

Trade Association PAC Fundraising and Congressional Gift and Travel Rules

INTRODUCTION

A federal political action committee (“PAC”) can be an important component of a trade association’s overall legislative and political strategy. Regulations governing PAC activity, however, can be complex and, thus, require careful attention to the various restrictions and limitations of federal campaign finance law. Similarly, the gift and travel rules applicable to Senators, Members of the House, and congressional staff (“Members and staff”) can be equally complex, and a trade association that engages in federal legislative lobbying activities is well served to have a basic understanding of these rules.

This issue of the *Trade Association Issue Brief*, the first in a series of briefs focused on trade association political compliance, introduces the laws and regulations governing trade association PAC fundraising and congressional gift and travel rules. In particular, this issue explains the important distinction between solicitations (which, under federal rules, may only be directed to the trade association’s executive and administrative personnel) and other political communications

that may be made to the general public, and the rules surrounding payment of congressional travel expenses by trade association in-house lobbyists.

PENDING CAMPAIGN FINANCE LEGISLATION

It is worth noting at the outset that the laws governing trade association political activity may be amended over the next several months. The 2004 elections saw the rise of “527” political committees which are not subject to federal campaign finance rules. In response, bills have been introduced in the House and Senate seeking to modify existing campaign finance law. These bills, each of which can affect trade association political activity, have been approved by their respective committees and could reach the floor for a vote within weeks.

The Pence-Wynne Bill

The House Administration Committee last week approved a campaign finance bill sponsored by Reps. Mike Pence (R-IN) and Albert Wynn (D-MD). The bill removes existing restrictions on corporations, unions and tax-exempt groups, including trade associations, with regard to the use of soft money for issue ads close to an election, something the Bipartisan Campaign Reform Act of 2002 had banned. The Pence-Wynn bill has the backing of the House GOP leadership and is expected to move to the floor for a vote before July 4.

The bill would also eliminate the requirement that a trade association seek the permission of its member companies to solicit the member companies executive and administrative personnel (its “restrict-

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ed class”). Currently, a trade association must seek permission of the member company to solicit the company’s restricted class. Under Pence-Wynn, a trade association’s restricted class would automatically include the restricted classes of all of its member companies.

The 527 Reform Act of 2005

On the Senate side, the “527 Reform Act of 2005,” sponsored by Sen. John McCain (R-AZ) and approved by the Senate Rules Committee, would require all section “527” political committees (except those with annual receipts of less than \$25,000) to register with the FEC as “political committees” and comply with federal campaign finance laws, unless they raise and spend money exclusively in connection with non-federal candidates or state or local ballot initiatives.

The bill, as amended, would also allow trade association and corporate PACs to solicit all employees, including non-supervisory workers. The bill is expected to be voted on by the full Senate within the next several weeks.

It is unclear at this time whether either bill will have sufficient support to pass both houses and be signed by the president. We will keep you apprised of any developments.

Compliance Program

For trade associations that maintain an active lobbying or political presence, the importance of a comprehensive compliance program cannot be overstated. Compliance training for trade association personnel and access to written guidance and competent counsel not only ensures compliance with federal and state rules but can also provide a defense against criminal, administrative, and civil enforcement

proceedings. An effective program will include procedures for reviewing activities in advance to ensure compliance with applicable laws and the accurate and timely filing of disclosure reports.

CAMPAIGN FINANCE LAWS

Federal election law generally prohibits trade associations from making contributions or expenditures in connection with federal elections. However, the law permits trade associations to form PACs which may make contributions to, and expenditures on behalf of, federal candidates and committees.

While a trade association cannot use its treasury funds to contribute directly to its PAC or to candidates, it can use its treasury funds to pay any set-up, administrative, or fundraising costs associated with its PAC. Costs that may be defrayed using trade association treasury funds include: office space; phones; salaries; utilities; supplies; legal and accounting fees; and fundraising and other expenses incurred in setting up and running the PAC. A trade association may also accept unlimited donations from its corporate members to defray these costs.

