Wiley Rein & Fielding

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Election Law News

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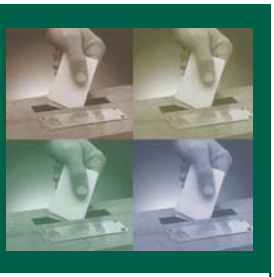

New FCC Fax Rule Stayed

Political groups and commercial organizations have received a temporary and partial reprieve from new, restrictive Federal Communications Commission (FCC) rules regarding unsolicited faxes. On August 18, 2003, the FCC stayed part of its new fax regulation until January 1, 2005, after receiving petitions for stays from, among others, the National Association of Business Political Action Committees (NABPAC) and the Chamber of Commerce.

Under the new rules, adopted by the FCC as part of the rules accompanying its federal Do-Not-Call list, faxes containing "unsolicited advertisements" could only be sent if the recipient has provided prior, written permission—including the recipient's signature (or e-signature) and fax number—that includes a clear invitation to send the faxes. An "advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods or services." Now, these rules are stayed until 2005.

On the other hand, the revised definition of "established business relationship" created by the rules has not been stayed. Therefore, in order for a faxing entity to avail itself of an exception for sending unsolicited faxes to persons with which it has an "established business relationship," the unsolicited faxes must be limited to those persons with which the entity had a transaction in the previous 18 months or from which it received an inquiry in the previous three months. This revised exception only goes into effect once the Office of Management and Budget gives its approval and the rule is published in the Federal Register. In the meantime, under the old FCC rules, established business relationships do not have an expiration date, and terminate only when the fax recipient asks to receive no more faxes.

Wiley Rein & Fielding LLP attorneys formally have petitioned the FCC on behalf of NABPAC to reconsider the application of the new fax rule to PACs. Other parties, including the Chamber of Commerce, have also petitioned for reconsideration. ✦

For more information, contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or Caleb P. Burns (202.719.7451 or cburns@wrf.com).

New York Adds to Procurement Requirements

Governor George Pataki of New York issued Executive Order 127 (EO 127) on June 16, 2003, which added disclosure and other requirements to the state's procurement process. On August 1, 2003, the state's Office of General Services issued guidelines to help agencies (and, hence, contractors) comply with EO 127. The requirements of EO 127 apply to certain procurements on or after August 14, 2003.

In brief, EO 127 and the guidelines require a contractor to provide four different types of information, which must be updated and supplemented on an ongoing basis. The categories of required information are as follows:

(i) Those persons retained, employed or designated by the contractor to attempt to influence the procurement process and known to the contractor at the time of the bid/proposal or offer, including information regarding the financial interest in the procurement of identified persons.

(ii) Those persons subsequently retained, employed or designated by the contractor to attempt to influence the procurement process.

(iii) Information about findings of non-responsibility against the contractor in the previous five years.

(iv) Certification by the contractor that the information provided is true and correct.

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Also in This Issue

Changes in State Campaign Finance & Ethics Law

Alaska

Lobbying

Alaska recently enacted two new statutes that affect lobbyist registration and lobbyist gift rules. First, effective September 14, 2003, the annual registration fee for lobbyists will be raised to $250 per client from $100. 108 SLA 03 (former SB 119) (signed July 18, 2003) (amending Alaska Stat. Ann. 24.45.041(g)).

Second, effective September 15, 2003, the following changes to the state's lobbying laws will be made by 115 SLA 03 (former SB 89) (signed June 17, 2003):

1. There will be an exception to the legislative-session gift prohibition from lobbyists for tickets to certain charity events. (Alaska Stat. Ann. 24.60.080 & 24.45.141(a)(9)).

2. Exceptions will be added to the definition of "administrative action" that exclude from the definition, among other things, procurement activity, certain activities regarding permits and the enforcement of compliance with existing law or the imposition of sanctions for a violation of existing law. (*Id.* 24.45.171(1)).

3. The phrase "communicate directly" will be added to the definition of "influencing legislative and administrative action." (*Id.* 24.45.171(6) & 24.45.171(13)).

