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**Doing Business with Pennsylvania
State Government: A Guide to Laws,
Regulations and Policies Governing Contacts
with Public Officials and Employees**

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Pennsylvania has adopted numerous laws, regulations and policies intended to protect the integrity of state and local government operations and which regulate permissible business relationships and other contacts with public officials and employees. These laws, regulations and policies govern lobbying, campaign contributions, conflicts of interest, and the payment of gifts or gratuities to public officials and employees. Whenever businesses, individuals or associations interact with state and local officials with respect to permits and approvals, protests and appeals, audits or compliance actions, contracts, or in efforts to advocate changes in governmental policies, these laws, regulations and policies impose important restrictions and obligations, and mandate the filing of various types of reports. The failure to understand and comply with these requirements may have serious consequences, including civil fines and penalties, the invalidation of permits, approvals or contracts, and possible criminal prosecution.

The most significant Pennsylvania laws and regulations which govern the conduct and ethics of public officials and employees are:

- The Lobbying Disclosure Act;
- The Campaign Finance Act (*i.e.*, Article XVI of the Election Code);
- The Public Official and Employee Ethics Act;
- The State Adverse Interest Act;
- The Legislative Code of Ethics;
- The Code of Conduct for Appointed Officials and State Employees; and
- The Commonwealth Procurement Code and Procurement Management Directives.

The major requirements of these laws, regulations and policies of relevance to businesses interacting with state and local officials and employees are summarized below.

Lobbying Disclosure Act

A. Overview

Subject to limited exceptions, Pennsylvania requires persons who receive compensation or incur expenditures for the purpose of influencing a broad range of state legislative and executive agency actions either on their own behalf or on behalf of other persons to register as “lobbyists.” Pennsylvania also requires detailed quarterly expense reporting by “principals” who engage lobbyists, or conduct lobbying on their own behalf, and requires the payment of sales and use tax for various types of lobbying related expenditures. Under the Pennsylvania Lobbying Disclosure Act, registrations must be filed with and quarterly expense reports submitted to the Department of State and enforcement actions may be undertaken by the State Ethics Commission and Attorney General.¹ The law applies to most persons who incur expenditures or receive compensation relating to any “direct” or “indirect” communications with State officials and employees for the purpose of influencing “legislative or administrative action” subject to a limited set of exclusions and exemptions. The law also applies to persons who provide “gifts, hospitality, transportation or lodging” to any State official or employee to “advance the interests” of any person engaged in lobbying or pay “office expenses” relating to lobbying.² Violations of the law may result in significant civil and criminal penalties and a disqualification for up to five years from incurring expenditures or receiving compensation for the purpose of seeking to influence legislative or administrative actions.

B. Scope

Lobbying registration and expense reporting may be required whenever a person incurs expenses or makes payments to other persons the purpose or reasonably foreseeable effect of which will be to influence legislative or administrative actions by State officials or employees. Legislative and administrative actions relate to decisions made by the General Assembly or agencies of the executive branch of state government relating to:

- Bills, resolutions, amendments and “any other matter that may become the subject of action by either chamber of the General Assembly.” Other matters that constitute legislation may include legislative procurement decisions, legislative rules, decisions to conduct hearings or investigations, or personnel matters;
- The Governor’s approval or veto of legislation;
- The nomination, appointment, or confirmation of individuals as officers or employees of the Commonwealth or as members of public boards or commissions by the General Assembly, the Governor or executive agencies;
- The proposal, consideration, promulgation, rescission, approval, or rejection of regulations by administrative agencies or the Independent Regulatory Review Commission;
- The development or modification by an executive agency of a “statement of policy.” Statements of policy differ from regulations in that they consist of documents setting forth guidelines and interpretations of laws and regulations which need not be published for review and comment before being adopted and need not be published in the *Pennsylvania Bulletin* or *Pennsylvania Code*;
- The proposal, consideration, promulgation or rescission of executive orders; and
- The procurement of supplies, services and construction pursuant to the Commonwealth Procurement Code.

While the definitions of legislative and administrative action are very broad, they also include several significant exclusions, including:

- Actions taken by legislative caucuses or administrative committees or agencies that do not require action by a chamber of the General Assembly, such as procurement and personnel decisions.
- Regulations exempt from review under the Regulatory Review Act, including regulations of the Fish & Game Commission, courts, the General Assembly, political subdivisions, and local authorities.
- Procurement actions other than those involving supplies, services or construction subject to the Commonwealth Procurement Code by Commonwealth agencies, including actions taken involving grants, loans, the investment of funds, maintenance of property and supplies, collective bargaining, and procurements undertaken by the courts, the General Assembly, political subdivisions, state-related institutions (*i.e.*, Penn State, Pittsburgh, Lincoln and Temple Universities), and by the Liquor Control Board for purchases of liquor and alcohol.
- Any non-regulatory policies not set forth in written documents.

C. Direct and Indirect Communications

The Lobbying Disclosure Act applies not only to “direct communications” relating to legislative and administrative actions, but also to “indirect communications,” the provision of “gifts, hospitality, transportation or lodging” for the purpose of “advancing the interest” of persons engaged in lobbying, and the use of resources to pay for “office expenses” relating to lobbying.

By expanding its coverage beyond “direct communication” and also encompassing “indirect communication,” the Lobbying Disclosure Act applies to activities that many may regard as nothing more than the use of private resources to publicly express views and opinions regarding issues of public concern. While “direct communications” consist of efforts undertaken through written, oral or any other mediums of communication to influence legislative or administrative actions that are directed to a State official or employee, “indirect communications” consist of any such efforts “to encourage others, including the general public, to take action, the purpose or foreseeable effect of which is to directly influence legislative action or administrative action.”

Notwithstanding the inclusion within indirect communications of all activities the purpose or foreseeable effect of which is to directly influence legislative action or administrative action, mere passive monitoring of legislative or administrative action does not constitute lobbying, unless undertaken with an expectation and intent to engage in future lobbying.

D. Exemptions

Notwithstanding the broad scope of the Lobbying Disclosure Act, a variety of specific, but narrow exclusions are also provided from its registration and reporting requirements for types of “persons and activities.”³ Exemptions from registration and reporting apply to the following classifications of “persons”:

- Individuals who limit their lobbying activity to “preparing testimony and testifying before a committee of the General Assembly or participating in an administrative proceeding,” provided the individuals are not otherwise registered as lobbyists;
- Individuals who are employees of an entity engaged in the business of publishing or broadcasting while engaged in providing news to the public in the ordinary course of business, provided broadcasting occurs on a regular and periodic basis, generates revenue or compensation, and is conducted by an entity that is independent of any person otherwise required to register as a lobbyist or principal;
- Individuals who do not receive economic consideration for lobbying from any principals and who are not themselves engaged in lobbying as principals;
- Individuals whose consideration in the aggregate from all principals they represent is less than \$2,500 in any reporting period;
- Individuals who lobby on behalf of their employers less than 20 hours during any calendar quarter;
- Individuals who are elected or appointed state or local officials acting in an official capacity, except for members of advisory boards that have no authority to expend public funds other than providing expense reimbursement to their members and which do not exercise the power of the State or any political subdivision;
- Individuals who represent and are members of a bona fide religious organization and limit lobbying “solely for the purpose of protecting the constitutional right to the free exercise of religion”;

- Individuals who serve on an advisory board, working group or task force at the request of an agency or the General Assembly, and who are not registered lobbyists; and
- Persons participating as a party or as attorneys or representatives in “a case or controversy in any administrative adjudication.”

To the extent these exemptions apply only to individuals, they will not provide exemptions from registration and reporting by associations, corporations, partnerships, business trusts or other entities on whose behalf individuals undertake activities and will not exempt principals, lobbyists and lobbying firms from including expenditures related to these activities in their expense reports.

Exemptions from registration and reporting also apply to the following types of “activities”:

- Expenditures or transactions subject to reporting under the Pennsylvania Election Code, *i.e.*, contributions to and expenditures by candidates and political committees; and
- Vendors whose efforts are directly related to responding to a publicly advertised invitation to bid or requests for proposals, or participating in “small” or emergency procurement activities, including participation in open and public trade shows, conventions, product demonstrations or public forums conducted by the Commonwealth. The exemption for vendor activities does not apply, however, to other attempts to influence procurement actions or decisions.

