Wiley Rein LLP

Election Law News

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Developments in All Aspects of Political Law

Recovery Act: President Obama Restricts Lobbyist Activities

By Jan Witold Baran and D. Mark Renaud

On March 20, 2009, President Obama issued a memorandum to all Executive departments and agencies that substantially affects the ability of federal lobbyists to communicate with the departments and agencies about the "American Recovery and Reinvestment Act of 2009," Public Law 111-5 (the Recovery Act). The lobbyists targeted are those as defined in the Lobbying Disclosure Act (LDA). On April 7, 2009, the Director of the Office of Management and Budget (OMB) issued additional guidance about the memorandum to Executive Branch agencies.

Although certain parts of the lobbying community have challenged the Administration with respect to these rules, the Administration has yet to rescind or amend them. Moreover, there have been reports on the Internet that some departments and agencies are not discussing certain items with lobbyists because of, among other things, a lack of funds to comply with the Internet posting requirements in the memorandum. The following is a guide to the lobbying rules from the memorandum, as interpreted by the OMB.

1 An Executive department or agency may not consider the view of lobbyists concerning

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Also In This Issue

Illinois Governor Rescinds Pay-to-Play Executive Order

By Carol A. Laham and D. Mark Renaud

On April 3, 2009, Governor Pat Quinn of Illinois issued an executive order, Executive Order No. 9, rescinding the pay-to-play executive order of Governor Blagojevich, Executive Order No. 3 (2008). Governor Quinn's executive order can be found at www.illinois.gov/gov/execorders/2009_9.htm.

Although this action lowers the level of pay-to-play risk in Illinois, it does not eliminate the risk, for the pay-to-play restrictions contained in Public Act 095-0971 remain in force, including the registration requirement for entities holding or seeking contracts with state agencies with a value in excess of $50,000 in the aggregate in a calendar year. More information on the statutory pay-to-play requirements can be found at www.wileyrein.com/docs/newsletter_issues/636.pdf. Moreover,

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FEC Matter Under Review 6121

Trade Association PACs and Fundraising: A Case Study

By Carol A. Laham and D. Mark Renaud

The Federal Election Commission (FEC) recently released a conciliation agreement (MUR 6121) entered into by the Advanced Medical Technology Association (AdvaMed), its PAC and the PAC's treasurer, in his official capacity. AdvaMed self-reported to the FEC after its new treasurer ordered a legal and compliance audit after assuming his position as treasurer. This audit of the 2006 election cycle uncovered a number of mistakes made by the trade association in operating its PAC and engaging in fundraising. It provides a case study for other corporations and trade association PACs that can learn from some of the following mistakes:

- The PAC solicited contributions from individuals not within its restricted class.
- The PAC solicited contributions from the PACs of the association's member corporations.
- The PAC solicited contributions from employees of nonmember companies.
- The PAC failed to maintain prior authorization forms from member companies or simply did not obtain them in the first instance.
- The PAC failed to disclose contributions from several individuals, misreported other contributions by failing to identify the actual date

> The association self-reported to the FEC after its new treasurer ordered a legal and compliance audit after assuming his position as treasurer.

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Pay-to-Play Spotlight

Ohio Court Strikes Down and Changes Pay-to-Play Laws

By Carol A. Laham and D. Mark Renaud

On April 14, 2009, an Ohio appellate court upheld a lower court's 2008 decision that struck down Ohio's 2006 expansion of the state's pay-to-play laws. The court made its decision on a procedural, not substantive, ground in that the governor signed language different from what was passed by the legislature because of a legislative clerk's error. The decision can be found here: www.sconet.state.oh.us/rod/docs/pdf/10/2009/2009-ohio-1750.pdf.

As a result of this decision, Ohio's pay-to-play statute reverts to its status before the impermissible 2006 changes. The preexisting statute, which affects contracts at both the state and local levels, is narrower and less detailed than the statute after the 2006 changes. For example, PAC contributions and contributions by children are not covered by the preexisting statute.

The decision of the appellate court is subject to an appeal by the state and, if appealed, a stay pending appeal. Our source at the Ohio Secretary of State's office indicates that the Attorney General's office has not yet decided whether or not to appeal the decision.

Our previous coverage of the pay-to-play court decisions in Ohio can be found at www.wileyrein.com/docs/newsletter_issues/594.pdf.

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GAO Reports to Congress on LDA Compliance

By Robert L. Walker and Caleb P. Burns

On April 1, 2009, as required by the Honest Leadership and Open Government Act of 2007 (HLOGA), the Government Accountability Office (GAO) issued its second annual report on compliance with the requirements of the Lobbying Disclosure Act (LDA) by lobbyists, lobbying firms and registrants. For this latest report, the GAO focused on evaluating the sufficiency of written documentation maintained by lobbyists to support their LDA filings. The GAO found that, although the LDA contains no specific requirement to create or maintain documentation to support LDA filings, "lobbyists were generally able to provide documentation . . . to support items in their disclosure reports."

