cap
- Clear definitions of lobbying and exclusions for specific activities
- Must affirmatively elect to use by filing IRS Form 5768
- Flexible sanctions
 - 25% tax on amount spent over the cap
 - No tax penalties imposed on organization managers for exceeding the limits
 - Revocation of exempt status results only if the organization exceeds 150 percent of the cap over a 4-year consecutive averaging period

No substantial part test

- Vague, facts and circumstances test
- Strict sanctions
 - revocation of exempt status
 - excise tax on organization and its managers (5% of lobbying expenditures)

Section 501(c)(3) Lobbying Rules—501(h) Caps

Exempt Purpose Expenditures	Percentage Allowed for Lobbying	Total Maximum Lobbying Amount
\$0 to \$500,000	20%	Up to \$100,000
\$500,001 to \$1,000,000	15%	\$100,000 plus 15% of excess over \$500,000
\$1,000,001 to \$1,500,000	10%	\$175,000 plus 10% of excess over \$1,000,000
Over \$1,500,000	5%	\$225,000 plus 5% over \$1,500,000, up to a maximum of \$1,000,000

Grassroots lobbying expenditures limited to no more than 25% of the total amount permitted for lobbying in a year

Definition of “Lobbying” under 501(h) Election

Direct Lobbying

- Attempts to influence legislation through communications with covered officials that
 - refer to specific legislation and
 - reflect a point of view on the legislation
- Covered officials:
 - any member or employee of a legislative body
 - any government official or employee who may participate in the formulation of legislation
 - the public in a referendum, initiative or constitutional amendment

Grassroots Lobbying

- Attempts to influence the **general public** through communications that
 - refer to specific legislation,
 - reflect a point of view on the legislation, and
 - include a “call to action”

Definition of “Lobbying” under 501(h) Election

- Specific exclusions from the definition of lobbying:
 - Communications with members regarding specific legislation
 - Point of view okay
 - No call to action
 - Nonpartisan analysis, study, or research
 - Discussions of broad social and economic problems
 - Efforts to change regulations
 - Requests for technical advice
 - Conducting self-defense activity
 - Volunteer time
- The excluded activities are not counted against a 501(h) electing organization’s annual lobbying expenditure cap
- Must take 501(h) election to use these definitions/exclusions

501(c)(3) Political Campaign Activity

- Activity to support or oppose the election of a candidate for public office could result in loss of tax exempt status
- Nonpartisan electoral activities may be permissible for public charities if properly conducted within IRS restrictions:
 - Get-out-the vote and voter registration drives
 - Legislative voting records (but beware of issuing during campaign season)
 - Candidate debates and forums (inclusive, fair and impartial forum, broad range of issues covered)
 - Candidate questionnaires and voter guides (inclusive, fair and impartial forum, broad range of issues covered)

Interacting with Candidates

May urge candidates to support policies (“lobbying” candidates)

May not ask candidates to take a pledge

May provide policy papers and other materials

Should provide material to all candidates

Should not create content at the request of candidates

501(c)(4)/(c)(6) Lobbying

- What is lobbying? (Code § 162(e))
 - Influencing legislation (federal, state, local)
 - Influencing the general public with respect to elections, legislative matters, or referendums
 - Influencing high-level federal executive branch officials with regard to executive and administrative actions
 - Participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office
- Definition is broader than the definitions for 501(h)-electing public charities (Code § 4911)
- Why we care: NO tax deductions are available for lobbying

501(c)(4)/(c)(6) Political Campaign Activity

- What are political activities?
 - Activities to influence or attempt to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization or the election of Presidential or Vice-Presidential electors
- Political activities cannot be “primary” activity
 - If primary, then organization would instead be exempt under Code Section 527 as a political organization, and would be required to disclose donors to the IRS on public filings
 - Also could trigger registration and regulation of entity as a political committee under applicable federal or state campaign finance laws

“Lobby Tax” Rules for 501(c)(4)/(c)(6) Organizations

- Lobbying and political activity portion of member dues paid to a 501(c)(4)/(c)(6) is NOT tax-deductible by members as ordinary and necessary business expense (Code Section 162(e))
- 501(c)(4)/(c)(6) has two options:
 - Notify members annually of the amount of dues that are not deductible as a result of lobbying and political activity expenditures; OR
 - Pay a “proxy tax” on these amounts directly to the IRS (currently at 21% rate)