E. Registration Requirements

The Lobbying Disclosure Act classifies individuals and organizations that receive compensation to influence legislative or administrative action on behalf of others as “lobbyists”; persons who hire lobbyists or engage in lobbying on their own behalf as “principals”; and entities that engage in lobbying on behalf of other principals as “lobbying firms.”⁴

Principals, lobbying firms and lobbyists are required to register with the Department of State within ten days of “acting in any capacity” as principals, lobbying or principals, including being retained for compensation to engage in lobbying, regardless of whether the commencement of any direct or indirect communications pertaining to legislative and administrative action occurs at the time a person is engaged for the purpose of conducting lobbying.⁵ Registration covers a biennial period ending on December 31st of each even numbered year. After the expiration of each biennial registration period, registration must be renewed within ten days of the commencement of any lobbying activity.⁶ Registrations must be accompanied by a \$100 fee payment by each person required to register for each biennial registration period. Each registrant must also indicate whether in the future it will file written or electronic registrations and expense reports.⁷ A registration statement filed by a “principal” must contain:⁸

- The name, permanent address, daytime phone number and e-mail address of the principal;
- A description of the nature of the principal’s business;
- The name, registration number and acronym of any “affiliated political action committees”;
- The name and permanent business address of each individual “who will for economic consideration engage in lobbying on behalf of the principal”;

- Any prior registration numbers assigned by the Department of State; and
- The number of dues-paying members in the most recently completed calendar year of any principal that is an association or organization.

An affiliated political action committee is a political committee that has an officer required to be included on a registration statement under the Pennsylvania Election Code who is a principal, an officer or employee of a principal, a lobbyist, or an employee of a lobbyist, unless the individual serves “in what is clearly a personal capacity and the goals and mission of the political committee clearly have no relationship to the goals and mission of [a principal, lobbyist or lobbying firm].”⁹ The Pennsylvania Election Code requires any political committee receiving contributions of \$250 or more to register individuals to serve as chair and treasurer of the committee.¹⁰

The registration statement for a “lobbyist” must contain the same information as the registration statement of a “principal,” but must also include:¹¹

- A recent photograph of the lobbyist;
- The name and registration number (when available) of any lobbying firm with which the lobbyist “has a relationship involving economic consideration”; and
- The name, registration number, and acronym of any candidate political action committee of which the lobbyist is an officer who must be included on the committee’s registration statement filed pursuant to the Election Code.

Corporations and their subsidiaries may register and report on a consolidated basis if they meet the eligibility standards of the Internal Revenue Service for filing consolidated corporate tax returns. When registration and reporting occurs on a consolidated basis, however, all reports and notices must disclose with particularity all of the required information as to the parent and subsidiaries.¹²

F. Quarterly Expense Reports

The Lobbying Disclosure Act requires that a “registered principal shall, under oath or affirmation, file quarterly expense reports with the Department of State no later than 30 days after the last day of the quarter.”¹³ In the event that total expenses for any reporting period are less than \$2,500, a principal may file a statement to that effect in place of an expense report.¹⁴ Otherwise, expense reports must include:¹⁵

- The name and registration number of all lobbyists representing the principal and the general subject matter being lobbied;
- The total costs of lobbying for the period, including office expenses, personnel expenses and expenses related to attempts to influence an agency/s “preparing, bidding, entering into or approving a contract”;
- The costs for gifts, hospitality, transportation, and lodging for State officials or employees or their immediate families;
- The costs for direct communication;
- The costs for indirect communication;
- The name of each State official or employee receiving anything of value of an amount that is required to be included in the official’s or employee’s Statement of Interests filed pursuant to the Ethics Act and each occurrence upon which such benefits were provided to the official or employee, except for the costs of receptions attended by State officials or employees “in connection with public office or employment”;

- The name, permanent business address and daytime telephone number of any individual or entity which contributed more than 10% of the “total resources received by the principal during the reporting period”; and
- The signature of each lobbying firm or lobbyist not associated with a lobbying firm registered on behalf of the principal attesting to the “validity and accuracy” of the report “to the best of the attester’s knowledge.”

Principals must report expenses incurred by individuals exempt from registration, but reports need not identify grassroots volunteers or participants not individually required to register as lobbyists. In addition, while mere monitoring of legislative or regulatory activities does not constitute lobbying, principals must include the cost of monitoring activities in their expense reports.

In preparing expense reports, personnel and office expenses related to lobbying must be allocated either to the costs of direct or indirect communications through the use of “reasonable methods of estimation and allocation.” Documents reasonably necessary to substantiate expense reports must be retained for four years from the date of filing and made available upon request for inspection by the Office of Attorney General, the Disciplinary Board of the Supreme Court, the Ethics Commission or the Department of State.¹⁶

“Personnel expenses” included in quarterly expense reports differ from “office expenses” the expenditure of which may make a person subject to mandatory reporting or registration. While “office expenses” consist only of expenditures for an office, equipment or supplies “utilized for lobbying,” personnel expenses consist of salaries, benefits, vehicle allowances, bonuses and reimbursable expenses paid to “lobbyists, lobbying staff, research and monitoring staff, consultants, publications, public relations staff, technical staff, and clerical support staff.”¹⁷ As a result, staff members and consultants providing research, monitoring, technical and clerical support, but not engaged in direct or indirect communications, may not be required to register and file expense reports, even though expenses for such services are required to be included in quarterly reports.

When an expense report will disclose gifts made to any public official or employee required to be named in the report, the person filing the report must give written notice to the official or employee providing sufficient information about the gifts to be reported to allow the official or employee to comply with the obligations imposed upon the official or employee by the Ethics Act to include such information in their Statements of Financial Interests.¹⁸ Things of value provided to State officials or employees for expense reporting requirements need not include the cost of receptions attended by officials or employees “in connection with public employment” or “anything of value received from immediate family when the circumstances make it clear that motivation for the action was the personal or family relationship.”

In the event that a principal’s expense report does not contain lobbying expenses incurred by a lobbying firm or lobbyist, the lobbying firm or a lobbyist not associated with a lobbying firm must submit a separate expense report.¹⁹ The requirement that lobbying firms or lobbyists not affiliated with lobbying firms report expenses incurred for lobbying not reported on the report of a principal includes expenses incurred on behalf of a principal exempt from reporting requirements under the Lobbying Disclosure Act (as further discussed below).²⁰

The Lobbying Disclosure Act requires that whenever a person makes an expenditure for any indirect communication “for the purpose of disseminating or initiating a communication, such as a mailing, telephone bank, print or electronic media advertisement, billboard, publication, or education

campaign,” the communication must “clearly and conspicuously” state the name of the person who made or financed the expenditure for the communication.²¹ These disclosure requirements do not apply to indirect communications not of the same class or character as mailings, telephone banks, print or electronic advertisements, billboards, publications or “education campaigns.”

G. Additional Requirements

In addition to requiring registration and reporting, the Lobbying Disclosure Act imposes a variety of restrictions and prohibitions upon the activities of principals, lobbyists and lobbying firms.²²

- A lobbyist may not serve as a treasurer or other officer required to be included in a registration statement by a candidate political committee for a candidate seeking election to a statewide office, i.e., the Governor, Lieutenant Governor, State Treasurer, Auditor General, Supreme Court, Commonwealth Court or Superior Court, or to the State House or Senate;
- A lobbyist may not charge or receive a fee or any other economic consideration “based on a contract, either written or oral, that any part of the fee or economic consideration will be converted into a contribution to a candidate for public office or a political committee”;
- A lobbyist, lobbying firm, or principal may not make a knowingly false statement intended to influence legislative or administrative action;
- A lobbyist, and the employer or partner of a lobbyist, may not represent any principal with respect to subject matter in which that principal’s interests are directly adverse to the interests of another principal currently represented by the lobbyist, unless a lobbyist “reasonably believes the lobbyist will be able to provide competent and diligent representation to each affected principal,” provides written notice to each affected principal “upon becoming aware of the conflict,” and obtains informed consent by the involved principals waiving the conflict of interest;
- A lobbyist, lobbying firm, or principal (other than a vendor) may not agree to compensate or receive compensation that is in any way contingent upon any outcome of legislative or administrative action, except that contingent relationships are permissible for procurement of supplies, services, and construction under the Commonwealth Procurement Code;
- A lobbyist or principal may not instigate legislation to obtain employment in opposition to that legislation;
- A lobbyist or principal may not counsel a person to violate any of the requirements of the Lobbying Disclosure Act; engage in fraudulent conduct; commit a criminal offense “arising from lobbying”; or influence or attempt to influence a State official or employee by “coercion, bribery or threats of economic sanctions”;
- A lobbyist or principal may not attempt to influence a State official or employee by “the promise of financial support or the financing of opposition to the candidacy of the State official or employee in a future election”;
- A lobbyist or principal may not influence a State official or employee with respect to legislative or administrative action by making or facilitating a loan to a State official or employee; and
- A lobbyist or principal may not engage in conduct that brings the “practice of lobbying or the legislative or executive branches of state government into disrepute.”