For its April 2009 report, the GAO reviewed a random sample of 100 quarterly lobbying activity reports (LD-2 reports) filed during the first three quarters of 2008. The GAO extrapolated the results to the total number of LD-2 reports (40,169) filed during the period. The GAO also met with and interviewed lobbyists regarding their filings and requested supporting documentation for key elements of the reports in the sample group. For income and expense entries, the GAO found that lobbyists could provide written documentation for an estimated 99% of the reports. In approximately 14% of the reports, however, the documentation was either incomplete or contradicted the entries on the forms. Based on the data, the GAO estimated that "approximately 6 percent of all disclosure reports erroneously report the amount of income or expenses for lobbying activities."

The GAO reviewed five additional data categories on the sampled LD-2 reports, including names of lobbyists

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Holdover Bush Appointees Required to Abide by Obama Executive Order on Ethics or Be Terminated

By Caleb P. Burns and Robert L. Walker

As reported in the March issue of *Election Law News*, President Obama signed an Executive Order immediately upon assuming office that imposed numerous ethical restrictions on all full-time, non-career appointees appointed after January 20, 2009, whether appointed by the president, vice president, an agency head or otherwise. The ethical restrictions require appointees to sign a pledge in which they agree to restrict, among other things, their acceptance of gifts and certain post-government employment.

> The Office of Government Ethics concluded: "Persons who are not prepared to sign the pledge should transition out within 30-days, by May 29th."

On April 28, the Office of Government Ethics formally applied the terms of the Executive Order to "appointees temporarily holding over from the previous Administration." The Office of Government Ethics explained that it "previously advised that holdover appointees would be given a 100-day grace period before being required to sign the pledge." The 100-day grace period ended April 29. The Office of Government Ethics concluded: "Persons who are not prepared to sign the pledge should transition out within 30-days, by May 29th."

As an aside, the terms of the Executive Order can only apply to holdover appointees who serve at

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FEC Deadlocks on $2 for $1 PAC Charitable Matching Program

By Jan Witold Baran and Andrew G. Woodson

By a vote of three to three (with four votes necessary for approval), the Federal Election Commission (FEC) failed to reach an agreement last month on an advisory opinion that would have expanded a corporation's ability to encourage PAC participation through a charitable matching program. Under current rules, the FEC allows a corporation to match employee contributions to the company's PAC with a contribution to a charity of the employee's choosing provided that the employee does not receive any financial or tangible benefit from the charitable contribution. For example, the employee may not take a tax deduction for the value of the contribution. However, the FEC has only approved matching programs on an equivalent, one-to-one basis (*e.g.*, a $1,000 PAC employee contribution is matched by a $1,000 employer charitable contribution).

In its advisory opinion request (AOR 2009-3), Intercontinental Exchange, Inc. (ICE), sought to double the amount that it could match for each employee contribution. ICE argued that the increased matching program was in line with previous Commission opinions, noting that the corporation would still not take a tax deduction for any part of the matching contribution. The three Republican-appointed Commissioners agreed with ICE's proposal, but the Democratic Commissioners strongly resisted the $2 for $1 program, noting that such a substantial enticement would "skew the incentives" and largely undercut the voluntariness of any contributions to the corporate PAC. One Commissioner noted that any rational person wanting to contribute to a charity would begin contributing to the PAC—even if he or she knew little about the PAC's purposes or, in some cases, even where he or she opposed candidates the PAC supported—simply to take advantage of the increased matching benefit.

The Commission's failure to approve or disapprove ICE's proposal means that such a program remains an open question for the foreseeable future. ■

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New Mexico Adopts Contribution Limits for Candidates and Committees after 2010 Election

By Caleb P. Burns and Andrew G. Woodson

On April 2, 2009, New Mexico Governor Bill Richardson signed a bill into law that would—for the first time—set contribution limits for a broad range of candidates and political committees in New Mexico. Effective November 3, 2010, persons (including individuals) are limited to contributing the following amounts, with the primary and general elections each having their own separate limit:

- $2,300 to a candidate for non-statewide office per election;
- $5,000 to a candidate for statewide office per election; and
- $5,000 to a political committee per election.

Political committees are subject to a $5,000 per election limit, regardless of whether the recipient entity is a statewide candidate, non-statewide candidate or political committee. Certain volunteer expenses and the payment of a PAC's administrative and solicitation costs are exempt from these limits. The dollar limits will be adjusted for inflation after each general election. ■

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A Trail Blazed Too Far? Oregon Reins in Reach of Ethics Law

By D. Mark Renaud and Andrew G. Woodson

Concerned that previous reform efforts from the 2007 session had created a large number of headaches, Oregon legislators last month passed a new law revising portions of the state's ethics code, although most changes will not become effective until January 1, 2010. According to staff with the Oregon Government Ethics Commission (OGEC), the primary purpose of the legislation was to remedy unintended consequences related to the economic interest forms filed by public officials, but the bill also became an opportunity to make changes to other provisions of the state's ethics laws.