4. An in-house employee will be required to reach a threshold of 40 hours in any 30 days before he or she falls under the definition of non-professional "lobbyist." (*Id.* 24.45.171(8)).

Campaign Finance

Former SB 119 also makes several changes to Alaska's campaign finance laws. The pertinent changes are detailed below. These campaign finance changes are effective September 14, 2003.

First, individuals may now contribute up to $1,000 per year to candidates, non-group entities, individuals conducting a write-in campaign and groups that are not political parties, an increase from $500. Individuals may also contribute up to $10,000 per year to political parties. This is an increase from $5,000. Sec. 8 (amending Alaska Stat. Ann. § 15.13.070(b)). Next, groups that are not political parties now may contribute up to $2,000 per year to a candidate, $2,000 per year to another group or $4,000 per year to a political party. Sec. 9 (amending Alaska Stat. Ann. § 15.13.070(c)). The statute also raised the limit on contributions by non-group entities to other non-group entities, candidates, groups and political parties to $1,000 per year from $500 per year. Sec. 10 (amending Alaska Stat. Ann. § 15.13.070(f)). Further, the ten-day post-election report is no longer required, and the year-end report, due February 15 of the next year, must include information through February 1 of that year. Sec. 14 (amending Alaska Stat. Ann. § 15.12.110(a)). Reports are due 105 days after a special election. *Id.*

Finally, the state has expanded its definition of "express communication" to mean "a communication that, when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. Sec. 18 (amending Alaska Stat. Ann. § 15.13.400(7)).

Illinois

Effective July 1, 2003, the Illinois Secretary of State raised the annual lobbyist registration fee. With the change, the annual fee for nonprofit entities is $100 and the annual fee for all other persons and entities is $300. Previously, the annual registration fee had been $50.

North Carolina

On June 26, 2003, Governor Mike Easley of North Carolina signed former S. 787, which amends the state's campaign finance law in relation to federal PACs that make contributions in the state. The statute simply states that federal PACs will not be subject to requirements that are more stringent than the ones applicable to North Carolina state PACs.

The North Carolina State Board of Elections indicates that this statutory change will eliminate the 10-day post-contribution report currently required of federal PACs that make contributions in North Carolina. Instead, federal PACs will be required to file quarterly reports in election years and semiannual reports in non-election years. No changes will be made to the registration requirements, and all reports must continue to be on North Carolina forms. Nevertheless, for the time being, federal PACs should continue to file reports ten days after making a contribution in North Carolina because the State Board of Elections has yet to issue new regulations. The statute gives the Board until January 1, 2004, to implement the change. When new regulations are promulgated, the Board will notify treasurers of federal PACs.

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FEC Interprets the BCRA

The Federal Election Commission has been dealing with many requests for Advisory Opinions involving interpretations of the Bipartisan Campaign Reform Act of 2002 (BCRA). Among those recently decided are as follows:

Advisory Opinion 2003-12

In Advisory Opinion 2003-12, the Commission, after considerable debate, determined that Representative Jeff Flank of Arizona and Stop Taxpayer Money for Politicians Committee (STMP) could not raise funds outside the limitations and restrictions of federal campaign finance law. In short, STMP, which wished to qualify and pass as state referendum to repeal portions of Arizona's campaign finance law, could not raise more than $5,000 per year from individuals or raise funds from corporations. The Commission arrived at this conclusion because Representative Flake had a significant and active role in forming STMP. Therefore, the Commission concluded, STMP was "established, financed, maintained, or controlled" by Representative Flake and subject to the restrictions imposed by the BCRA.

On the other hand, the Commission stated that STMP and Representative Flake's principal campaign committee were not affiliated. The Commission analagized STMP's situation to that of a leadership PAC.

Advisory Opinion 2003-16

The FEC, in Advisory Opinion 2003-16, permitted Providian National Bank to establish affinity credit card programs with national political party committees as sponsors. The Commission allowed such an affinity card program as long as the program was conducted in an arms-length fashion and the bank did not provide the party with more than the "normal and usual charge" for the party's mailing list.