H. Sanctions and Audits

Generally, intentional violations of the Lobbying Disclosure Act are punishable as a misdemeanor of the third degree with fines up to \$25,000 against a principal found guilty in addition to “any other penalties imposed under this chapter.”²³ Third degree misdemeanors are punishable by imprisonment of up to one year.²⁴ In addition, administrative penalties of up to \$2,000 per offense may be imposed by the Ethics Commission and individuals may be banned from engaging in lobbying for economic consideration for up to a five-year period. In addition, the intentional failure to file a registration statement, or the filing of a knowingly false or incomplete report, is punishable as a misdemeanor of the second degree.²⁵ Second degree misdemeanors are punishable by imprisonment of up to two years.²⁶

The Ethics Commission provides advice and opinions to all parties affected by the Act that request such information. A person that acts in good faith based upon the written advice or opinion of the Commission may not be held liable for doing so.²⁷ The Department of State provides the forms used under the Act (i.e., registration and reporting forms) and has posted those forms on its website.²⁸ The Department will provide public access to completed registration statements, expense reports, and notices of termination on file and will post all registration and reporting statements on the internet, for a period of 4 years. On an annual basis, the Department will publish an annual report on Commonwealth lobbying activities and a list of principals’ lobbyists, lobbying firms, and affiliated political action committees, along with a list of registered lobbyists, for each lobbying firm.²⁹

Every two years, the Department of State is required to engage a certified public accountant to audit 3% of randomly selected registration and expense reports filed under the Act. The audit report and findings shall be confidential, unless the Commission is conducting an investigation of the audited registration or report.³⁰ The Commission may also initiate an investigation and may hold a hearing concerning an alleged violation of Act 134.³¹

The Department of State and the Ethics Commission are required to refer all intentional violations of the Lobbying Disclosure Act to the Attorney General for criminal prosecution, and to refer violations involving attorneys to the Disciplinary Board of the Supreme Court.³² The Attorney General may also investigate and prosecute violations of the Act without referral and shall have exclusive jurisdiction to prosecute criminal violations.³³

I. Sales and Use Tax

The Pennsylvania Tax Reform Code imposes sales and use tax upon the purchase or use of lobbying services.³⁴ Because the term “lobbying services” is defined by the Code to mean the “services of a lobbyist, as defined in the definition of ‘lobbyist’ in ... [Act 1961-712],” i.e., Pennsylvania’s 1961 Lobbying Registration and Regulation Act rather than current law, since 1993 the Department of Revenue has administered the sales and use tax using a Statement of Policy which defines as taxable some, but not all, types of services that constitute lobbying under the current version of the Lobbying Disclosure Act.³⁵ In particular, pursuant to the Department’s Statement of Policy, the Department does not impose sales and use tax upon:

- The review of proposed legislative or administrative actions;
- Communications with a client, other lobbyists, members of trade associations, or private individuals;
- The drafting of testimony;

- Attending legislative or administrative agency meetings for the purpose of monitoring developments; and
- The purchase of services by charitable organizations, volunteer fire companies, religious organizations or nonprofit educational institutions, except to the extent used in an unrelated trade or business.

Notwithstanding the Department of Revenue's published Statement of Policy, on January 10, 2010, the Pennsylvania Ethics Commission issued a *Manual for Accounting and Reporting* applicable to lobbying expenses which states that the Department of Revenue has now determined that the definition of "lobbying services" for purposes of sales and use tax "must be referring to 'lobbyist' as it is defined in [Act 2006-134]," i.e., the 2006 Lobbying Disclosure Act.³⁶ As a result, pending changes being made by the Department of Revenue to its published Statement of Policy or some other formal announcement by the Department, substantial uncertainty exists regarding the extent to which lobbying services are subject to sales and use tax. Reflecting this uncertainty, the *Manual for Accounting and Reporting* advises registrants to "consult with an attorney or accountant for further guidance on the tax implications of lobbying."

Regardless of the definition of lobbying services for sales and use tax purposes, because sales and use tax is imposed only upon the "purchase price" of taxable services collected by a vendor from a "purchaser" or upon use of taxable services "purchased at retail," and the term "purchaser" excludes an employer who obtains services from its employees in exchange for wages or salaries, the tax on lobbying services does not include the value of "in-house" personnel and office expenses used for lobbying.³⁷

Campaign Finance Act

A. Overview

Article XVI of the Pennsylvania Election Code, often referred to as the Campaign Finance Act, allows unlimited individual donations to candidates for election to state and local offices and to political committees, but prohibits corporate contributions or expenditures to be made to or for the direct benefit of candidates or political committees, except for contributions and expenditures made by registered political committees that collect and disburse donations collected from individual donors. Corporations may, however, utilize their funds for the organization and management of affiliated political committees. Political committees must file periodic reports disclosing contributions received and expenditures made to support or oppose the election of candidates to state or local office. In addition, registered lobbyists must file reports of political contributions and expenditures in the same manner as political committees. Persons receiving non-bid contracts from state and local agencies must also file annual reports regarding their political contributions with the Pennsylvania Department of State.

B. Corporate Contributions

The Campaign Finance Act declares it to be unlawful for corporations and unincorporated associations, except corporations organized as a political committee, to make any "contributions" or "expenditures" to or on behalf of any candidate or political committee.³⁸ Criminal penalties for improper

corporate contributions and expenditures include fines of between \$1,000 to \$10,000 and imprisonment for a term of one month to two years.³⁹ For purposes of these prohibitions, the term "unincorporated association" does not include a partnership or a limited liability company treated as a partnership for federal tax purposes, provided that any contribution made by a partnership or LLC does not contain corporate funds.⁴⁰

The Campaign Finance Act also prohibits independent expenditures by corporations advocating the election or defeat of any candidate or for "any political purpose," except in connection with ballot questions. These provisions of the Act, however, are most likely invalid and unenforceable pursuant to the U.S. Supreme Court's January 21, 2010 decision in *Citizens United v. Federal Election Commission*, 558 U.S. ___ (2010) which held that similar prohibitions upon direct expenditures made by corporations and labor unions to advocate the election or defeat of candidates imposed by the Bipartisan Campaign Reform Act of 2003 constitute unconstitutional restraints on freedom of speech.

The definitions of the terms "contribution" and "expenditure" are so broad as to include virtually any type of activity undertaken in support of a political candidate for elective office. The term "contribution" is defined to include "any payment, gift, subscription, assessment, contract, payment for services, dues, loans, forbearance, advance or deposit of money or any valuable thing" provided to a candidate or political committee or for the benefit of a candidate to influence the outcome of an election. The term "expenditure" is defined to mean "the payment, distribution, loan or advancement of money or any valuable thing," "providing ... a service" or "compensat[ing] any person for services rendered" for the purpose of influencing the outcome of an election. As utilized in the definition of contributions and expenditures, the term "valuable thing" is defined to include "all securities, goods, facilities, equipment, supplies, personnel, advertising, services, membership lists ... or other in-kind contributions."⁴¹

C. Permissible Use of Corporate Resources

Notwithstanding the general prohibition upon contributions and expenditures, the Campaign Finance Act allows the use of corporate funds for "the establishment, and administration by a corporation ... of a separate segregated fund ... created by voluntary individual contributions, including those solicited by the corporation," provided the fund is organized and registered as a political committee.⁴²

Corporate funds may be used to establish and maintain political committees, provided that (1) no administrative expenses are used for activities directly involved in influencing elections; (2) no administrative expenses are used to pay debts incurred by candidates or committees; (3) no payments are made to compensate an agent for services rendered to a committee or to a candidate; and (4) administrative expenses are not paid by another political committee. Regulations adopted by the Department of State further provide that "[c]orporations and unincorporated associations may expend their own funds to establish and administer funds for political purposes," provided that (1) "[e]ach political fund shall be separate and segregated from any other account of the corporation or unincorporated association"; (2) "[e]ach political fund shall be created by voluntary individual contributions including those solicited by the corporation or unincorporated association"; and (3) "[e]ach political fund shall be deemed to be a political committee and subject to the same requirements as political committees."⁴³

D. Reporting of Contributions and Expenditures

Contributions or expenditures in support of a candidate must be reported either by the candidate's political committee, by another political committee or by the individual as "independent" political expenditures.⁴⁴ Reports by persons making independent political expenditures must include the same information required of candidates or political committees. In addition, if an individual making any contributions or expenditures is registered as a lobbyist, the Campaign Finance Act requires registration by the lobbyist in the same manner as required for a political committee.⁴⁵

Exceptions for the reporting of individual contributions or expenditures are provided for "*de minimis* items," including:⁴⁶

- The value of personal services rendered on behalf of a political committee or candidate by a volunteer;
- The provision of food and beverages for consumption by the candidate or members of the candidate's immediate family;
- The use of real or personal property, including a community room or church used on a regular basis by members of a community for noncommercial purposes;
- The cost of invitations, food and beverages voluntarily provided by an individual to any candidate in rendering voluntary personal services on the individual's residential premises or in the church or community room to the extent that the cumulative value of the invitations, food and beverages does not exceed \$250;
- The provision of food or beverages by a vendor other than a corporation or unincorporated association for use in any candidate's campaign at a charge less than the normal comparable charge, provided the charge is at least equal to the cost of the food or beverages and the cumulative value of such reduced charge does not exceed \$250;
- Unreimbursed travel expenses of up to \$250; and
- The use of the personal residence, personal property or the business or office space of a volunteer, other than a corporation or unincorporated association, provided the cumulative value of the use does not exceed \$250.

