Political Giving: A Primer for High-Net-Worth Individuals and Family Offices

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For many years, financial supporters of a candidate or a cause could simply write a check and ask friends and colleagues to do the same. The legal landscape has changed dramatically, however, presenting high-net-worth individuals and family offices with many options for maximizing political influence while at the same time pursuing financial goals and protecting reputational interests. Yet with new opportunities come new risks. Laws vary significantly from one jurisdiction to another, and as some regulators make frequent changes, others work from arcane laws that do not speak to modern practices in business, wealth planning, philanthropy, or campaigning. Violations, even if inadvertent, can result in financial penalties, legal liability, reputational risk, and loss of business.

Before engaging in any political activity, donors should be careful to vet (or seek assistance vetting) potential donations for legal and reputational concerns. Certain higher-risk donations, such as those to politically active nonprofits and candidate contributions in states where the donor or donor's company has government contracts or manages pension fund investments, require additional scrutiny. Among other considerations, donors should know the answers to the following questions.

What Is the Nature of the Recipient Organization?

Know the company you keep. Political and advocacy groups take many forms and are subject to varying limits, disclosure rules, and potential business implications. Sometimes the name of a recipient organization can be misleading. Is it a candidate committee, traditional PAC, super PAC, leadership PAC, 501(c)(4) social welfare organization, Section 527 political organization, LLC, or for-profit entity? Is it registered with and reporting to the Federal Election Commission, the IRS, or a state regulator? The answers to these questions will determine the rules that might apply to the contribution. Also, it is generally prudent not to send transmittal letters with contributions or make statements in email or other writings referring to legislative matters, or past or future action by an officeholder. Finally, check out who founded and runs the recipient organization, whether it is in good legal standing and abides by compliance requirements, and whether the organization or its principals have taken controversial public positions or otherwise have a problematic history.

Where Will the Contribution Come From?

Though donors may use different financial vehicles interchangeably, there may be strategic advantages in choosing one vehicle over another, and different limits, prohibitions, and disclosure obligations may apply. For example, in making contributions to federal committees, the rules applicable to a contribution from a single-member LLC do not apply to an LLC taxed as a corporation. The laws may treat a contribution from a trust differently from one made by a checking account. In some circumstances, regulators may look closely at whether a donor stood up a new entity to facilitate a contribution or uses the contributing entity for other business purposes.

What Are the Contribution Limits, if Any?

Federal, state, and local laws set limits on how much (and whether) individuals, organizations, businesses, and government contractors may contribute to candidates, political parties, and other political organizations over the course of a year or an election cycle. In contrast, tax-exempt organizations, such as 501(c)(4)s, may accept unlimited funds from most donors.

How Will a Joint Fundraising Committee Allocate a Contribution?

Joint fundraising committees, commonly known as "victory funds," allow donors to write a single check that is then disbursed to multiple candidates and committees, usually according to a predetermined formula found in the small print of the fundraising solicitation or set by agreement with the donor. Donors must be careful not to exceed their personal contribution limits, as contributions made through a joint fundraising committee are combined with those the donor makes directly to the participating candidates and committees.

What About In-Kind Contributions?

Providing goods or services, hosting in-home fundraisers, and paying for third-party costs for consulting, polling, printing, or other services for the benefit of candidates and parties often count toward contribution limits. It's important to understand what is allowed, and what does and does not count as an in-kind contribution. For example, fundraising events for federal candidates that are held on corporate premises must be structured to avoid making an in-kind contribution based on the value of conference space, corporate lists, or the value of employee time.

How Will the Donation Be Publicly Disclosed?

The nature and timing of public disclosure may be important to donors concerned with their privacy and reputational or business interests, or who are concerned that ill-timed disclosure of their contribution could be used against the candidates or causes they support. Candidate and political party committees, as well as PACs, are required to file periodic reports disclosing contributions, but the donor might time a contribution to mitigate any disclosure concerns or request that the recipient committee report identifying information (employer, occupation, address) in a particular way. In contrast, donations to tax-exempt organizations such as 501(c)(4) organizations are generally not disclosed unless the donations are solicited or earmarked for political purposes.

Does the Donor Have Any Filing Obligations?