The Commission allowed the bank to permit the cardholders to designate a portion of his or her card rebates or bonuses to the party, subject to certain restrictions. Further, the Commission allowed the bank to award points for contributions to the party that were charged on the credit card as long as the party agreed to pay the fair market value for such points. Finally, the FEC permitted the party to purchase ad space in the bank's mailings to cardholders and prospective cardholders. ✦

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New York Adds to Procurement Requirements

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In addition, certain contracts will be required to include a termination provision based upon the failure to disclose all required information.

Failure by a contractor to abide by the requirements of EO 127 and the guidelines will result in a finding of non-responsibility. Those contractors found to be non-responsible will be precluded from receiving a procurement contract unless the agency makes a finding on the record that such a contract is in the best interest of the state notwithstanding the prior finding of non-responsibility.

EO 127 and the guidelines apply to contracts in excess of $15,000 with any New York state department, office or division, board, commission or bureau thereof, or with any public benefit corporation, public authority or commission, at least one of whose members is appointed by the Governor, including the State University of New York and the City University of New York. Furthermore, the Office of General Services also is encouraging voluntary compliance with EO 127 by other agencies, such as the Department of Law, the Office of the State Comptroller and the State Education Department. The requirements also apply to amendments that change the scope of the contract. Some renewal options may be considered by the contracting agencies to fall under the requirements of EO 127.

On the other hand, EO 127 and the guidelines do not apply to procurement contracts that by law must be awarded to the lowest responsible bidder or that must be awarded on the basis of lowest price subsequent to a competitive bidding process. ✦

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FEC Issues Two NPRMs

On August 21, 2003, the Federal Election Commission (FEC or Commission) issued two different Notices of Proposed Rulemaking (NPRMs) that affect those in the political arena. Comments on both NPRMs are due on September 19, with hearings tentatively scheduled for October 1.

Multicandidate PACs and Biennial Limits

In the first NPRM, the Commission addresses both multi-candidate federal PACs and the biennial contribution limits for individuals and puts forth three main proposals. *Multicandidate Committees and Biennial Contribution Limits*, 68 Fed. Reg. 50,488 (Aug. 21, 2003). First, the FEC proposes that PACs automatically become multi-candidate committees when they have existed for six months, have received contributions from more than 50 persons, and have made contributions to five or more federal candidates. The Commission proposes this change because it believes that in the future, PACs might want to opt out of multi-candidate status if the per-election contribution limit for "persons" exceeds the multi-candidate limit of $5,000 because the "person" limit is indexed to inflation.

Second, the Commission proposes to require that PACs file Form 1M, Notice of Multicandidate Status, within ten days of attaining this status.

Lastly, in relation to the biennial contribution limits applicable to individuals, the Commission proposes to change its regulations so that contributions are attributed to the two-year cycle in which they are made, regardless of when the election occurs. This changes the current system whereby contributions for elections in future two-year cycles are attributed to the aggregate limit of the future two-year cycle (*e.g.*, a contribution in 2003 to a Senate primary in 2006 would be attributed to the 2005-2006 cycle).

Candidate Travel

In the second NPRM, the Commission tackles the issue of candidate travel. *Candidate Travel*, 68 Fed. Reg. 50, 481 (Aug. 21, 2003). In this NPRM, the Commission provides three alternatives to the current system of reimbursement for travel on airplanes provided by corporations and labor unions. Currently the rules call for advance payment of either a first-class airfare or the normal charter rates depending on whether regular commercial airline service exists at the destination airport. The Commission has found that this arrangement tends to discriminate against rural areas where there is no regular commercial airline service and hence the charter rate must be charged.

The first alternative calls for all reimbursements to equal the lowest, non-discounted first class airfare at the closest airport that has such service. The proposal also eliminates the advance payment requirement and calls for payment within seven calendar days after travel has begun.