E. Registration of Political Committees

Any "committee, club, association or other group of persons" which receives contributions for the purpose of influencing elections in an aggregate amount of \$250 or more must file a registration statement as a "political committee" with the Pennsylvania Department of State. A statement must be filed within 20 days after the date the committee receives such amount. A political committee not formed on behalf of or authorized by a specific candidate is known as a "political action committee." A political committee formed on behalf of or authorized by a specific candidate is known as a "candidate committee." A political committee may not use any of its funds to make contributions to candidates or other political committees until it is registered.⁴⁷

The registration statement for a political committee must include (1) the name, address and phone number of the committee; (2) the name address and phone number of the committee's treasurer and chairperson; (3) the names, addresses and relationship of other affiliated or connected organizations supporting the establishment and operation of the committee; (4) a list of offices of candidates the committee intends to support; (5) any ballot questions that the

committee supports or opposes; (6) the bank, safety deposit boxes or other repositories used by the committee; and (7) the proposed period of operation of the committee (which may be indefinite). Changes to a political committee's registration must be reported within 30 days of the change.

F. Management of Political Committees

Every political committee must designate a treasurer and a chairperson who cannot be the same person. No contributions may be received or expenditures made if there is a vacancy in either office. A political committee may also designate an assistant treasurer or vice chairperson to assume the duties and responsibilities of the treasurer or chairperson in the event of a temporary or permanent vacancy in the office.

All money received and disbursement made must be through the committee treasurer. Any person receiving any contribution on behalf of the committee must turn such contributions over to the treasurer within 10 days of its receipt. The committee treasurer is responsible for the filing of all campaign finance reports. The treasurer is also personally responsible for late filing fees in the amount of \$10 a day for the first 6 days and \$20 a day thereafter up to a maximum of \$250.

A political committee must keep records of the names and addresses of each person who makes a contribution over \$10. Records regarding contributions received by a committee must be retained by the committee's treasurer for three years following the date the committee is required to file a report disclosing receipt of the contributions.

A political committee which receives contributions or makes expenditures or incurs liabilities exceeding the sum of \$250 must file cumulative annual campaign finance reports. A political committee which receives contributions or makes expenditures or incurs liabilities in an amount not exceeding the sum of \$250 shall file a sworn statement to that effect on the current version of Form DSEB-503. The reports must be submitted on the following schedule:

- A pre-election report must be filed not later than the second Friday or at least 15 days prior to an election for which the committee has made expenditures to influence the election or made contributions to another political committee.
- A post-election report must be filed 30 days after an election for which the committee has incurred expenditures or made contributions, or 10 days after a special election.
- An annual report must be filed on January 31st of each year for the prior calendar year.

Federally registered PACs must also register in Pennsylvania, but the Department of State allows federally registered committees to file expense reports using portions of reports filed with the Federal Election Commission that identify only Pennsylvania contributions and expenditures and provide a summary of the committee's other activities.

Whenever a political committee makes expenditures for the purpose of financing communications expressly advocating the election or defeat of a candidate or a position on ballot questions through a broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing or other type of general public political advertising, a disclosure statement must accompany the communication. If authorized by the candidate, his authorized political committee or their agents, the communication must clearly and conspicuously state that the communication has been authorized. If not authorized by a candidate, his authorized political committee or their agents,

the communication must clearly and conspicuously state the name of the PAC that made or financed the expenditure for the communication, and the name of any affiliated or connected organization. These requirements do not apply to bumper stickers, pins, buttons, pens and similar small items upon which the statement cannot be conveniently printed.

G. Non-bid Contractors

The Campaign Finance Act also requires any business entity that has been awarded non-bid contracts by the State or any political subdivision during the preceding calendar year to file a report by February 15th of each year with the Secretary of the Commonwealth containing an itemized list of all political contributions known to the business entity by virtue of the knowledge of each officer, director, associate, partner, limited partner, or individual owner to have been made by any officer, director, associate, partner, limited partner, individual owner, employee, or members of the immediate families. The report must disclose contributions made by (1) any officer, director, associate, partner, limited partner or individual owner or members of their immediate family when the contributions exceed an aggregate of \$1,000 by any individual during the preceding year; or (2) any employee or members of his immediate family whose political contribution exceeded \$1,000 during the preceding year. For purposes of this subsection, "immediate family" means a person's spouse and any unemancipated child.⁴⁸

Upon receipt of these reports, the Secretary of the Commonwealth within 60 days is required to publish a complete itemized list of all contributions reported. The penalties for failing to file required reports include a late filing fee of up to \$250 and potential criminal misdemeanor prosecution punishable by imprisonment of up to one year.⁴⁹

These reporting requirements are triggered if a "business entity" is awarded a "non-bid" contract during the preceding calendar year by the Commonwealth or a political division. The term "business entity" is construed narrowly to mean only the actual business association entering into a non-bid contract and does not include parents or subsidiaries.⁵⁰ The term "non-bid contract," by way of contrast is construed broadly to apply to all "contracts let by virtue of some selection process or exercise of governmental discretion."⁵¹ In particular, as the terms are utilized in the Pennsylvania Procurement Code, non-bid contracts include contracts awarded through competitive proposals or RFPs.⁵² The term "Commonwealth" is defined to mean all executive and independent agencies of state government, excluding interstate compact commissions, and the term "political subdivision" is defined to mean "any county, city, borough, incorporated town, township, school district, vocational school district and county institutional district."⁵³

Contributions required to be included in non-bid contractor reports include those made in relation to the election of candidates to "all offices, Federal or State, for which votes are cast by Pennsylvania electors" and to any "donation of money or other valuable thing to a candidate for nomination or election, or to a political committee."⁵⁴

Public Official and Employee Ethics Act

A. Overview

The Public Official and Employee Ethics Act, commonly referred to as the "Ethics Act," establishes the Commonwealth Ethics Commission and prescribes basic rules of conduct for public officials,⁵⁵ public employees⁵⁶ and candidates for public office.

B. Restricted Activities

The Ethics Act establishes categories of restricted activities:

- Public officials and public employees are prohibited from engaging in any conduct that constitutes a "conflict of interest," *i.e.*, using their offices or confidential information received through holding office to obtain financial gain for themselves, members of their immediate families or businesses with which they are associated. The prohibition does not apply to actions having "a *de minimis* economic impact," *i.e.*, "insignificant economic consequences."⁵⁷
- Whenever a matter comes before a governmental body for which a public official has a conflict of interest, the official is required to abstain from voting and, prior to the vote being taken, publicly announce and disclose the nature of the conflict in a public memorandum filed with the person responsible for recording the minutes of the meeting at which the vote is taken.⁵⁸
- No person may offer or give to a public official, employee or a candidate for public office or a member of their immediate families or businesses with which they are associated, "anything of monetary value, including a gift, loan, political contribution, reward or promise of future employment based on [any understanding] that the vote, official action or judgment of the public official or public employee or nominee or candidate for public office would be influenced thereby." The Act also prohibits public officials, employees and candidates from soliciting or accepting any such gifts, loans, contributions or other benefits.⁵⁹
- The payment and acceptance of an honorarium by any public official or public employee is prohibited. An honorarium is payment made in recognition of published works, appearances, speeches and presentations and which is not intended as consideration for the value of nonpublic professional or occupational services except for "tokens presented or provided which are of *de minimis* economic impact."⁶⁰
- The solicitation and acceptance of severance payments contingent upon the acceptance of public office or employment is prohibited.⁶¹
- Public officials, public employees, spouses and children of public officials and employees and businesses with which the former are associated are only permitted to enter into contracts or subcontracts with governmental bodies with which officials or employees are associated valued at \$500 or more if the contracts are awarded through an open and competitive process which includes prior public notice and the subsequent disclosure of all proposals considered and contracts awarded. Officials and employees awarded such contracts may also not have any supervisory or other overall responsibility with respect to the administration of such contracts.⁶²
- Former public officials and employees are prohibited from representing persons before the governmental body with which they were associated for one year after leaving the governmental body.⁶³
- No person may use for any commercial purpose information copied from statements of financial interest filed by public officials or employees pursuant to the Ethics Act or from lists compiled from such statements.⁶⁴
- Former "executive-level state employees" may not represent businesses which they participated in recruiting to the State, or in inducing the opening of new facilities or the expansion of existing facilities through grants or loans for a period of two years.⁶⁵