In a small number of states, like California, donors to candidates, parties, or political committees may have their own obligations to file a "major donor" report disclosing contributions over a certain threshold. Organizations that lobby or seek or hold government contracts may also be required to disclose their contributions, as well as those of their principals.

How Else Might the Donation Be Publicized?

In a growing number of jurisdictions, an organization's top donors must be identified in the legal disclosure statement that appears on websites and in campaign ads. In those jurisdictions, a contributor concerned about such exposure may want to consider adjusting the amount of the donation to avoid disclosure or deferring a contribution to a later date.

What Are Conduit Contributions?

Donors may not make a contribution to one entity, such as a 501(c)(4), for the purpose of passing it through to a campaign committee, super PAC, or other reporting committee. Such "straw donor" arrangements conceal the true source of the contribution and are sometimes used to skirt contribution limits. This is an active area of enforcement that has ensnared corporate executives, law firm partners, and others, and is punishable by civil and criminal penalties. Similarly, donors may not advance funds to another individual for the purpose of making a contribution or reimburse another individual for making a contribution. Companies and their executives have paid steep fines and been criminally prosecuted for reimbursing employee contributions through expense reimbursements, grossed-up bonuses, and other means.

What Do Government Contractors and State Pension Investors Need to Know?

Many states and municipalities have "pay-to-play" laws that restrict contributions by companies that do business with the government (or seek such business), and by their owners, officers, directors, and employees who are engaged in seeking government contracts. Pay-to-play laws are complex and carry significant consequences—one errant contribution may result in the voiding of an existing contract, disqualification of a bid, or debarment from future contracts. Contributions by covered individuals should be subjected to pre-clearance procedures.

How Can Foreign Nationals and Businesses Participate in Political Activities?

Amid growing concerns about foreign interference in U.S. elections, donors who are not U.S. citizens or who work with businesses with foreign owners or principals should proceed with caution. Federal law prohibits anyone other than a U.S. citizen or lawful permanent resident from contributing to federal, state, or local candidates and political parties. In addition, foreign nationals may not participate in making decisions regarding contributions or expenditures in U.S. elections. A growing number of states and localities are attempting to regulate in this area by targeting foreign national contributions to ballot initiatives and barring contributions from "foreign-influenced" corporations.

Are There Tax Planning Benefits in Making a Donation?

Many high-net-worth individuals are using creative ways to structure their advocacy and philanthropic activities while advancing their financial goals. Understanding which entity and structure makes the most sense is a complicated balance of advocacy goals, reputational concerns, and tax benefits. For example, as a complement to their philanthropic LLCs and family foundations, some donors are setting up their own 501(c)(4) organizations to drive social change, including through public education, issue advocacy, and some election-influencing activities.

The primary purpose of a 501(c)(4) is to promote a social or community benefit. A 501(c)(4) may devote unlimited resources to influencing legislation or other issue advocacy and may also engage in some political activity, including making political contributions or independent expenditures supporting or opposing candidates, as long as that activity is not its primary activity. In terms of disclosure, 501(c)(4)s must file annual reports to the IRS, including information about the organization and its spending. However, while major contributions must be reported, the names and addresses of contributors can be redacted and generally do not need to be disclosed to the IRS or the public.

501(c)(4)s have gained popularity as a vehicle for political advocacy in recent years, largely for the anonymity they offer donors. But they also offer some donors significant tax advantages. Notably, when a donor funds the organization with gifts of appreciated stock, the 501(c)(4) may then sell the stock to fund its activities without the donor incurring tax on capital gains or a gift tax. A politically active 501(c)(4) may be taxed on investment income resulting from the 501(c)(4)'s sale of the stock, but only under certain circumstances. Specifically, 501(c)(4)s pay taxes on the lesser of the organization's net investment income or its "exempt function" expenditures, a term that refers to spending aimed at influencing federal, state, and local elections. But in a year when investment income or political spending is zero, no tax is owed. For that reason, donors may wish to carefully consider deferring gifts likely to confer significant investment income on the organization to years when the organization engages in no election-related spending.

Venable LLP's Political Law Group helps high-net-worth individuals and family offices achieve their political and policy goals while managing their legal and reputational risks. Anyone with questions about this advisory is encouraged to reach out to the authors or to any member of Venable's Political Law Group.

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