Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Key Recent Changes To Lobbying, Campaign Finance Rules

By **Melissa Laurenza and Samuel Olswanger** (February 5, 2018, 11:45 AM EST)

Melissa Laurenza

Samuel Olswanger

The 2018 midterm elections are quickly approaching, bringing with them anticipated increases in political activity along with scrutiny from government regulators and the press. Coinciding with this are a number of new changes in federal and state lobbying, gift and campaign finance laws and regulations.

Below is an examination of these recent changes as well as an analysis of their significance and impact.

Federal

A week after taking office, President Donald Trump issued an executive order prohibiting executive branch appointees from accepting gifts from registered lobbyists and lobbyist employers, lobbying their respective agency for five years after leaving their position, engaging in an activity that would require registration under the Foreign Agents Registration Act (FARA) and requiring that registered lobbyists appointed to an executive office recuse themselves from working on any matter on which they lobbied for the first two years of their appointment.

The Financial Industry Regulatory Authority (FINRA) Rule 2030 took effect on Aug. 20, 2017. This new rule generally bans all FINRA members from engaging in distribution or solicitation activities for compensation with a government entity on behalf of an investment advisor that provides, or is seeking to provide, investment advisory services to such government entity within two years after a contribution to an official of the government entity is made by the covered member or a covered associate.

The new FINRA rule closely parallels the Securities and Exchange Commission’s Rule 206(4)-5, which prohibits similar contributions by investment advisors.

California

In September, Gov. Jerry Brown signed new campaign finance laws that require political committees to disclose contributions or independent expenditures aggregating $5,000 or more to support or oppose a single local ballot initiative or referendum. Previously, disclosure was required for state-level ballot measures only.

Less than a month later, the state legislature passed the DISCLOSE Act, which the governor also signed into law. Under this new campaign finance law, disclosure of an ad's top donors must be displayed more prominently on the ad than previously required, including special rules for disclosures on social media, websites and other forms of electronic communications.

The act also requires disclosure of the original source of earmarked donations, closing a loophole that committees previously used to hide the true identity of their donors. All of California's changes took effect Jan. 1, 2018, in time for the 2018 gubernatorial race and other state elections.

Kentucky

Campaign finance legislation enacted in March 2017 doubled the contribution limits applicable to individuals contributing to state or local candidates ($1,000 → $2,000), state executive committees ($2,500 → $5,000) and caucus committees ($2,500 → $5,000). The bill also eliminated the PAC-to-PAC and individual-to-PAC aggregate limit of $1,500 in favor of an annual $2,000 cap.

Through most of 2017, Kentucky had some of the strictest ethics laws in the country, including a complete ban on gifts from lobbyists and their employers to Kentucky legislators. In addition to the gift ban, lobbyists in Kentucky were also prohibited from making political contributions to members of the state legislature or candidates for the state legislature.

In comparison, lobbyist employers were prohibited only from making political contributions to members of the state legislature or candidates for the state legislature during an active legislative session. Kentucky's gift and campaign finance restrictions were challenged in court this year.

On June 6, U.S. District Judge William Bertelsman upheld the ban applicable to lobbyist employers during an active legislative session, but struck down the outright ban on political contributions from lobbyists. In explaining the difference, he wrote that the "time-specific prohibition is less restrictive than a complete ban, and is closely drawn to the goal of deterring corruption or its appearance by preventing money from exchanging hands between legislators and lobbyists during legislative sessions when quid pro quo corruption would be a greater danger." Bertelsman also reversed the prohibition on lobbyists serving as campaign treasurers.

The Kentucky Registry of Election Finance (KREF) and Kentucky Legislative Ethics Commission (KLEC) decided to continue enforcing the rules struck down by Bertelsman, pending appeal. This came to an end on December 7, when Bertelsman issued a permanent injunction, requiring KREF and KLEC to obey his previous ruling. KLEC has not declared its intentions yet, but it may appeal the decision in the Kentucky Court of Appeals.

Missouri

Missouri Gov. Eric Greitens signed an executive order on Jan. 10, 2018, that prohibits executive branch officials and employees from accepting gifts from registered lobbyists. The order also prohibits gubernatorial staff from lobbying the governor's office after leaving their position for the remainder of the Greitens administration.

In May 2017, a U.S. district court judge reversed several aspects of the constitutional amendment adopted by voters on Nov. 8, 2016. As passed, the amendment would have prohibited corporations and labor unions from making direct contributions to state candidates, campaign committees and political parties in Missouri, as well as PAC-to-PAC contributions. The court ruled that corporations and labor organizations are permitted to make contributions to campaign committees that support or oppose a ballot measure and that PACs may continue to receive contributions from other PACs.

New Mexico

On Sept. 8, 2017, Secretary of State Maggie Toulouse Oliver approved new rules requiring independent expenditure groups that spend more than $3,000 in support or opposition of a non-statewide race or ballot measure, or more than $7,500 in support or opposition of a statewide race, to disclose the names and address of each person who contributed more than $200 in total for independent expenditures over the previous 12 months.