C. Financial Disclosure Statements

By May 1st of each year for the prior calendar year public officials and employees must file annual statements of financial interest.⁶⁶ This requirement includes full or part-time solicitors for political subdivisions. Candidates also must file statements of financial interest prior to appearing on ballots.⁶⁷ Nominees for appointment to public office must file statements ten days prior to any vote being taken regarding an appointment to public office.⁶⁸

The statements of financial interest must include:⁶⁹

- The identification of any direct or indirect interest in real estate which is sold or leased to the Commonwealth.
- The name and address of any creditor to whom the public official or employee owes in excess of \$6,500 and the applicable interest rate, except for intra-family obligations and residential mortgage loans.
- The name and address of any direct or indirect source of income totaling in the aggregate \$1,300 or more, except for confidential information that may not be divulged pursuant to professional codes of ethics or common law privileges.
- The name and address of the source and the amount of any gift or gifts valued in the aggregate at \$250 or more and the circumstances surrounding each gift. Gifts from family members and friends are excluded from this reporting requirement “when the circumstances make it clear that the motivation for the action was a personal or family relationship.” However, a registered lobbyist or an employee of a registered lobbyist is specifically excluded from the definition of “friend.”
- The name and address of the source and amount of payments or reimbursements for actual expenses for transportation and lodging or hospitality received in connection with the public office or employment when such actual expenses for transportation, lodging or hospitality exceed \$650 for a single occurrence.
- Any office, directorship or employment of any nature in any business entity.
- Any financial interest in any legal entity engaged in business for profit.
- The identity of a financial interest in a business which the person filing the report has been associated with in the preceding year, but which has been transferred to a member of the reporting person’s immediate family.

The Ethics Commission is authorized biennially to increase the applicable thresholds for reporting financial information in annual statements, but has not done so since the establishment by law of the current thresholds in 1998. The Ethics Commission also is required to adopt a code of conduct to govern the activities and ethical standards of its members.⁷⁰

D. Sanctions

The failure to make proper or timely filings of financial statements may be punishable as a misdemeanor subject to fines of up to \$1,000, imprisonment of up to one year, or both. In addition to other penalties, persons obtaining financial gains in violation of the Ethics Act are also required to pay three times the amount of any such gains to the State Treasury.⁷¹

The Ethics Act also prohibits the disclosure of any information relating to a complaint, preliminary inquiry, investigation, hearing or petition for

reconsideration which is before the Commission, except for final orders of the Commission, hearing notices, requests for legal advice, the filing of appeals, communications with the Commission and its staff and law enforcement agencies, or disclosures made by a person who is the subject of a complaint, inquiry, hearing, investigation or petition.⁷² Violations of these confidentiality requirements constitute misdemeanors subject to fines of up to \$1,000, and imprisonment of up to one year, or both.⁷³ A recent preliminary injunction issued by the Middle District Court, however, in *Stilp v. Contino* has stayed the enforcement of these provisions as an excess infringement upon the freedom of speech.⁷⁴

The Ethics Commission is authorized to conduct investigations of persons filing “frivolous” complaints, filing complaints without probable cause or publicly disclosing or causing the disclosure that complaints have been filed.⁷⁵ If the Commission determines that complaints are frivolous or filed without probable cause, the Commission may award compensation to a party injured by defamation, including payments for pecuniary losses, emotional distress, punitive damages, attorneys’ fees, and other expenses.⁷⁶ Retaliation by public entities against public officials or employees filing complaints before the Ethics Commission is prohibited.⁷⁷ Immunity from prosecution is provided to public officials of political subdivisions who act in good faith reliance on the written, non-confidential opinions of municipal solicitors.⁷⁸

Violations of the law are subject to penalties of up to \$10,000 per offense or five-year imprisonment, or both, and treble civil damages payable to the State Treasury.⁷⁹ The decisions of courts reviewing alleged violations of the Ethics Act have consistently concluded that only actions which confer private pecuniary benefits not authorized by law upon public officials or employees or members of their immediate families are contrary to law, as opposed to actions which confer benefits upon “the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business.”

In *Pulse v. Pa. State Ethics Comm’n*, 713 A.2d 161 (Pa. Commw. Ct. 1998), petition for allowance of appeal denied, 557 Pa. 642; 732 A.2d 1211 (1998), the Commonwealth Court considered whether a member of a school board violated the Ethics Act by participating in a personnel committee meeting which approved the creation of a new position of Assistant Principal/Athletic Director and subsequently voting to approve the hiring of his son-in-law in the new position at a salary higher than was previously paid by the school district to his son-in-law. Stressing that violations of the Ethics Act can be found to occur only when “clear and convincing proof” exists of a violation of the law, the Court held that the school board member did not violate the Ethics Act because neither the creation of the new position, to which any qualified member of the public could apply, nor the payment of a salary as authorized by law, conferred a private pecuniary benefit upon the board member’s son-in-law. 713 A.2d at 162, 164-65. The Court held that the Ethics Act declares to be unlawful only “any effort to realize personal financial gain through public office other than compensation provided by law ... [and] was not intended to be concerned even with immediate family members who receive only compensation provided by law.” 713 A.2d at 165.

Likewise, in *Raines v. Pa. State Ethics Comm’n*, 805 A.2d 677 (Pa. Pa. Commw. Ct. 2002), petition for allowance of appeal denied, 572 Pa. 761, 818 A.2d 506 (2003), the Commonwealth Court considered whether a County Controller violated the Ethics Act by approving payments to her husband for performing autopsies for the county at rates in excess of those

stipulated in contracts between the county and its medical examiners. The Court reversed a finding by the State Ethics Commission that a violation of the Ethics Act had occurred because it concluded that the County Controller's husband was paid the same amount as other medical examiners performing autopsies on behalf of the county and her actions in approving payments to her husband and other medical examiners benefited a "subclass" of the "general public" consisting of the members of an "occupation," rather than primarily conferring a private pecuniary benefit upon the County Controller. The Court held that "[t]he Ethics Act specifically prohibits a public official from using the authority of her office in order to obtain a private pecuniary benefit for a member of her immediate family, including spouse ... [but] does not include an action having a *de minimis* economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated." Instead, "[i]n order for a public official to violate § 1103(a) [of the Ethics Act], ... the public official must 'use' his public office to obtain financial gain." 805 A.2d at 681.

Most recently, in *Keller v. State Ethics Comm'n*, 860 A.2d 659 (Pa. Commw. Ct. 2004), the Commonwealth Court held that a borough mayor violated the Ethics Act by accepting more than \$16,000 in fees to preside over weddings, even though the fees were subsequently donated by the mayor to charity. The Court rejected the claims of the mayor that he had accepted the gratuities in constructive trust for the charities to which the fees were donated because the mayor (1) accepted compensation for official duties without statutory authority in addition to his salary as provided by law; (2) deposited the proceeds into his private bank account over which he exercised exclusive control; and (3) used the account to make charitable donations in his own name and for his personal benefit. In rejecting claims that the mayor received only *de minimis* economic benefit from the fees collected, the Court noted that "if [the mayor] had deposited this amount with the Borough, the Borough's treasury would have been enriched by \$16,000." 860 A.2d at 665.

State Adverse Interest Act

The State Adverse Interest Act governs the relationship between state agencies, advisors, consultants and employees with respect to the contractual obligations of state agencies.⁸⁰

Any "state advisor" or "state consultant" who has recommended to a state agency either the making of a contract, or "a course of action of which the making of a contract is an expressed or implied part," is prohibited from "having an adverse interest" in the contract. "Having an adverse interest" is defined as being a party to the contract or being a stockholder, partner, member, agent, representative or employee of a party to a contract.⁸¹

State employees are prohibited from influencing, supervising or dealing with any contracts in which they have adverse interests or from obtaining adverse interests in contracts with state agencies. Persons having adverse interests in contracts with state agencies may not become employees of the agencies until the adverse interests have been wholly divested.⁸²

The State Adverse Interest Act also prohibits state employees from representing any other person "upon any matter pending before or involving any state agency" for remuneration either directly or indirectly. The term "state employee" is defined as "an appointed officer or employee in the service of a state agency who receives a salary or wage for such service."⁸³

Violations of the law are subject to fines of up to \$1,000, imprisonment of up to one year, and loss of office or employment with state agencies.⁸⁴

Legislative Code of Ethics

The Legislative Code of Ethics supplements the Public Official and Employees Ethics Act by establishing standards for members and employees of the General Assembly.⁸⁵ Where the Legislative Code of Ethics conflicts with the provisions of the Public Official and Employees Ethics Act, the provisions of the Public Official and Employees Ethics Act control.⁸⁶

The Legislative Code of Ethics prohibits members and employees of the General Assembly from:

- Accepting employment or engaging in any business or professional activity which requires the disclosure of confidential information or otherwise disclosing confidential information "gained by reason of his official duties."
- Using or attempting to use the member's or employee's official position to secure "unwarranted privileges or exemptions for himself or others."
- Knowingly soliciting, accepting or receiving any gift or compensation "which is intended to influence the performance of official duties or . . . for doing any act intended to influence the passage or defeat of legislation."
- Receiving any compensation for consultations the subject matter of which relates to the responsibilities, programs or operations of the General Assembly or draws upon official data or ideas which have not become part of the body of public information.
- Participating as a principal in any transactions with the Commonwealth in which the member or employee "has a substantial personal economic interest."
- Receiving any compensation or entering into any agreement for compensation for services for assisting persons in transactions involving the Commonwealth, unless a written disclosure has been filed with the Chief Clerk of the House of Representatives or the Secretary of the Senate.