Tax on Political Activities (527(f) Tax)

- Expenditures on political campaign activities are taxable under Code Section 527(f)
- Tax rate is 21% and is assessed on either the amount of the organization's political expenditures or the amount of the organization's net investment income, whichever is less
- Political expenditures are described and reported on Form 990, Schedule C, even if no tax is owed

Using Related Tax-exempt Organizations

- A 501(c)(3) organization may create a related 501(c)(4) or (c)(6) entity
- No limits on the amount of lobbying a 501(c)(4) or (c)(6) may conduct, as long as the legislation pertains to the purpose for which the organization was formed
- A 501(c)(4) or (c)(6) organization may establish a political action committee for the purpose of supporting or opposing candidates for elective office
- The related entity must have independent funding sources and no charitable tax deduction will be available to donors
- Related organizations may share staff and office space, subject to a cost-sharing agreement

Form 990 Reporting—Schedule C

501(c)(3)s

- 501(h)-electing organizations need only report lobbying expenditures
- Non-electing organizations must report lobbying expenditures and also describe their lobbying activities

501(c)(4)s & 501(c)(6)s

- Report lobbying expenditures
- Report political campaign activities, if any
- Calculate lobby tax liability, if any

Tracking & Reporting Activities & Expenses

- Effective compliance requires careful tracking of time and money spent on lobbying
 - Include allocable staff time and compensation, overhead, and administrative costs
 - Time and money spent on research, planning, drafting, reviewing, publishing, and mailing in support of lobbying is included
- Provide training on what is and is not lobbying according to the applicable definitions (Tax Code, LDA, etc.)
- Use time sheets!



Restrictions for Recipients of Federal Funds

Byrd Amendment

Prohibitions

- Federal funds may not be used to lobby Congress or the Executive Branch for a specific federal award (a contract, grant, loan, or cooperative agreement) or the modification or extension of an award
 - Prohibits lobbying Congress to earmark funds for a particular program, project, or activity
 - Does not prohibit lobbying Congress with regard to general programs
- Non-federal funds may be used to lobby for an award—pursuant to OMB guidance, the government will presume that non-federal funds were used in a lobbying effort so long as the award recipient has sufficient non-federal funds to cover those lobbying activities

Disclosure

- SF-LLL
- If non-federal funds are used to pay lobbyists for assistance in obtaining a federal award, award recipient must disclose the names of the LDA registrants who made lobbying contacts on the recipient's behalf with respect to that particular award

OMB Guidance/FAR

- OMB “Super Circular”—Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Grants
 - Cost Principles for Nonprofit Organizations (fmr. Circular A-122)
 - Federal grant recipient may not be reimbursed out of federal grant money to influence federal, state or local elections or to influence federal or state legislation through direct or grassroots lobbying
 - Membership dues paid to organizations that lobby are also unallowable costs
- Federal Acquisition Regulations (“FAR”)
 - Apply to commercial and nonprofit federal contractors.
 - Establish similar cost principles for contractors as set forth in OMB Circular A-122 with regard to federal grantees: costs for lobbying and political activities are unallowable

18 U.S.C. § 1913

- Permanent statutory prohibition on lobbying at all levels of government with federally appropriated funds
- Federal criminal statute originally enacted in 1919:
 - Amended in 2002 to remove criminal penalties in favor of “Byrd Amendment” civil penalties
 - 2002 amendment made the provision broadly applicable (previously only applied to officers and employees of the federal government)
 - Appears to have never been enforced to date

Annual Appropriations & Other Statutory Limitations

- Usually there is a general rider included in annual appropriations laws prohibiting the use of the appropriated funds for lobbying or “propaganda or publicity” purposes (i.e., grassroots lobbying)
- May also be more specific statutory or appropriations limitations applicable to particular federal programs

Simpson Amendment—501(c)(4) Restrictions

- 501(c)(4) organizations are ineligible to receive any federal grant, loan, or award if the organization engages in lobbying activities
- LDA definition of “lobbying activities” applies
- May use separate affiliated organization to lobby



Lobbying Disclosure

Lobbying Disclosure Overview

- No uniformity between federal and state laws, or among states
- Lobbying disclosure laws cover range of influencing activities
 - Legislation, regulations, executive orders, procurement
 - Grassroots
 - Cultivating goodwill
- Public reporting on activity, expenses
- May limit gifts, political contributions

Federal Lobbying Disclosure



What Is Lobbying?

