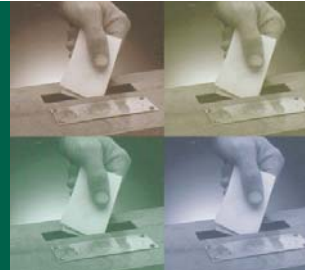




November 2004

Election Law News

A Publication of the WRF Election Law Practice Group



Post-Election: Time to Review Your PAC and Political Operations

Depending on when you read this issue of *Election Law News*, the 2004 elections may have been completed and the winners and losers known. Regardless of the outcome of the election, however, the post-election period presents every corporation and trade association and their PACs with a perfect opportunity to start anew and to put their house in order. Below are three ideas for starting the new election cycle off right.

1. PAC Audit

Every PAC should be audited at least once every election cycle so that a disinterested person can ensure that all monies have been accounted for and that the PAC is on solid financial footing. Not only can an audit ensure that there has been no wrongdoing, inadvertent mathematical mistakes and discrepancy between the bank accounts and the FEC reports, but the PAC can use the results of the audit to refine its financial and money-handling processes. An audit also gives additional reassurance to a PAC's very important constituency—its contributors.

The connected corporation or trade association may pay all of the costs of this audit, which can be undertaken by inside or outside auditors.

2. Legal Process Audit

An audit of the legal and ministerial processes related to the PAC, and to other corporate activities in the political realm such as lobbying, gift giving and charitable contributions, can complement a PAC audit at the beginning of the election cycle. Every corporation and trade association should examine its procedures for soliciting contributions to the PAC, operation of the PAC and use of funds to ensure that corporate operations comply with applicable legal requirements. Moreover, entities should clarify that lobbyists are tracking their lobbying time correctly, state lobbyists are complying with applicable state laws and the entity is observing all of the relevant ethics rules when entertaining

government officials. Other areas ripe for review are local lobbying and gift rules, corporate contributions in the states, tax-related questions and changes in state lobbying and gift laws. With high-profile corruption cases in Connecticut and New Jersey this past year, many states may attempt to tighten their lobbying and gift rules in the coming year.

continued on page 4

BCRA Regulations in Legal Limbo; FEC to Appeal

The 2004 election is being held under some Federal Election Commission (FEC) regulations that have been declared legally defective but that remain in effect. Fortunately, because virtually all of the impaired regulations were intended to ameliorate BCRA and because the FEC is unlikely to seek penalties for relying on its regulations, the immediate practical effects likely will be limited. However, things could get interesting if private FEC complainants go to court under Section 437g of the Federal Election Campaign Act of 1971, as amended, to compel the FEC to enforce BCRA directly, ignoring the regulations.

Congressmen Shays and Meehan, sponsors of BCRA, brought the underlying lawsuit in U.S. District Court for the District of Columbia. They challenged 18 FEC regulations that, in their view, tended to water down BCRA. The suit was assigned to Judge Kollar-

continued on page 3

In This Issue

- 2 Louisiana to Regulate Executive Branch Lobbying
- 4 Upcoming Dates to Remember

Louisiana to Regulate Executive Branch Lobbying

Effective January 1, 2005, Louisiana will begin to regulate those individuals who lobby the state's executive branch and, separately, those who have or are seeking contracts or business relationships with the state's retirement systems. These changes are a result of Act 116 (former H.B. 1246) and Act 868 (former H.B. 1215). Like the legislative branch lobbying code discussed in the September 2004 issue of *Election Law News* (visit www.wrf.com for a copy), both types of lobbying have a \$500 calendar-year expenditure threshold before the regulations apply to any individual. The Louisiana Board of Ethics is currently finalizing the pertinent forms and regulations applicable to each type of lobbyist.

New Law Starts January 1, 2005

The executive branch lobbying provisions apply to those making direct communications with executive branch officials in order to influence "executive branch actions," which are any acts related to, among other things, policymaking, rulemaking, legislation or, importantly, contracts. The covered communications are those with elected or appointed officials in the state's executive branch or with employees in the executive branch. The new executive branch lobbying law does not apply to communications with officials at the local level.