A trade association may only solicit contributions to its PAC from its restricted class which is comprised of its executive and administrative personnel and its non-corporate members. Nevertheless, even with this restriction, a trade association and its PAC may:

- **Accept contributions from any individual.** A trade association PAC is permitted to accept *unsolicited* contributions from any individual (except a foreign national

or federal contractor). The prohibition is on *soliciting* individuals outside the trade association's restricted class, not on accepting unsolicited contributions.

- **Respond to questions from any individual about a PAC fundraiser.** Though a trade association may not solicit or invite to a PAC fundraiser individuals that are not within its restricted class, it may respond to questions about a fundraiser if asked by any individual.
- **Permit any person to purchase a PAC raffle or fundraiser ticket.** Any individual (except a foreign national or federal contractor), including individuals not within the trade association's restricted class may purchase a raffle or fundraising ticket at his or her request, provided he or she was not solicited to do so.
- **Communicate with the general public about its PAC.** A trade association may communicate to the general public factual, historical, statistical, or other information regarding its PAC, provided the information does not constitute a solicitation or advocate the election or defeat of a federal candidate. Specific examples of permissible public communications are discussed below.
- **Seek authorization to solicit the restricted classes of member-companies.** With written authorization, a trade association is permitted to solicit the restricted classes its member-companies.
- **Solicit contributions from persons outside of its restricted class.** Only persons within the trade association's restricted class may be solicited or asked to make a contribution.
- **Pay less than the standard rate for goods or services provided to the PAC for fundraising purposes.** Promotional items (such as T-shirts and hats) or raffle items or any other item or service (except uncompensated volunteer services) provided to the PAC for fundraising purposes must be purchased at the usual and normal commercial rate – any discount could result in a prohibited contribution.
- **Make statements that contain words of “express advocacy” to anyone outside of the trade association’s restricted class.** A trade association may never make “express advocacy” statements (e.g., “Vote for Smith in November”; “Re-elect Senator Jones”) to persons outside of its restricted class.
- **Reimburse anyone or allow its PAC to be reimbursed for a contribution.** A trade association may *never* directly or indirectly (e.g., through a bonus) reimburse anyone for making a contribution to its PAC or to any other political committee.
- **Use coercion to persuade an employee to contribute to its PAC.** The law requires that all political activity and contributions be completely voluntary.
- **Make a contribution to a state or local candidate using PAC funds without checking with counsel first.** While

On the other hand, to stay within the bounds of federal law, a trade association should *not* do any of the following:

most states permit federal PACs to contribute to state and local candidates, many states also require that the PAC first register with the state. To avoid failing to comply with state law, we recommend consulting counsel prior to making any contributions to state or local candidates.

TRADE ASSOCIATION PAC FUNDRAISER RULES

A trade association may utilize several different methods to raise funds for its PAC, including automatic payroll deductions, solicitations, and various kinds of fundraising events.

“Restricted Class”

As discussed above, a trade association may only solicit contributions to its PAC from its executive and administrative personnel and its non-corporate members (collectively referred to as its “restricted class” under federal law), not from all of its employees or the general public.

A trade association’s restricted class is comprised of: (1) its “executive and administrative” personnel; (2) its non-corporate members; and (3) their immediate families (i.e. wife, husband, son, and daughter).

“Executive and administrative” personnel includes only those employees that are paid on a salary rather than hourly basis and that have some policymaking, managerial, professional, or supervisory responsibilities.

A trade association’s restricted class also includes members of its board of directors that qualify as executive and administrative

personnel or that receive regular compensation, or both. Members of the board of directors that do not receive compensation or are not executive and administrative personnel do not fall within the trade association’s restricted class and may not be solicited.

Written Authorization to Solicit Member Companies

A trade association may also, with written permission, solicit contributions from the restricted class of its member corporations. However, because federal law permits a corporation to allow only one trade association each year to solicit the corporation’s restricted class, trade associations are often left with a narrow group of individuals from whom to solicit contributions. It is, therefore, important for a trade association to understand the subtle distinctions between “solicitations” – which may only be directed to its restricted class – and other political communications that may be made to the general public.