- Lobbying communication or contact
 - Actual communication with a covered official
 - Oral, written, or electronic
 - About:
 - Federal legislation
 - Federal regulations
 - Federal program administration
 - Federal nominations (Senate confirmations)
- Lobbying activity
 - All activities that support lobbying communications, like preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts

Who Is A Covered Official?

- All Members, officials, and employees of Congress
 - Everyone from the receptionist to the chief of staff to the Member
- Specific categories for executive branch
 - The President
 - The Vice President
 - Any member of the uniformed services whose pay or grade is at or above O-7
 - Any officer or employee in the Executive Office of the President
 - Any officer or employee in a position listed in levels I through V of the Executive Schedule
 - Schedule C political appointees

Exemptions



Administrative: meeting requests | status | no intent to influence

Legislative: testimony | for record | written response | subpoena

Regulatory: Fed Reg | written response | FACA | Comments/Petitions | public record

Law Enforcement: subpoena | confidential

Public: articles | speeches | ads | mass communication

Who is a Lobbyist?



Reporting under the LDA

- Quarterly reports of lobbying activity
 - Form LD-2
 - Filed by the registrant organization
- Semiannual reports of political contributions
 - Form LD-203
 - Filed by registrant
 - Filed by each of registrant's individual lobbyists

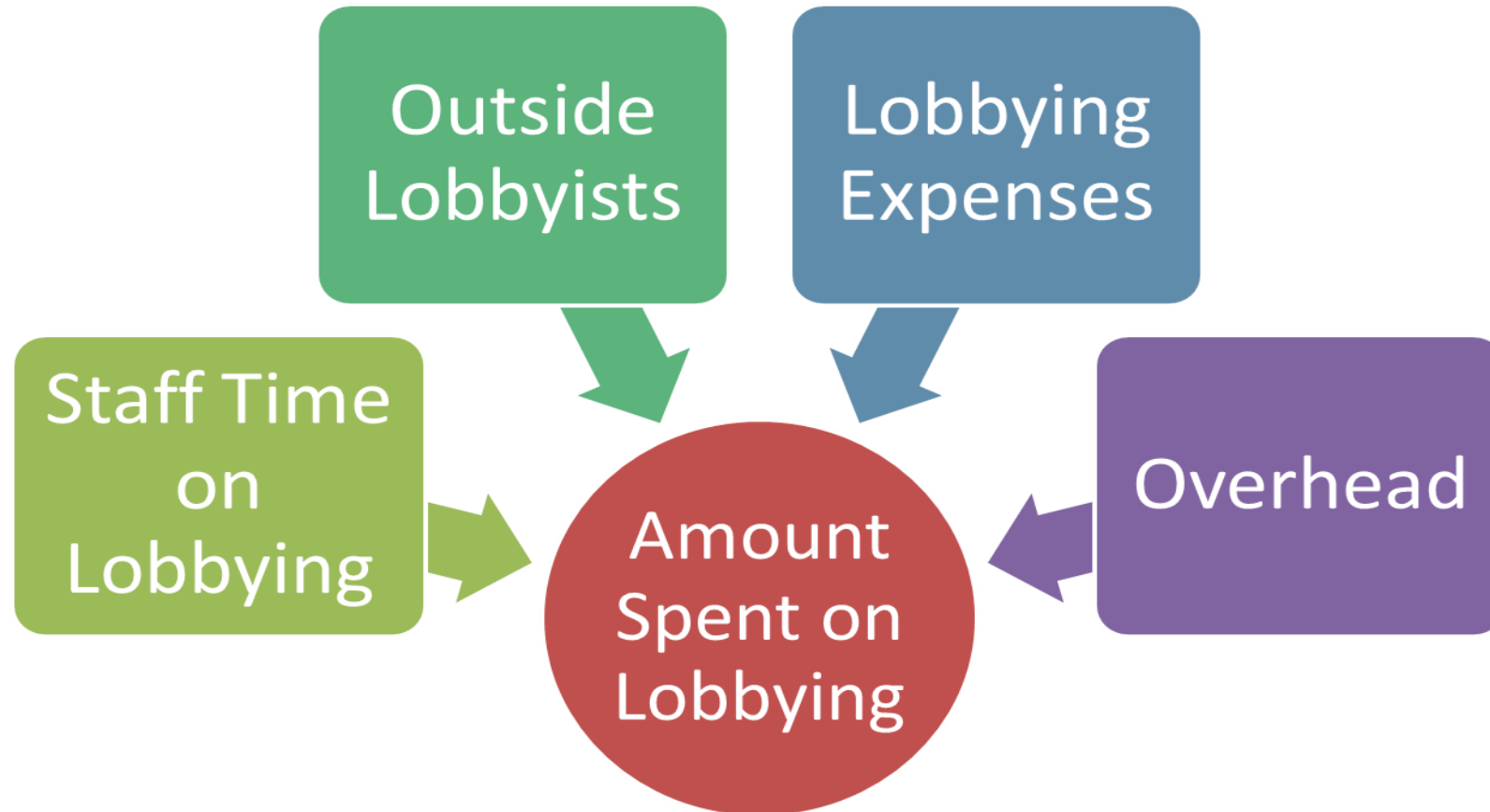
Quarterly LD-2 reports

Amount spent on lobbying

Issues lobbied

Name of each lobbyist

Amount Spent on Lobbying



LD-203

- What Gets Reported?
 - Certain federal political contributions
 - “Honoring & Recognizing” payments
 - Payments for certain meetings
 - Presidential Library contributions
 - Presidential Inaugural Committee contributions
- Gift Rule Certification
 - LD-203 filers must certify that:
 - Filer has read and is familiar with the House and Senate Gift and Travel Rules; and
 - Filer has not provided a gift (including travel) to a House or Senate Member or Congressional employee with knowledge that receipt of the gift would violate the Gift Rules

LDA and Tax Code Lobbying Compared

Type of Lobbying	LDA	162(e)	4911
State	No	Yes	Yes
Grassroots	No	Yes	Yes
Legislative	Yes	Yes	Yes
Executive	Broad	Narrow	No
International	No	Yes	Yes