The prohibitions contained in the Legislative Code of Ethics do not apply to the "receipt of bona fide reimbursement, to the extent permitted by law, for actual expenses for travel and such other necessary subsistence . . . for which no Commonwealth payment or reimbursement is made."⁸⁷

The Act also does not apply to the acceptance of "awards for meritorious public contribution given by public service or civic organizations," sharing compensation from low-bid contracts, campaign contributions, and receipt of compensation under certain circumstances for legal services.⁸⁸

Violations of the Legislative Code of Ethics are subject to fines of up to \$1,000, imprisonment of up to two years, or both.⁸⁹ In addition, a state agency may cancel or rescind contracts without further liability to the agency if a violation of the Legislative Code of Ethics has "influenced the making" of a contract, provided that "rescission shall be limited so as not to affect adversely the interests of innocent third parties." The Attorney General may also initiate civil proceedings to recover the amount of any "economic advantage" gained by a member or former member of the General Assembly due to violations of the Act. Contracts may not be canceled or rescinded, or civil proceedings initiated, however, before an "affirmative finding of the appropriate House or Senate Committee on Ethics that a violation has occurred."⁹⁰

Code of Conduct for Appointed Officials and State Employees

Since 1974, Pennsylvania Governors, by Executive Order, have established Codes of Conduct and Financial Disclosure Requirements for appointed officials and state employees.⁹¹ Under certain circumstances, Executive Orders may have the force and effect of law. See *Shapp v. Butera*, 348 A.2d 910 (Pa. Commw. Ct. 1975).

Generally, the Code of Conduct restates provisions of the Ethics Act and Adverse Interest Act with respect to adverse pecuniary interest, representation on behalf of private parties before the Commonwealth, and the misuse of confidential information. The Code, however, supplements provisions of statutory law by establishing detailed rules with respect to gifts and favors, supplemental employment, honoraria and political activity.⁹²

The Code of Conduct prohibits employees, appointees or officials of the Executive Branch from soliciting or accepting for personal use any “gift, gratuity, favor, entertainment, loan or other thing of monetary value” from any person who:

- Is seeking to obtain business from or has financial relationships with the Commonwealth;
- Conducts operations or activities that are regulated by the Commonwealth;
- Is engaged either as a principal or attorney in proceedings before the Commonwealth or in court proceedings to which the Commonwealth is an adverse party; or
- Has interests that may be substantially affected by the performance or nonperformance of an official duty.

Limited exceptions to the blanket prohibition against the acceptance of gifts and favors occur only in the following instances:

- The solicitation or acceptance of gifts from family members;
- The acceptance of food and refreshment of “nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting”;
- The acceptance of loans from banks or other financial institutions “on customary terms of finance for proper and usual activities”;
- Acceptance of unsolicited advertising or promotional material of “nominal intrinsic value”;
- The receipt of bona fide reimbursement for actual expenses in travel and other necessary subsistence;
- Participation in the affairs or acceptance of an award for a meritorious public contribution or achievement;
- Voluntary gifts of nominal value or donations in nominal amounts made on special occasions such as marriage, illness or retirement; and
- Plaques, mementos or gifts of nominal value offered as a token of esteem or appreciation.

Commonwealth officials, appointees and employees may not accept reimbursement for “excessive personal living expenses, gifts or other personal

benefits” and any reimbursement of bona fide actual expenses must be made to the Commonwealth rather than to the employee directly.⁹³

Section 7.156 of the Code prohibits employees, appointees or officials of the Executive Branch from engaging in or accepting supplemental private employment without the prior approval of the head of the agency. Supplemental employment may be undertaken only when not in conflict with the conditions of the public employment and when not undertaken “in a manner inconsistent with the impartial administration of ... official duties.”

The Code of Conduct entirely prohibits employees, appointees, and officials of the Executive Branch from accepting honoraria, speaking fees, consulting fees or other valuable consideration for ideas or data derived from official duties. Commonwealth officials and employees may, however, designate nonprofit charitable organizations to be the recipients of honoraria or speaking fees. The prohibition against the receipt of honoraria does not apply to individuals appointed to serve on boards and commissions provided such individuals do not accept honoraria from groups that are regulated by the boards or commissions.⁹⁴

Employees, appointees, and officials of the Executive Branch are prohibited from engaging in political activity during specified working hours or at any other time which may interfere with the ability of the official or employee to effectively carry out their duty. Further, employees, appointees and officials are prohibited from coercing another person in government service or employment to contribute time, money or services to a political candidate or campaign.⁹⁵

The financial disclosure requirements of the Governor’s Code of Conduct exceed in detail the reporting requirements of the Public Official and Employee Ethics Act, but generally do not expand the scope of reporting required by the Ethics Act.⁹⁶ The only substantive area in which the Code of Conduct requires disclosure of information not covered by the Ethics Act involves reporting of severance arrangements with prior employers of public officials and employees.

Commonwealth Procurement Code and Procurement Management Directives

A. Overview

The Commonwealth Procurement Code declares it to be a “breach of public trust” for any state employee “to attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of the duties” and requires state employees to “avoid any conflict of interest or improper use of confidential information.” It is also a breach of trust for a Commonwealth employee to require that any bond necessary to contract with the Commonwealth be furnished by a particular surety company or through a particular agent or broker.⁹⁷ Likewise, any effort by persons who are not state employees to influence state employees to breach the standards of ethical conduct set forth in this section also constitutes a breach of ethical standards. When any person has reason to believe that any breach of these ethical standards has occurred, a report is required to be filed providing all relevant facts to the State Ethics Commission and to the Attorney General.⁹⁸

The Commonwealth Procurement Code requires all contracts for the construction, alteration or repair of any public building or public work to contain provisions prohibiting discrimination by any contractor, subcontractor

or any person acting on behalf of the contractor or subcontractor in the hiring of employees by reason of gender, race, creed or color or to discriminate or intimidate any employee hired on such a basis. Contracts may be canceled or terminated, and all moneys due under contracts may be forfeited for a violation of these antidiscrimination requirements.⁹⁹

The Commonwealth Procurement Code also declares it to be unlawful for any person “to conspire, collude or combine with another in order to commit or attempt to commit bid-rigging involving a contract or subcontract for the purchase of equipment, goods, services or materials or for construction or repair. Bid-rigging consists of concerted activity of two or more persons to determine in advance the winning bidder of a contract, including agreements to (1) sell items or services at the same price; (2) submit identical bids; (3) rotate bids; (4) share profits with a contractor who does not submit the low bid; (5) submit prearranged bids, agreed-upon higher or lower bids or other complementary bids; (6) set up territories to restrict competition; or (7) not to submit bids. Bid-rigging is a felony of the third degree punishable by fines of up to \$1,000,000 for business associations, \$50,000 for an individual, and imprisonment for up to three years. In lieu of criminal prosecution, the Attorney General may bring an action for civil penalties of up to \$100,000; may initiate a civil action to recover treble damages, costs and attorneys’ fees; and may issue debarment orders effective for up to five years. All persons responding to invitations to bid may be required to submit non-collusion affidavits confirming their compliance with these requirements.¹⁰⁰

To implement the Commonwealth Procurement Code, the Department of General Services may promulgate regulations and establish policies governing the procurement, management, control and disposal of any and all supplies, services and construction to be procured by Commonwealth agencies.¹⁰¹ Pursuant to this grant of authority, the Secretary of General Services and the Secretary of Budget have published directives and manuals governing the award and administration of Commonwealth contracts.¹⁰² While these policy pronouncements do not have the force and effect of law or regulations, they establish important policies applicable to persons doing business with state government agencies. *Cutler v. State Civil Service*, 924 A.2d 706, 711 (Pa. Commw. Ct. 2007).

B. Contractor Integrity

Management Directive 215.8 (December 20, 1991) establishes standard Contractor Integrity Provisions which must appear in all contracts between private parties and state agencies within the Governor’s jurisdiction. The Contractor Integrity Provisions contain the following provisions:

- The contractor shall maintain the highest standards of integrity in the performance of this agreement and shall take no action in violation of state or federal laws, regulations, or other requirements that govern contracting with the Commonwealth.
- The contractor shall not disclose to others any confidential information gained by virtue of this agreement.
- The contractor shall not, in connection with this or any other agreement with the Commonwealth, directly or indirectly, offer, confer, or agree to confer any pecuniary benefit on anyone as consideration for the decision, opinion, recommendation, vote, other exercise of discretion, or violation of a known legal duty by any officer or employee of the Commonwealth.