Executive branch lobbyists must register within five days of being employed as a lobbyist or within five days of the first action requiring registration. Registration expires every December 31, and a lobbyist may re-register between December 1 and January 31 of each year. There is a registration fee of \$110.

Executive branch lobbyists must file semi-annual certified reports on August 15 and February 15. Lobbying expenditures must be aggregated on the reports, and itemization is required if a lobbyist expends more than \$50 on one state official on one occasion, or spends an aggregate for the reporting period of more than \$250 on one state official. Expenditures by a lobbyist principal or employer made in the presence of the lobbyist must also be reported by the lobbyist. Lobbyist employers and principals are not required to register or report, but a lobbyist principal may report for all of its lobbyists if it so chooses. ■

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

WRF Attorney News

Upcoming Speeches



Panelist: Jan Witold Baran
Title: Complying with the New Campaign Finance Laws: A Primer for Business

Conference: NABPAC Post-Election
Location: Miami, FL

Information: www.nabpac.org



Speaker: Carol A. Laham
Title: Legal Quick Start: Not-for-Profit Advocacy (2/15)

Title: Legal Quick Start: Understanding the Federal Campaign Finance Law (2/15)

Title: Avoiding Fines, Keeping Your Name out of the News and Preserving Your Job: Answers to All of Your Legal Questions (2/17)

Conference: 4th Annual Innovate to Motivate National Conference for Political Involvement Professionals

Location: Key West, FL

Information: www.innovatetomotivate.com

Media Appearances

Wiley Rein & Fielding attorneys are widely recognized as experts in their fields and frequently appear in newspapers, magazines, radio, and on television programs and Internet webcasts.

Recently, WRF election law expert **Jan Witold Baran** made several appearances in news reports about legal preparations and disputes leading up to the presidential election, including Fox News Live, ABC World News Tonight with Peter Jennings, the Canadian Broadcasting Corporation evening news, National Public Radio's "Marketplace" and *Time* magazine.

In addition, WRF attorney **Lee E. Goodman** was a commentator on an ABC News "Now" report covering legal issues in the 2004 presidential election and was recently quoted in a Federal Times article on the record number of Hatch Act violations being prosecuted by the Office of Special Counsel.

Kotelly, one of three who heard the first-round constitutional challenge to BCRA and distinguished herself by writing a 706-page opinion explaining why virtually every clause was valid, a position that a narrow U.S. Supreme Court majority largely vindicated.

On September 18, 2004, Judge Kollar-Kotelly issued a lengthy opinion ruling that 14 of the 18 challenged regulations were defective on grounds ranging from inconsistency with BCRA's language or its perceived intent to failure to give sufficient advance public notice of the proposed rule or sufficient explanation of the underlying reasoning. *See sidebar for the 14 disapproved regulations.*

Strikingly, Judge Kollar-Kotelly stopped short of explicitly declaring the regulations invalid. Instead, she remanded the case to the FEC "for further action consistent with this opinion."

When the befuddled FEC asked her to stay her opinion or otherwise clarify the legal status of the 14 regulations, she refused in a 27-page ruling issued October 19, 2004. In the course of berating the FEC, however, she made clear that "the deficient rules technically remain 'on the books,'" and that it is up to the FEC, at least in the first instance, to figure out what curative steps should be taken. For example, the FEC could begin drafting more complete explanations to be released promptly if the D.C. Circuit upholds her rulings that some initial explanations were inadequate.

According to an FEC press release dated October 29, 2004, the FEC has voted to appeal to the U.S. Court of Appeals for the D.C. Circuit. In addition to challenging the plaintiffs' standing to sue (which could overturn the whole decision), the FEC will argue that the following regulatory provisions were wrongly struck down by the District Court:

- The district court's decision regarding the coordinated communications content standards, including the specific regulations found at 11 C.F.R. 109.21(c)(4)(i), (ii), and (iii).
- The district court's decision regarding the definition of "solicit" at 11 C.F.R. 300.2(m) and "direct" at 11 C.F.R. 300.2(n).
- The district court's decision regarding the regulation governing payment of state, district, or local party employee wages or salaries at 11 C.F.R. 300.33(c)(2).
- The district court's decision regarding the de minimis exemption for Levin Amendment funds in 11 C.F.R. 300.32(c)(4).
- The district court's decision regarding the requirement that public distribution be "for a fee" in 11 C.F.R. 100.29(b)(3)(i).