In addition, while the law prohibits a trade association from soliciting contributions from any persons outside of its restricted class, a trade association may accept unsolicited contributions from any permissible source.

Solicitations and Other Communications

A trade association is prohibited from directing partisan political statements to, or soliciting contributions from, persons outside of its restricted class. Conversely, a trade association may communicate with its restricted class without limitation including partisan statements or soliciting contributions. Under current law, partisan statements include only those statements that “expressly advocate” the election or defeat of a federal candidate. This includes statements such as “vote for Smith in November,” or “defeat Senator Jones,” and

these are easily identified and avoided for public communications.

What constitutes a “solicitation,” however, can be more subtle, and requires more detailed discussion. Put simply, under federal rules, to “solicit” means to ask another person to make a contribution or donation, or a transfer of funds or other thing of value, whether to be provided directly or through an intermediary. Thus, in order to be considered a “solicitation,” the solicitee must be asked or invited to contribute.

It follows, then, that not every communication that mentions trade association political activity or a trade association’s PAC constitutes a partisan statement or solicitation.

Permissible Public Communications

For instance, a trade association is permitted to do all of the following under federal campaign finance rules:

- Publicly distribute a newsletter or periodic report discussing the existence of its PAC, the PAC’s accomplishments, how much it has raised, the number of contributors, who the PAC has contributed to, and the legal requirements that apply to PAC activities (except for the rule regarding a trade association PAC’s ability to accept, but not solicit, contributions from the general public – the FEC has said that announcing this rule may amount to a tacit “solicitation”)
- Publicly announce the time, date, and place of a PAC fundraiser, but not the price of tickets or items to be raffled, or any words of encouragement, enticement, or solicitation

- Defray the costs of non-partisan communications and activities, including: non-partisan voter registration and turnout communications; official registration and voting information; publication of candidate voting records; and the publication of non-partisan voter guides
- Place on its website a bona fide press release that refers to an election but that does not advocate the election or defeat of a federal candidate or party
- Place on its website a press release of the trade association’s endorsement of a political candidate
- Announce the trade association’s endorsement of a federal candidate at a press conference or distribute a press release to the media

Partisan Newspaper to Corporate Member Representatives

In addition, a trade association may send a partisan newsletter (but not a solicitation) to the representatives at a member corporation that it normally works with, even though these individuals are not technically within the trade association’s restricted class. For example, if a trade association normally conducts activities with a member corporation’s CEO and the director of government affairs, a newsletter containing partisan statements (but not a solicitation) may be sent to those individuals.

Fundraising Methods

Payroll Deductions

A trade association may choose to use a payroll deduction or check-off system to collect contributions from its restricted class.

Often, companies and contributors prefer contributing via payroll deduction because it keeps a steady flow of funds coming into the PAC and is less of a financial burden on the contributor.

Any written communication made to a trade association's restricted class may include a payroll deduction authorization form, or the form may be provided to individuals in person. Authorizations must contain certain disclaimers, including the disclosure that the funds may be used for political purposes and that the individual has the right not to contribute.

Twice Yearly Solicitations

Though a trade association is generally prohibited from soliciting contributions from individuals outside of its restricted class, it is permitted to solicit all of its employees twice a year, subject to certain rules. For instance, the solicitations must be in writing and made only by mail to the employee's residence, and the collected contributions must be held in a separate account by a designated "custodian" who is not an employee of the trade association nor a member of the restricted class.

Requests for Corporate Member Approval

A trade association may solicit, with written permission, the restricted class of member corporations. To accept, the member corporation may not have approved such a request by any other trade association during the same calendar year.