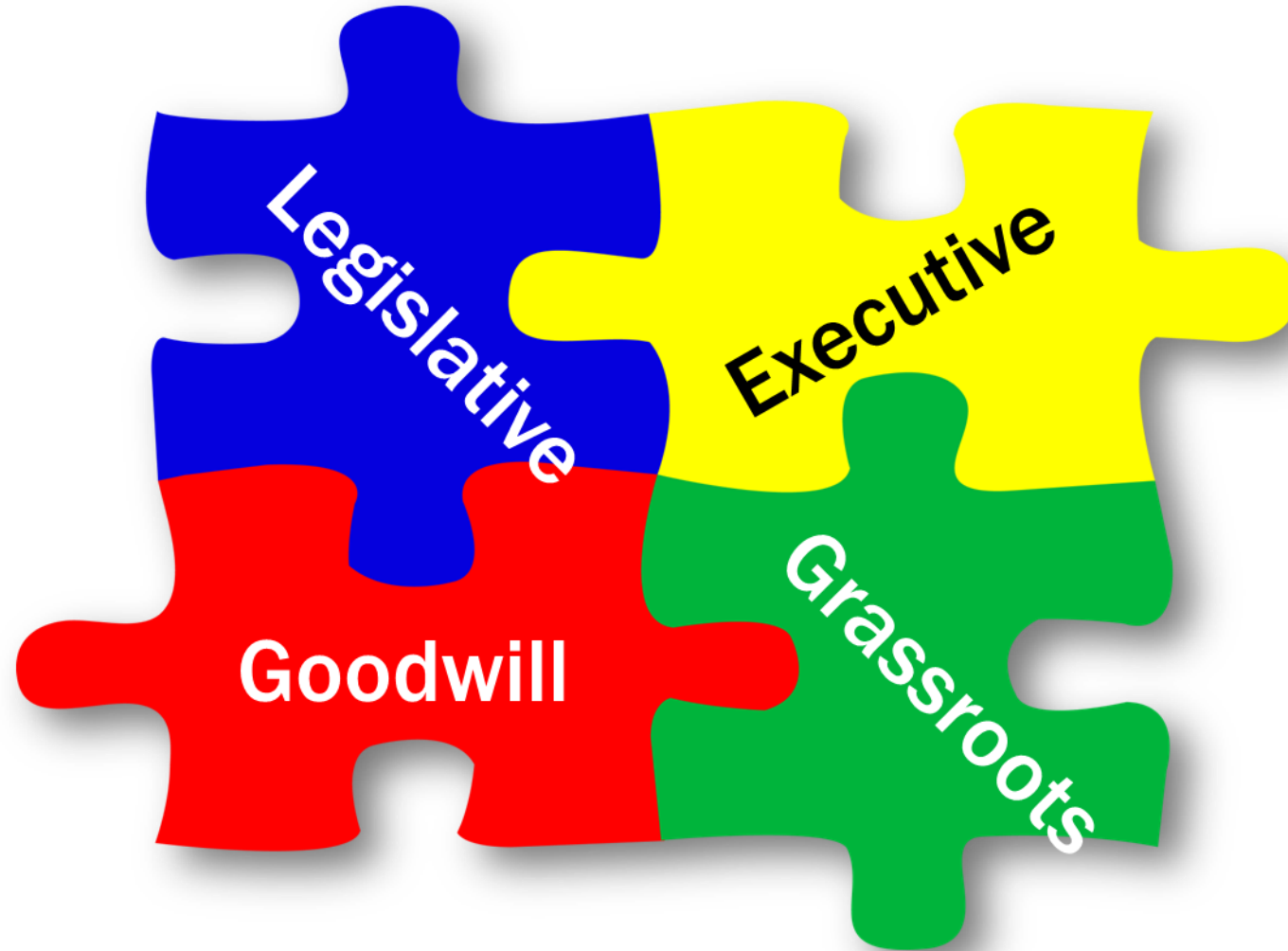


State Lobbying Disclosure

State lobbying disclosure

- Laws vary widely
- Triggers for registration
- Activities covered
- Reporting frequency
- Report contents
- Who is responsible for filing
 - Individual lobbyist
 - Lobbying firms
 - Lobbyist employer/client

What is Lobbying?



State Issues





Ethics and Gift Rules

Federal Gift Rule Limits



Legislative

- Organization:
 - No, unless exemption
- Lobbyist:
 - No, unless exemption
- Others:
 - <\$50 or exemption



Administration

- Organization:
 - No, unless Exemption
- Lobbyist:
 - No, unless exemption
- Others:
 - <\$20 or exemption



Career

- Organization:
 - <\$20 or exemption
- Lobbyist:
 - <\$20 or exemption
- Others:
 - <\$20 or exemption

What is a Gift?



Meals and
beverages



Travel expenses



Invitations to
charitable events



Tickets



Commemorative
items



Books, periodicals
and informational
materials

Two Key Exemptions

- Receptions
 - The food matters
 - No particular format
- Widely Attended Events
 - Any kind of food
 - The format matters

Receptions

Executive

- Modest food and refreshments
- Other than part of a meal
- Soft drinks, coffee, donuts
- No alcohol

Legislative

- Food or drink of nominal value
- Other than part of a meal

Widely Attended Events

Invitee	Function	Number	Audience
Legislative	Speaker Related to official duties	More than 25 non- Congressional	From throughout industry or profession Wide range of persons interested in a matter
Administration	Speaker	No set number	Diversity of views or interests