The second alternative follows the House and Senate ethics rules. Reimbursement of first-class airfare would be required for previously or regularly scheduled flights where there is regular commercial airline service. For flights to airports not regularly served by commercial airlines and for flights that are specifically scheduled for the candidate, the reimbursement must equal the normal charter rate. Again, this proposal eliminates the advance payment requirement and calls for payment within seven calendar days after travel has begun.

The third option mandates that reimbursements equal the normal and usual charter rates for chartering the entire plane. This proposal retains the advance payment requirement.

The NPRM also asks for comment on the costs that make up the normal charter rate as well as other travel issues. ✦

For more information, contact Carol Laham (202.719.7301 or claham@wrf.com) or Mark Renaud (202.719.7405 or mrenaud@wrf.com).

U.S. Supreme Court Argument on BCRA

On Monday, September 8 at 10 am, the U.S. Supreme Court will hear oral arguments in *McConnell v. FEC*, the constitutional challenge to the Bipartisan Campaign Reform Act of 2002 (BCRA). The oral argument is scheduled to last four hours.

Wiley Rein & Fielding LLP represents Senator McConnell, as well as the Chamber of Commerce, the National Association of Manufacturers and the Associated Builders & Contractors in this case. ✦

*For more information, please contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com). Visit the Stanford Law School website at **www.law.stanford.edu** to read any of the pleadings filed in the case.*

Upcoming Filing Dates to Remember

September 20, 2003	September Monthly FEC Report due for Federal PACs filing monthly
September 20, 2003	September Monthly IRS Form 8872 due for non-federal PACs filing monthly.*
October 15, 2003	Third Quarterly FEC Report due for House and Senate candidates
October 20, 2003	October Monthly FEC Report due for Federal PACs filing monthly
October 20, 2003	October Monthly IRS Form 8872 due for non-federal PACs filing monthly.*

Deadlines are not extended if they fall on a weekend.

(*Note: Qualified state and local political organizations are not required to file Form 8872 with the IRS.)

If you have any questions or would like any additional information, please contact a member of Wiley Rein & Fielding's Election Law & Government Ethics Group at 202.719.7000 or visit the website at www.wrf.com. We welcome the opportunity to discuss any matter of specific concern to you or to tell you more about our practice and our capabilities. ✦

Upcoming Events

September 4, 2003

Television Advertising Bureau's Forecast Conference

New York, NY

Jan Baran will be part of a panel on "Forecasts for Political Advertising in 2003 and 2004" at the TVB's annual conference, which presents estimates—derived from a consensus of Wall Street and financial analysts, station rep firms and independent TVB research—for 2004 and 2005 local and national spot ad revenue.

September 11-12, 2003

The Practising Law Institute's Program: Corporate Political Activities 2003: Complying With Campaign Finance, Lobbying and Ethics Laws

Capitol Hilton, Washington DC

Jan Baran will co-chair this program, where high-level officials from the FEC, Department of Justice, Office of Government Ethics, and congressional ethics committees, as well as expert private practitioners, will explain current and future laws regulating political activities. The program will address both current 2002 laws and new laws for the 2004 elections, including the Bipartisan Campaign Reform Act (also known as McCain-Feingold/Shays-Meehan).

Carol Laham will be speaking at the program on "Advisory Opinions: Recent Developments, and the Process of Getting an Opinion" on September 12.

For more information, visit **www.wrf.com** and click on events.

September 21-24, 2003

Council on Governmental Ethics Laws (COGEL) Annual Conference

Austin, TX

Carol Laham will be moderating a panel on the "Interaction Between the Regulated Community and the Regulators." The Council on Governmental Ethics Laws (COGEL) is a professional organization for government agencies, organizations and individuals with responsibilities or interests in governmental ethics, elections, campaign finance, lobby laws and freedom of information.

For more information, visit **www.cogel.org**.

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South Carolina

On June 26, 2003, Governor Mark Sanford of South Carolina signed H. 3206 into law, changing many provisions of the state's lobbying and campaign finance code.