There is no limitation on the method of soliciting contributions, except that a trade association may not, under current FEC

rules, use a payroll deduction or payroll check-off system to accept contributions from employees of member corporations. However, we expect that the FEC will promulgate rules in the second or third quarter of 2005 that will permit a trade association to accept contributions from the executive and administrative personnel of member corporations via payroll deduction.

Fundraising Activities

Outlined below are specific activities a trade association may engage in to raise funds for its PAC. All of these activities may be held during a trade association's annual meeting, convention, or other gathering.

It bears emphasizing that individuals outside of a trade association's restricted class may attend trade association PAC fundraising events and make contributions, provided that they were not solicited to contribute nor invited to attend.

Raffles

Selling raffle tickets and other promotional items is an oft-used way to generate contributions to a trade association's PAC. For example, a trade association, or one of its member corporations, may use treasury funds to purchase anything of value, and then donate the item to the trade association PAC. Any proceeds from the raffle ticket sales would be treated as contributions to the trade association PAC.

Any promotional or raffle items purchased by the trade association or member corporation must be purchased at the usual and normal commercial rate. Any discount provided by a seller could constitute an impermissible contribution to the PAC.

Golf Tournament or Other Recreational Event

A trade association or member corporation may purchase time on a golf course and hold a golf tournament or similar recreational event to raise funds for the PAC. The proceeds of tickets sales are treated as contributions to the PAC.

Dinner Honoring an Elected Official

A trade association may hold a fundraiser at which a federal officeholder is an honored guest.

PAC Booth at Convention or Annual Meeting

A trade association PAC may set up a booth at a trade association convention or meeting to accept contributions. The booth may contain materials about its PAC, and trade association representatives at the booth may provide information about the PAC to anyone, on request, as long as the materials do not contain a solicitation to contribute to the PAC. The PAC should not place signs or other materials visible to the public in or near the booth that ask for contributions to the PAC.

CONGRESSIONAL GIFT AND TRAVEL RULES OVERVIEW

The recent flurry of media attention on congressional travel highlights the importance of paying close attention to the congressional travel and gift rules. It is, therefore, useful to have a basic understanding of these rules and their application to trade association activity.

Summary of the Gift Rule

A Member of the House or Senate, or an

officer or employee of the House or Senate (“Members or staff”) may generally accept any gift that has a value of less than \$50, even from a lobbyist. This includes meals, refreshments, cab rides, or other items of value. However, a single source may not provide gifts having a cumulative value of \$100 or more in a calendar year to the same Member or staff.

Exceptions to the Gift and Travel Rules

There are over 20 exceptions to the rule prohibiting gifts of \$50 or more to Members and staff, and we discuss these in detail below. Perhaps the most widely invoked exception to the rule relevant to trade associations is the exception for payments in support of officially-connected travel.

Payments For Officially-Connected Travel

This exception allows Members or staff to accept travel in connection with “official duties” that is paid for by a private source (such as a trade association), and includes expenses for transportation, meals, and lodging to attend or participate in a trade association annual meeting, speaking engagement, fact-finding trip, convention, or similar event. Only registered lobbyists and agents of foreign governments are prohibited from funding these kinds of trips.

As discussed above, Members or staff may generally accept any gift that has a value of less than \$50, even from a lobbyist. It should be noted, however, that Members or staff may not “buy-down” gifts. In other words, if a Member’s meal costs \$60, the Member cannot provide \$11 to the giver to bring the gift under the \$50 limit; the gift must itself be valued at less than \$50. Gifts having a value of less than \$10 do not count towards the annual limit of less than \$100.

It should also be noted that Members and staff are absolutely prohibited from soliciting or asking for any gift, even those under \$50.

Exceptions to the Gift Rules

In addition to payments for officially-connected travel, other exceptions to the gift rule include:

Gifts given on the basis of a personal friendship.

This exception allows a gift to be given, even by a lobbyist, on the basis of a bona fide, pre-existing friendship.

Free or discounted attendance at certain events.

Such events include:

- “Widely attended” events (at least 25 people in attendance and open to individuals from within a given industry); and
- Charity fundraising events.