- The contractor shall not, in connection with this or any other agreement with the Commonwealth, directly or indirectly, offer, give, or agree or promise to give to anyone any gratuity for the benefit of or at the direction or request of any officer or employee of the Commonwealth.
- Except with the consent of the Commonwealth, neither the contractor nor anyone in privity with him or her shall accept or agree to accept from, or give or agree to give to, any person, any gratuity for the benefit of or at the direction or request of any officer or employee of the Commonwealth.
- Except with the consent of the Commonwealth, the contractor shall not have a financial interest in any other contractor, subcontractor, or supplier providing services, labor, or material on a project.
- The contractor, upon being informed that any violation of these provisions has occurred or may occur, shall immediately notify the Commonwealth in writing.
- The contractor, by execution of any agreement with the Commonwealth and by the submission of any bills or invoices for payment pursuant thereto, must certify and represent that it has not violated any of the contractor integrity program requirements.
- A contractor, upon the inquiry or request of the Inspector General or an agents or representatives, must provide any information deemed relevant by the Inspector General to the contractor’s integrity or responsibility. Such information may include the contractor’s business or financial records.
- For violations of any contractor integrity program requirements, the Commonwealth may terminate any agreement with the contractor, claim liquidated damages in an amount equal to the value of anything received in breach of these provisions, claim damages for all expenses incurred in obtaining another contractor to complete performance and may debar or suspend the contractor from doing business with the Commonwealth.

C. Contractor Responsibility

Management Directive 215.9 (April 16, 1999) establishes a “Contractor Responsibility Program.”¹⁰³ The Directive requires any agency awarding a contract for services or supplies of \$10,000 or more to make a determination that a contractor is “responsible” before awarding the contract or approving a subcontract included within the award of a contract. Any subcontractor which was not identified prior to the award of the contract must be certified by the contractor to be not currently suspended or disbarred by the Commonwealth or federal government and current in the payment of state taxes.

The Directive also establishes suspension and debarment of contractors which automatically prohibits an agency from awarding contracts to such contractor. The factors to be considered in determining whether a contractor is responsible include judgment, skill, promptness, workmanship, honesty, financial standing, reputation, experience, resources, facilities, the past history of the contractor’s compliance with plans and specifications, adherence to state and federal laws and regulations, and the capacity and ability to do the work in a timely and efficient manner. The following are reasons for suspending or debaring a contractor if substantial evidence of the alleged conduct is available:

- Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.

- Commission of fraud or a criminal offense or improper conduct in association with obtaining, attempting to obtain, or performing a public contract or subcontract by a contractor, any affiliate, officer, employee or other individual, or the acquiescence in, or the acceptance of benefits derived from, such activities.
- Violation of federal or state antitrust statutes.
- Violation of any state or federal law regulating campaign contributions.
- Violation of any state or federal environmental law.
- Violation of any state or federal law regulating hours of labor, minimum wage standards, prevailing wage standards, discrimination in wages; or child labor violations.
- Violation of the Pennsylvania Worker's Compensation Act.
- Violation of any state or federal law prohibiting discrimination in employment.
- Debarment by any other state or by any agency or department of the federal government.
- Three or more occurrences where a contractor has been declared ineligible for a contract.
- Unsatisfactory performance of a contract.
- Providing false or misleading information as part of an investigation, audit, program review, prequalification statement or certification, contract bid or proposal, contractor applications or claims for payment.
- Other acts or omissions indicating a lack of skill, ability, capability, quality control, business integrity, or business honesty that seriously and directly affects the present responsibility of a contractor.

Management Directive 215.9 also establishes contractor responsibility provisions that must be included in all contracts of any amount entered into by agencies under the Governor's jurisdiction except contracts with permittees, licensees, or any agency, instrumentality, or political subdivision of the Commonwealth. The contractor responsibility provisions are:

- A contractor must certify for itself, and all of its subcontractors, that it is not currently under suspension or debarment by the Commonwealth, any other state, or the federal government or provide a written explanation of why such a certification cannot be made.
- A contractor must certify that it has no "tax liabilities" (*i.e.*, a contractor is not current in the payment of any federal, state, or local taxes, or the filing of returns or reports for such taxes) or other Commonwealth obligations.
- The contractor must agree that if at any time during the term of a contract "tax liabilities" or Commonwealth obligations arise, or the contractor or any of its subcontractors are suspended or debarred by any governmental entity, notice shall be given to the Commonwealth within 15 days.
- A contractor must acknowledge that failure to notify the Commonwealth of the suspension or debarment of itself or any of its subcontractors constitutes an event of default.

- A contractor must agree to be responsible for reimbursing the Commonwealth for all necessary and reasonable costs and expenses incurred by the Office of the Inspector General relating to any investigation of the contractor's compliance with the requirements of the Contractor Responsibility Program or any other agreement between the contractor and the Commonwealth.

D. Contractor Compliance Program

Management Directive 215.16 (June 30, 1999) adopts a Contract Compliance Program which requires all contracts and subcontracts to contain nondiscrimination and sexual harassment clauses and which authorizes the Bureau of Contract Administration and Business Development of the Department of General Services to conduct routine reviews of contractors to ensure compliance with these requirements and investigations of suspected violations. The Commonwealth's mandatory nondiscrimination and sexual harassment clause requires contractors to agree that:

- In the hiring of employees, the contractor, its subcontractors, or any person acting on behalf of the contractor or its subcontractors, will not discriminate against any person qualified and available to perform work by reason of gender, race, creed or color.
- Neither the contractor nor its subcontractors will in any manner discriminate against or intimidate any employee on account of gender, race, creed or color.
- Both contractors and subcontractors will establish and maintain written sexual harassment policies and inform employees of such policies in a notice stating that sexual harassment will not be tolerated and employees who practice it will be disciplined.
- Contractors shall not discriminate against qualified subcontractors or suppliers by reason of gender, race, creed or color.
- The contractor and each subcontractor will furnish "all necessary employment documents and records" and permit access to their books and records to the Bureau of Contract Administration and Business Development for purposes of investigation and to ascertain compliance with nondiscrimination and sexual harassment requirements, and if records are not available containing the information requested, will furnish such information on reporting forms supplied by the contracting agency or the Bureau.
- The Commonwealth may cancel or terminate a contract and demand for forfeiture of all amounts paid or required to be paid under a contract for a violation of the nondiscrimination and sexual harassment requirements, and may suspend or debar a contractor from conducting future work for the Commonwealth.

To document compliance with nondiscrimination and sexual harassment requirements, or to conduct investigations, the Bureau of Contract Administration and Business Development is authorized for any job category to request information regarding (1) the percentage of protected categories of individuals in the "labor area" surrounding a facility; (2) the percentage of protected categories of individuals in the work force of a contractor as compared to the total work force in the "immediate labor area"; (3) the percentage of the protected categories of individuals having requisite skills in the immediate labor area and in the "reasonable recruitment area"; (4) the

percentage of the protected categories of those promotable or transferable within the facility; (5) the percentage of protected categories among those provided training in requisite skills by a contractor; (6) the degree of training which a contractor is "reasonably able to undertake" in order to make all job classifications available to otherwise qualified minorities or women; and (7) the degree to which good faith efforts have been made to hire and promote within protected categories. Both the terms "labor area" and "recruitment area" are defined as "the local area within which the contractor can reasonably expect people to commute."

Management Directive 215.16 provides that proportional representation of protected categories of employees is not required, but that "good faith efforts implementing nondiscrimination policies, taking into account the effects of past discrimination," are required. To the extent a contractor has an Equal Opportunity Plan approved by a state or federal agency or issued pursuant to a court order, the Bureau of Contract Administration and Business Development may accept the plan as evidence of compliance with the Management Directive, provided a contractor has undertaken "good faith efforts to make the program work."

Other Laws and Regulations

In addition to the laws and regulations outlined above, there are numerous other laws, regulations and directives which establish rules relevant to government ethics in specific circumstances. These include the various laws governing political subdivisions, the Crimes Code, public bidding laws and regulations, anti bid-rigging laws and an extensive body of Management Directives governing the operations of state government. Of particular note is a recently enacted Code of Conduct for persons providing services to municipal pension funds; ordinances adopted by a number of municipalities, including the City of Philadelphia; and special requirements relevant to persons obtaining gaming and liquor licenses and hauling solid waste. The Ethics Act expressly provides that any governmental body may adopt requirements to supplement the requirements of the Act, provided that no such requirements shall be "less restrictive" than the Ethics Act.¹⁰⁴

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K&L Gates maintains a robust Pennsylvania Policy practice and enjoys a long history of developing innovative and lasting alliances with our clients to solve problems arising before state government. Our substantial knowledge of Pennsylvania government enhances our ability to effectively monitor, advise, and influence government affairs/policy decisions. In combination with K&L Gates' substantial presence in its Pittsburgh and Harrisburg offices, we provide an efficient and coordinated federal lobbying team for Pennsylvania companies and organizations with federal policy priorities. We represent our Pennsylvania-based client interests in Washington, D.C. before Congress, executive branch and regulatory agencies, and the courts.