Lobbying

Effective immediately are three provisions affecting the state's lobbying laws. First, the lobbyist and lobbyist principal registration fees increase to $100 each. S.C. Code Ann. § 2-17-20 & 2-17-25. Second, the monetary limits on the gift rule exception applicable to the provision of food, transportation, beverages, entertainment and lodging by a lobbyist principal to public officials at certain specified group events have been increased to $50 per day and $400 per year from the previous $25 and $200, respectively. *Id.* § 2-17-190. These amounts are now indexed for inflation. Finally, lobbyists and lobbyist employers who terminate their registration continue to be subject for the remainder of the calendar year to the lobbyist contribution prohibitions, the prohibition against a lobbyist's causing the introduction of legislation for employment purposes, and the prohibition against a lobbyist's or lobbyist principal's hosting events to raise funds for public officials. *Id.* §§ 2-17-20(C) & 2-17-25(C).

Effective January 1, 2004, the state reduces the number of reports required from lobbyists and lobbyist employers. In 2004 and beyond, reports will be due on June 30 (covering January 1 to May 31) and January 31 (covering June 1 to December 31). *Id.* §§ 2-17-30. For 2003, remaining reports continue to be due on October 10 and December 31.

Campaign Finance

The five significant changes made by former H. 3206 to the South Carolina campaign finance statute are as follows:

1. The legislature mandates that the State Ethics Commission develop a system of mandatory electronic reporting for candidates and committees. Mandatory electronic reporting will not be instituted before November 3, 2004. The legislature also mandates that campaign finance reports be made publicly available at the State Ethics Commission, the Senate Ethics Committee, the House for Representatives Ethics Committee and the county clerk of court's office. Secs. 16 & 45 (adding S.C. Code § 8-13-365 & amending *id.* § 8-13-1366).
2. The definition of "coordinated with" is clearly defined. Sec. 26 (adding definition to S.C. Code § 8-13-1300). This provision takes effect on November 3, 2004.
3. The new statute adds a person making independent expenditures of $500 or more during an election cycle for the election or defeat of a candidate to the definition of "committee." Sec. 20 (amending S.C. Code § 8-13-1300(6)). This provision takes effect on November 3, 2004.
4. The state also added a definition of "influence the outcome of an elected office," which means

   (a) expressly advocating the election or defeat of a clearly identified candidate using words including or substantially similar to 'vote for', 'elect', 'cast your ballot for', 'Smith for Governor', 'vote against', 'defeat' or 'reject';

   (b) communicating campaign slogans or individual words that, taken in context, have no other reasonable meaning other than to urge the election or defeat of a clearly identified candidate including or substantially similar to slogans or words such as 'Smith's the One', 'Jones 2000', 'Smith/Jones', 'Jones!' or 'Smith-A man for the People!'; or

   (c) any communication made, not more than 45 days before an election, which promotes or supports a candidate or attacks or opposes a candidate, regardless of whether the communication expressly advocates a vote for or against a candidate. For purposes of this paragraph, 'communication' means (i) any paid advertisement or purchased program time broadcast over television or radio; (ii) any paid message conveyed through telephone banks, direct mail or electronic mail; or (iii) any paid advertisement that costs more than $5,000 that is conveyed through a communication medium other than those set forth in subsections (i) or (ii) of this paragraph. 'Communication' does not include news, commentary or editorial programming or article, or communication to an organization's own members.

Sec. 25 (adding definition to S.C. Code § 8-13-1300). This provision takes effect on November 3, 2004. According to the Office of the Governor, this provision and others in the new statute are designed to make sure that funds used to make advertisements that support or attack a candidate, regardless of the source, are publicly disclosed—especially "last minute sneak attacks by organizations whose membership and

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funding are unclear or ambiguous." Office of the Governor, *Gov. Sanford Signs Campaign Reform Bill Into Law*, available at www.state.sc.us/ethics/News%20Release-Campaign%20Reform%20Bill%206-26-03.pdf.