Career	Speaker Interest of the agency	No set number	Diversity of views or interests

Widely Attended Events

- Any kind of food, including seated meal
- Waiver of any conference fees
- Does not include separate entertainment
 - Concert with dinner: OK
 - Trip to ball game after conference: Not OK

If Not Approved as Widely Attended

- Official may always pay to attend
- Develop per-person cost
 - NOTE: if there is a ticketed cost to attend, then the ticketed cost will apply, not the derived cost
 - Food and beverage, not room rental and staffing

Exemptions: Friendship

- How do I know it is a friend?
 - Mutual exchange of gifts
 - Duration and formation
 - Similar gifts to others
- Cannot be expensed to employer
- Gifts of up to \$250 for legislative, unlimited for executive



Other Exemptions

- Informational Materials
 - Books, periodicals, but not software
- Items of Nominal Value
 - Ball caps
 - Tee-shirts
 - Greeting cards
 - <\$10



Travel Rules

- Trip sponsor may pay for all travel costs (flight, hotel, meals)
- Duration:
 - If sponsor employs/retains lobbyists: One night only (two for West Coast); all events must be on one day
 - If sponsor does not employ/retain lobbyists:
 - House: 4 days inclusive of travel days (7 days for foreign travel)
 - Senate 3 days, exclusive of travel days (7 days for foreign travel, exclusive of travel days)
- Must be cleared by Ethics Committee in advance
- All costs disclosed
- Must provide full itinerary
- No leisure/fun activities
- Lobbyists not permitted on any segment of transportation to/from event; lobbyists may not have more than de minimis involvement in planning