The FEC will initiate a rulemaking to address regulations struck down on procedural rather than substantive grounds.

Judge Kollar-Kotelly's two opinions and related court papers, including FEC filings, may be found on the FEC website at www.fec.gov/pages/bcra/litigation.shtml#shaysmeehan. ■

14 Regulations Disapproved by the District Court

1. 11 C.F.R. § 109.21(c) (coordination content regulations),* including 11 C.F.R. § 109.21(c)(4) (provision excluding the Internet from coordination communication regulations)
2. 11 C.F.R. § 109.3 (coordination definition of "agent")
3. 11 C.F.R. § 300.02 (m) (definition of "solicit")*
4. 11 C.F.R. § 300.02(n) (definition of "direct")*
5. 11 C.F.R. § 300.2(b) (nonfederal money definition of "agent")
6. 11 C.F.R. § 300.64(b) (state party fundraiser provision)
7. 11 C.F.R. § 100.24(a)(2) (definition of "voter registration activity")
8. 11 C.F.R. § 100.24(a)(3) (definition of "get-out-the-vote activity")
9. 11 C.F.R. § 100.24(a)(4) (definition of "voter identification")
10. 11 C.F.R. § 100.25 (definition of "generic campaign activity")
11. 11 C.F.R. § 300.33(c)(2) (provision regarding state, district and local employees)*
12. 11 C.F.R. § 300.32(c)(4) (*de minimis* Levin Amendment exemption)*
13. 11 C.F.R. § 100.29(c)(6) (exemption for Section 501(c)(3) organizations from electioneering communication regulations)
14. 11 C.F.R. § 100.29(b)(3)(i) ("for a fee" electioneering communication requirement)*

* To be appealed

For more information, please contact Thomas W. Kirby (202.719.7062 or tkirby@wrf.com).

Upcoming Dates to Remember

December	12/02/04	Post-General FEC report due for federal PACs filing quarterly and monthly
	12/02/04	Post-General IRS report due for nonfederal PACs filing quarterly and monthly*
January	1/31/05	Year End FEC report due for federal PACs filing quarterly and monthly
	1/31/05	Year End IRS report due for nonfederal PACs filing quarterly and monthly*

Deadlines are not extended if they fall on a weekend.

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

Review Your PAC

continued from page 1

3. Training

The beginning of a new election cycle and a new calendar year both present corporations and trade associations with an opportunity to focus on training—especially before Congress and the state legislatures convene for new sessions. Proper training encompasses three areas of political involvement: campaign finance, lobbying and ethics. Training doesn't have to be dry and boring—a mere recitation of the rules—but can be an interactive and interesting process that informs the employees and lets them know about their employer's commitment to proper behavior. Knowledge about the applicable law is the first defense against problems down the road. ■

For more information, please contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or Carol A. Laham (202.719.7301 or claham@wrf.com).

WRF Election Law Attorneys

Jan Witold Baran
202.719.7330
jbaran@wrf.com

Jason P. Cronic
202.719.7175
jcronic@wrf.com

D. Mark Renaud
202.719.7405
mrenaud@wrf.com

Carol A. Laham
202.719.7301
claham@wrf.com

Bruce L. McDonald
202.719.7014
bmcdonal@wrf.com

Thomas W. Antonucci
202.719.7558
tantonuc@wrf.com

Thomas W. Kirby
202.719.7062
tkirby@wrf.com

Lee E. Goodman
202.719.7378
lgoodman@wrf.com

Megan L. Brown*
202.719.7413
mbrown@wrf.com

Barbara Van Gelder
202.719.7032
[bvangel@wrf.com](mailto:bvangeld@wrf.com)

Caleb P. Burns
202.719.7451
cburns@wrf.com

* D.C. Bar membership pending. Supervised by the principals of the firm.

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