5. Finally, the new statute clarifies the requirements applicable to committees that support or oppose ballot measure committees. *See, e.g.*, sec. 24 (amending S.C. Code § 8-13-1300). This provision takes effect on November 3, 2004.

Texas

Through H.B. 1606, which was signed by Governor Rick Perry on June 18, 2003, the Texas legislature made several changes to both the state's lobbying laws and its campaign finance laws. These statutory changes are effective September 1, 2003. Pertinent changes are described below.

Lobbying

The threshold for filing detailed itemized reports of expenditures for transportation, lodging, food and beverages and entertainment has been increased. The threshold for expenditures on or after September 1, 2003, will be $75, which is 60% of a legislator's *per diem*. H.B. 1606 Sec. 4.06 (amending Tex. Gov't Code § 305.0061). For expenditures made before September 1, 2003, the triggering threshold was $50.

Second, the Texas Ethics Commission is required to create an electronic filing system and appropriate rules for lobbyist registration statements and reports. Sec. 4.07 (amending Tex. Gov't Code § 305.0064). The Commission must complete this process by December 1, 2004 and may then increase registration fees to cover the cost of system.

Third, the legislature has revised the conflict of interest provisions that govern how and when a lobbyist may represent more than one client. Sec. 4.08 (amending Tex. Gov't Code § 305.028).

Finally, the legislature increased the penalty for filing a late lobbying activity report to $500. This increased penalty applies to reports due on or after September 1, 2003.

Campaign Finance

The legislature made six significant changes to its campaign finance laws, effective September 1, 2003 and which follow.

1. Out-of-state political committees (including Federal PACs) that do not register with Texas must file copies of their Federal Election Commission (FEC) reports or other state's reports for periods in which they accept contributions or make expenditures in Texas. The reports are filed according to the FEC or other state's schedule. Secs. 2.02 & 2.21 (amending Tex. Elect. Code §§ 251.005 & 254.1581).

2. The regular session contribution prohibition applicable to statewide officeholders, members of the legislature, and legislative caucuses is extended to include the period up to 20 days after final adjournment of a regular session. Sec. 2.06 (amending Tex. Elect. Code §§ 253.034(a) & 253.0341(a)).

3. General-purpose PACs, like corporate Texas state PACs, must disclose expenditures by corporations or labor organizations made to establish and administer the PAC and to finance solicitations for political contributions. Sec. 2.20 (amending Tex. Elect. Code § 254.451). This provision only applies to the reporting of expenditures made on or after September 1, 2003.

4. The definition of "political advertising" is expanded to include communications on Internet websites. Sec. 2.01 (amending Tex. Elect. Code § 251.001(16)).

5. Political advertising published or distributed on or after September 1, 2003, that contains express advocacy must contain disclaimers indicating, among other things, the person who paid for it and the political committee or the candidate authorizing it. Political advertising that is authorized by a candidate, an agent of a candidate, or a political committee is deemed to contain express advocacy. Sec. 2.23 (amending Tex. Elect. Code § 255.001). An exception to this disclaimer requirement is added for "circulars or flyers that cost in the aggregate less than $500 to publish and distribute." *Id.*

6. Solicitations for political contributions must include a statement indicating the information that the political committee is required to report (*i.e.*, "best efforts"). Sec. 2.10 (amending Tex. Elect. Code § 254.0312). Political committees must make at least one written request for missing information within 30 days to contributors of $500 or more in a reporting period. *Id.* ✦

For more information, contact Carol Laham (202.719.7301 or claham@wrf.com) Mark Renaud (202.719.7405 or mrenaud@wrf.com).

Bookmark WRF's Election Law Website for information on the following frequently asked questions and other useful information:

www.wrf.com/practice/detail.asp?group=13

- Gift Rules
- Travel On Corporate Aircraft by Candidates, Members of Congress and Staff
- Merging and Terminating PACS
- The "One-Third" Rule Checklist
- Foreign Nationals and U.S. Subsidiaries of Foreign Parent Corporations

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