State Gift and Ethics Rules

- Know before you go!
- Rules vary widely
- Giving gifts may trigger lobbying registration in some jurisdictions

In Practice

If processing
expenses, pay
attention for
gifts

Consult with
legal before
paying for
meals with
government
officials

Consult with
legal on events
with officials

Note: Lobbyists may not pay for meals even with their own money unless an exemption applies. Others subject to limits with personal funds.



Grassroots Advocacy

Additional Compliance Considerations

Telephone & Texting Campaigns

- Key regulations:
 - TCPA (federal Telephone Consumer Protection Act of 1991)
 - State telemarketing/auto-dialer laws
- TCPA applied to nonprofit advocacy calls:
 - Prior expressed consent required to call or text a cell phone
 - Consent need not be in writing (but recommended)
 - Ok to deliver prerecorded voice message calls (i.e., “robocalls”) to landlines without prior express consent
 - All prerecorded voice message calls must include certain identification information:
 - the identity of the entity initiating the call (must use official business name) must be stated clearly at the beginning of the message; and
 - the telephone number of the calling party must be provided either during or after the message
 - Exempt from Do-Not-Call restrictions
- P2P texting=no auto-dialer?

Telephone & Texting Campaigns

- SMS Campaign Best Practices
 - Require opt-ins before texting
 - Honor all opt-out requests
 - Follow calling hour restrictions (e.g., 8 a.m. to 9 p.m.)
 - Follow industry best practices and wireless carrier requirements
 - Mobile Marketing Association
 - CTIA
 - Include recommended disclaimers for calls-to-action, confirmation messages, and program messages
 - e.g., “Message and data rates may apply. Messaging frequency varies. Text STOP to opt out. Terms & conditions and privacy policy: <insert url>.”

Email

- CAN-SPAM
 - Applies to unsolicited email advertising or promoting commercial products or services
 - Advocacy emails unlikely to be commercial advertising, but be careful about mixed-purpose communications
- Best practices
 - Send all e-mails from a legitimate, active e-mail address
 - The “from” line should accurately identify the individual sender or the organization, or both
 - The body of the message should contain a valid postal address for the organization
 - Subject lines may not be misleading
 - Put the word “Advertisement” in the subject line or body of the e-mail if the message advertises or promotes commercial products or services
 - Offer a way to opt-out (link to a webpage or an email address) and maintain a system to enable you to promptly honor those requests

Broadcast Advertising

- Television or radio advertising disclaimers:
- FCC sponsorship identification requirements
 - “Paid for by [sponsor].”
- FEC requirements for “electioneering communications” that refer to a federal candidate close in time to an election (30 or 60 days)
 - “Paid for by [sponsor] ([sponsor website url]) and not authorized by any candidate or candidate’s committee.”
 - Voiceover required: “[Sponsor] is responsible for the content of this advertising.”
 - Must follow specific requirements for disclaimer size and duration

Digital Advertising

- Sponsorship identification requirements vary depending on content and platform used to distribute
 - e.g., Facebook requires sponsorship disclosure of all ads relating to “any national legislative issue of public importance” in addition to ads relating to elections. Also covers ads on referenda, ballot initiatives, GOTV, or “election information campaigns”
 - Ad must be linked to a Facebook account verified as belonging to sponsor and labeled as paid for by the sponsor
- Privacy policy should address use of cookies and analytics tools

Privacy and Data Collection

- Basic principles when collecting donor data:
 - Adhere to the promises made to donors regarding privacy and data protection (privacy policies/other statements)
 - Implement reasonable and appropriate measures to protect personal data against theft
 - Disclose whether the organization will sell or share data

More Information

- Venable's Political Law Briefing blog: www.PoliticalLawBriefing.com
- Additional articles, presentations, recordings, and upcoming seminars on nonprofit legal topics:
 - Articles: [Insights | Venable LLP](#)
 - Monthly Webinars: www.venable.com/nonprofits/recordings
 - Upcoming and Past Events: www.venable.com/nonprofits/events

Questions and Discussion



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