However, for contributions to quasi-political groups, the new rule provides a disclosure carveout for individuals who expressly designate that their money not be used for political activities.

Vermont

On June 15, Gov. Phil Scott signed a bill approving the creation of a state code of ethics and a state ethics commission. The bill also prohibits former lawmakers and executive officers from lobbying for one year after leaving office, and prohibits employees of businesses contracting with state executive agencies from making campaign contributions to candidates for office in the respective agency.

Virginia

On April 26, 2017, Gov. Terry McAuliffe signed legislation into law that requires registered lobbyists to send a summary of all "gifts" (anything of value more than $20) to each assemblymen and executive official to whom gifts were given within three weeks of adjournment of the regular session of the General Assembly.

Analysis

Congress has not enacted major legislative changes to the Lobbying Disclosure Act (LDA) since 2007 or to the Federal Election Campaign Act (FECA) since 2002. In contrast, states, and even localities, are actively expanding disclosure requirements and implementing new laws regulating political and lobbying activities within their jurisdictions.

While Congress does not appear to be considering any substantive changes to either the LDA or FECA at this time, legislation has been introduced that would change the FARA disclosure regime dramatically and impact domestic U.S. subsidiaries.

As introduced, the Disclosing Foreign Influence Act reverses a 1995 Congressional decision that allows most foreign private sector companies and their U.S. subsidiaries to register and report federal lobbying-related activity under the LDA in lieu of registering and reporting activity under the much more onerous FARA statute. Currently, private sector entities engaged in federal lobbying-related activities on behalf of foreign persons or entities that are registered and reporting under LDA are not required to register and report under FARA, provided that the registered entity is not acting on behalf of a foreign government or foreign political party.

If the Disclosing Foreign Influence Act were to become law, foreign-owned corporations as well as U.S.-based subsidiaries seeking to influence U.S. policy would be required to register and report their activity under FARA — increasing the regulatory burdens on such private companies. Moreover, unlike the LDA, FARA does not have a de minimis exception for time spent lobbying.

Under the proposed legislation, even the occasional meeting with covered officials may require FARA registration and reporting. In addition to removing the LDA exemption, the proposed legislation increases the frequency of reporting under FARA from semiannual to quarterly,
and strengthens oversight and enforcement mechanisms.

The legislation was approved by the House Judiciary Committee on Jan. 17, 2018. The Senate Judiciary Committee has yet to mark up the bill, but the measure was introduced by the chairman of the committee, Sen. Chuck Grassley, R-Iowa.

With respect to new laws and executive orders regulating lobbying-related activity at the state and local levels, some of the new regulations — such as post-employment lobbying restrictions applicable to elected officials and executive officers, as well as restrictions and reporting requirements on gifts from lobbyists and lobbyist employers — are similar to existing federal laws and regulations.

As a result, it is likely that states will continue to be active in these areas. Already this year, legislation has been introduced in Florida to prohibit legislators and statewide elected officers from lobbying any state government body or agency for two years after leaving office, and a bill seeking to limit gifts from lobbyists to public officials was unanimously approved by the General Laws Committee of the Missouri House of Representatives.

Unlike at the federal level, several states prohibit legislative candidates from accepting political contributions while the legislature is in session. These types of restrictions are generally more prevalent in states with part-time legislatures. The court's ruling in Kentucky striking the outright ban on political contributions from registered lobbyists to legislative candidates demonstrates that there are limits to the restrictions a state can impose.

Finally, since the 2010 Supreme Court ruling in Citizens United v. Federal Election Commission that prohibits the government from restricting independent expenditures for political communications from corporations, states and localities have been enacting measures to increase transparency as to the sources of funding for independent expenditures made to influence state and local elections and ballot measures.

In addition to the DISCLOSE Act in California and the rules issued by the New Mexico Secretary of State, the Spokane, Washington, City Council adopted its own ordinance requiring disclosure of contributors making independent expenditures.

It should be noted that the new disclosure rules in New Mexico were enacted in a controversial manner, as they are based on legislation Gov. Susana Martinez vetoed early last year. Critics of increased disclosure for independent expenditures argue that these types of rules could curb free speech rights and lead to individuals being harassed for their political activity. Despite arguments against, state and local officials are likely to continue efforts to increase disclosure of political activity — whether through legislation or executive action.

Conclusion

As 2018 is an election year with all U.S. House seats, 33 U.S. Senate seats, 36 state governorships and numerous other state and local offices on the ballot, it is likely to be an active year for political activity.

Increased political activity leads to increased scrutiny from regulators and the media, highlighting the necessity for politically active entities and individuals to take steps to ensure they are complying with applicable federal, state and local laws and ordinances.

Melissa L. Laurenza and Samuel J. Olswanger are, respectively, a partner and policy advisor in Akin Gump Strauss Hauer & Feld LLP's public law and policy practice. They focus on advising clients on federal, state and local campaign finance laws and regulations, lobbyist registration provisions, gift rules applicable to public officials and their employees, pay-to-play restrictions and securities laws regulating political activity.