Food or refreshments (but not meals) of nominal value.

Meals or local transportation provided incident to a visit to an organization or business site.

For example, a trade association may offer a Member a ride to its office or food offered at its office as part of the visit.

Items of nominal value.

Items such as T-shirts, baseball caps and other promotional items may be provided to Members or staff without violating the gift rule.

Commemorative items.

This refers to the presentation of a plaque,

trophy, or other similar commemorative item to Members or staff.

Personal hospitality of an individual.

Members or staff may accept a gift of personal hospitality from an individual, but not a registered lobbyist or agent of a foreign principal. This includes things such as a meal or lodging at an individual’s residence.

TRAVEL RULES

Congressional travel rules permit Members and staff to accept several different kinds of travel paid for by a private source, depending on the source of the travel expenses and the purpose of the trip. Most relevant to trade associations is travel in connection with Member or staff official duties that is paid for by a private source.

Travel in Connection with Official Duties

Members or staff may accept, in connection with fulfilling official duties, necessary travel expenses for him or herself, and a spouse or child, to attend a trade association meeting, speaking engagement, fact-finding trip or similar event from a private source (other than a registered lobbyist or agent of a foreign principal).

Trade associations should pay special attention to this rule. Recently, the media has reported about the source of payments for officially-connected trips taken by Members and staff. Congressional travel rules permit a private source to pay Member or staff travel expenses (transportation, lodging, and meals) for attendance or participation at a convention, annual meeting, fact-finding trip, or similar occasion.

There are three issues with regard to this rule that deserve particular emphasis:

1. Only the person or organization that is *directly and immediately associated with the event or location* being visited may pay Member or staff travel expenses (for example, if a particular corporation is holding an event, and the trade association is not in any way associated with the event, the corporation, and not the trade association, should cover the Member's travel expenses; however, the trade association would be permitted to cover the Member's travel expenses if the trade association were a co-sponsor, or otherwise directly involved with, the event);

2. Where an organization pays for travel with *donations that were earmarked, either formally or informally, for the trip*, the donor is considered the true source for the trip. The donor must also be directly and immediately associated with the event (for example, if a corporation donates funds to a trade association specifically for the purpose of helping a trade association defray the costs of a trip, and a trade association then covers a Member's travel expenses for the trip, the true source of the funding is considered to be the corporation. In that case, the corporation must have a direct and immediate connection with the event); and

3. *Registered lobbyists* may not pay Member or staff travel expenses.

A trade association is generally not considered a lobbyist (it is considered a "client" of its in-house lobbyists), so a trade association is permitted to pay these expenses. Also, a trade association in-house lobbyist could use a credit card provided by a trade association to cover these travel expenses without transgressing

the prohibition on payments by lobbyists, provided a trade association pays the credit card bill.

It is an open question whether a trade association in-house lobbyist could use a personal credit card to pay these expenses, even where a trade association intends to reimburse its in-house lobbyist.

Considerations that would seem relevant to the issue include whether the lobbyist is acting for the trade association, whether the trade association provides credit cards to its staff, and whether the trade association customarily reimburses its staff for out-of-pocket expenses within a reasonable period of time.

In addition to the issues identified above, the following should also be noted with regard to the travel rule:

- **The rule does not permit the payment or reimbursement for events that are substantially recreational in nature.** Members and staff are required to make this determination in a reasonable manner.
- **Proper destination.** Members or staff may not accept local travel (travel within 35 miles of the District of Columbia) or travel within 35 miles of the Member's home district (official allowances cover travel costs for these purposes).
- **Time limits.** For domestic travel (within the continental United States), the trip cannot exceed four days without advance written approval from the ethics committee. For international travel,

the trip cannot exceed seven days, not including travel time. Members or staff may extend travel at their own expense.

FOR MORE INFORMATION

We hope this discussion has been helpful and we look forward to providing additional *Trade Association Issue Briefs* on trade association political activity in the near future.

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