Our team is led by a former Secretary of Legislative Affairs to the Governor of Pennsylvania, who also held senior positions within the Pennsylvania Governor's Office, the Pennsylvania House of Representatives, and the Pennsylvania Department of Labor & Industry. Team members are lawyers and professionals that have served as elected and appointed legislative, executive, and judicial officials at the local, state, and federal level and also include a former Pennsylvania governor and United States Attorney General and a former major lobbyist for one of Pennsylvania's largest business associations, with significant experience in managing coalitions on broad industry issues.

Endnotes:

- 1 65 Pa.C.S. § 13A01 *et seq.*
- 2 65 Pa.C.S. § 13A03.
- 3 65 Pa.C.S. § 13A06.
- 4 65 Pa.C.S. § 13A03.
- 5 51 Pa. Code § 53.2.
- 6 65 Pa.C.S. § 13A04(a).
- 7 65 Pa.C.S. § 13A10(a) & (c).
- 8 65 Pa.C.S. § 13A04(b)(1) & (3).
- 9 65 Pa.C.S. § 13A03.
- 10 25 P.S. § 3244.
- 11 65 Pa.C.S. § 13A04(c).
- 12 51 Pa. Code § 51.11.
- 13 65 Pa.C.S. § 13A04(a).
- 14 65 Pa.C.S. § 13A04(d).
- 15 65 Pa.C.S. § 13A05(b).
- 16 65 Pa.C.S. § 13A05(c).
- 17 65 Pa.C.S. § 13A03.
- 18 65 Pa.C.S. § 13A05(b)(3)(iv).
- 19 65 Pa.C.S. § 13A05(b)(6).
- 20 65 Pa.C.S. § 13A05(b)(8).
- 21 65 Pa.C.S. § 13A05(e).
- 22 65 Pa.C.S. § 13A07.
- 23 65 Pa.C.S. § 13A09(e).
- 24 18 Pa.C.S. § 106(b)(8).
- 25 65 Pa.C.S. § 13A08(e).
- 26 18 Pa.C.S. § 106(b)(7).
- 27 65 Pa.C.S. § 13A08(a).
- 28 65 Pa.C.S. § 13A08(b).
- 29 65 Pa.C.S. § 13A08A(c) and (e).
- 30 65 Pa.C.S. § 13A08(f).
- 31 65 Pa.C.S. § 13A08(g).
- 32 65 Pa.C.S. §§ 13A07(d)(8) and 13A09(h).
- 33 65 Pa.C.S. § 13A09(h).
- 34 72 P.S. § 7201(w).
- 35 61 Pa. Code § 60.6.
- 36 40 Pa.B. 383 (January 9, 2010).
- 37 72 P.S. §§ 7201(h), 7202(a) & (b).
- 38 25 P.S. § 3253(a).
- 39 25 P.S. § 3543.
- 40 The term "unincorporated associations" as used in the Campaign Finance Act is not defined. In these circumstances, the Statutory Construction Act defines the term "association . . . when used in any statute finally enacted before Dec. 7, 1994, [as] any form of unincorporated enterprise owned by two or more persons other than a partnership or limited partnership." 1 Pa.C.S. § 1991 (emphasis added). Because the Campaign Finance Act was enacted before Dec. 7, 1994, as used in the law, the term "unincorporated association" does not include partnerships and limited partnerships.
- 41 25 P.S. § 3241(b) & (d).
- 42 25 P.S. § 3253(c).
- 43 4 Pa. Code § 178.4.
- 44 25 P.S. §§ 3244(a), 3246(a) & 3246(g).
- 45 25 P.S. § 3245.
- 46 25 P.S. § 3241(k).
- 47 Forms for the registration of a political committee in Pennsylvania and for filing campaign finance reports are available at <http://www.dos.state.pa.us/campaignfinance>.
- 48 25 P.S. § 3260a.
- 49 25 P.S. §§ 3252, 3550.
- 50 4 Pa.Code § 174.1.
- 51 4 Pa.Code § 174.2.
- 52 See 62 Pa.C.S. §§ 103, 512 & 513 which draw distinctions between a "bidder," *i.e.*, "a person that submits a bid in response to an invitation for bids," versus an "offeror," *i.e.*, "a person that submits a proposal in response to a request for proposals," and between "competitive sealed bidding" which involves the submission of "bids," versus the use of "competitive sealed proposals" involving the submission of "proposals" in response to RFPs.
- 53 4 Pa.Code § 174.3.
- 54 4 Pa.Code § 174.6.
- 55 Public officials are individuals elected or appointed to serve in the executive, legislative or judicial branch of the state government or any political subdivision, other than members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense or to otherwise exercise the power of the State or any political subdivision. 65 Pa.C.S. § 1102.
- 56 Public employees are individuals employed by the State or a political subdivision responsible for taking or recommending non-ministerial official action regarding contracting or procurement, the administration or monitoring of grants or subsidies, planning or zoning, inspections, licensing, regulation, or auditing, or any other activity where the official action has more than a *de minimis* economic impact. 65 Pa.C.S. § 1102.
- 57 65 Pa.C.S. §§ 1102, 1103(a).
- 58 65 Pa.C.S. § 1102(h). Where necessary to retain a quorum needed for public action, an exception to these restrictions is provided.
- 59 65 Pa.C.S. § 1103(b) & (c).
- 60 65 Pa.C.S. §§ 1102, 1103(d).
- 61 65 Pa.C.S. § 1103(e).
- 62 65 Pa.C.S. §§ 1102, 1103(f). These restrictions do not apply to contracts relating to payments made to public officials or employees as wages or salaries, expense reimbursement, retirement or other benefits, tenure or other matters in consideration of their current public employment or service.
- 63 65 Pa.C.S. § 1103(g).
- 64 65 Pa.C.S. § 1103(h).
- 65 65 Pa.C.S. § 1103(i).
- 66 65 Pa.C.S. § 1104(a).
- 67 65 P.S. § 404(b).
- 68 65 Pa.C.S. § 1104(c). Regulations interpreting the requirement to file a statement of financial interest are codified at 5 Pa. Code Ch. 15.
- 69 65 Pa.C.S. § 1105(b)(3) – (10); 51 Pa. Code §§ 17.2 – 17.9.
- 70 65 Pa.C.S. §§ 11-5(d), 1106(j).
- 71 65 Pa.C.S. § 1109.
- 72 65 Pa.C.S. § 1108(k).
- 73 65 Pa.C.S. § 1109(e).
- 74 *Stilp v. Contino*, 629 F. Supp. 449 (M.D. Pa. 2000).
- 75 65 Pa.C.S. § 1108(l).
- 76 65 Pa.C.S. § 1110(d).
- 77 65 Pa.C.S. § 1108(j).
- 78 65 Pa.C.S. § 1109(g).
- 79 65 Pa.C.S. § 1109.
- 80 71 P.S. § 776.1-776.8).
- 81 71 P.S. §§ 775.3, 776.2(4).
- 82 71 P.S. § 776.4776.6.
- 83 71 P.S. §§ 776.2(10), 776.7.
- 84 71 P.S. § 776.8.
- 85 46 P.S. § 143.1-143.8.
- 86 65 Pa.C.S. § 1112.
- 87 46 P.S. § 143.5(e)(1).
- 88 46 P.S. § 143.5(e)(2)(7).
- 89 46 P.S. § 143.6.
- 90 46 P.S. § 143.7.
- 91 The current Code of Conduct is codified at 4 Pa. Code § 7.151-7.164.
- 92 25 Pa. Code § 7.153.
- 93 25 Pa. Code § 7.153(5). See also Management Directive 230.10.
- 94 4 Pa. Code § 7.157.
- 95 4 Pa. Code § 7.158.
- 96 4 Pa. Code § 7.161-7.164.
- 97 26 Pa.C.S. § 2311.
- 98 62 Pa.C.S. §§ 2302, 2303, 2311.
- 99 62 Pa.C.S. § 3701.
- 100 62 Pa.C.S. §§ 4501 – 4507.
- 101 62 Pa.C.S. § 311.
- 102 4 Pa. Code § 1.1.
- 103 4 Pa. Code §§ 7.501 – 7.504.
- 104 65 Pa.C.S. § 1111.



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