Among other changes, the new law will add several additional exceptions to the gift restrictions, including where a public official represents state or local government, or a special government body at a reception, meal or meeting held by an organization. (The old exception required the public official to speak or answer questions as part of a scheduled program before the organization.) The bill also refines a number of allegedly ambiguous definitional provisions, including clarifying who has a "legislative or administrative interest" for purposes of the state's gift restrictions.

OGEC staff has indicated that more detailed guidance—including clarifying regulations—will be available later this year. ■

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Judging by Appearances: Revisions to the Code of Conduct for U.S. Judges

By Jan Witold Baran and Robert L. Walker

In March 2009, the Judicial Conference of the United States adopted a revised Code of Conduct for United States Judges. In announcing adoption of the revised Code, the Judicial Conference stated that the Code "for the first time" defines the "appearance of impropriety" as used in Canon 2, which, as before, requires that a "judge should avoid impropriety and the appearance of impropriety in all activities."

The revised Code, in Canon 2A, states: "An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired." The old Canon 2A included a narrower "test for appearance of impropriety," which, on its face, appeared to be limited in application to situations involving a "judge's ability to carry out judicial responsibilities." The language of the new definition of "appearance of impropriety" clarifies and underscores that a judge's obligation to avoid any such appearance applies to "all activities," whether professional or personal.

> Only "family" and "social" relationships were specifically cited in the old Code as potential sources of impermissible influence.

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Trade Association PACs and Fundraising (*continued from page 2*)

of receipt, put the wrong amount on one receipt and misreported another.

- The PAC also failed to report two contributions to federal candidates, failed to file pre-primary reports and failed to disclose or misreported fundraising expenses as well as bank fees.
- The PAC's cash-on-hand amounts were misstated.
- The PAC reported primary election contributions as general election contributions without properly designating them.
- Contributions over $50 were not properly forwarded to the PAC by its collecting agent within 10 days as required by law.
- Deposits were not timely made within 10 days of receipt, and two contributions were never deposited.
- The trade association advanced costs for fundraising events hosted by the PAC that were either not reimbursed at all—in contravention of the law—or reimbursed after the fact and not in advance as required by law.
- The PAC did not follow the one-third rule when holding a PAC raffle and failed to reimburse the trade association as required, resulting in a corporate in-kind contribution.

The FEC showed leniency to AdvaMed because it *sua sponte* disclosed these violations, and because (1) the trade association hired counsel to assist in compliance and an independent auditor to confirm its findings and (2) the trade association restructured its PAC to comport with the FEC's recommended best practices (www.fec.gov/law/policy/guidance/internal_controls_polcmtes_07.pdf). The FEC imposed a relatively modest civil penalty of $19,000 and required the PAC to amend its reports and disgorge funds raised outside of the restricted class or prove that the contributions from the member company PACs were unsolicited.

Wiley Rein has often recommended that you conduct audits of your own to make sure your PAC is following best practices.

What are the lessons to be learned? Do you recognize any of these mistakes as mistakes made by your PAC? Wiley Rein has often recommended that you conduct audits of your own to make sure your PAC is following best practices. In the January issue of *Election Law News,* we provided an end-of-cycle checklist for consideration (www.wileyrein.com/publication_newsletters.cfm?sp=newsletter&year=2009&ID=16&publication_id=14141&keyword=). Unfortunately, it is often only after a case like this becomes public that this self-assessment takes place. If you haven't had your PAC audited lately, now is the time. ■

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Holdover Bush Appointees (*continued from page 3*)

the pleasure of the Administration. The Executive Order cannot apply to holdover appointees serving terms pursuant to federal statute, like, for example, commissioners of certain independent regulatory agencies. The only possible exception would be appointees whose statutory terms have expired and are serving until they are replaced by the Administration.

Please note that the contours of the Executive Order continue to evolve. We will provide additional updates in future issues of *Election Law News.* ■

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President Obama Restricts Lobbyist Activities (*continued from page 1*)

"particular projects, applications, or applicants for funding under the Recovery Act" unless such views are in writing. According to OMB, a "particular project" is a discrete and identifiable transaction, or set of transactions, in which specific parties have expressed an interest.

2 A department or agency must post to its recovery website any written comments from lobbyists "concerning the commitment, obligation, or expenditure of funds under the Recovery Act for particular projects, applications, or applicants" within three business days of receipt.

3 Departments and agencies must refuse to meet with or talk on the telephone with lobbyists about "particular projects, applications, and applicants for funding under the Recovery Act" and must screen such lobbyists out of all such meetings and telephone calls.

4 Lobbyists may communicate orally with a department or agency about general Recovery Act issues, but only if the following are true:

- The oral communications do not "extend to or touch upon particular projects, applications, or applicants for funding;"
- A department or agency official reduces the following to writing:
  - The date and time of the contact on policy issues;
  - The names of the lobbyists and officials participating in the discussion; and
  - A short description of the substance of the communication; and
- The department or agency posts the writing to its recovery website within three business days of the communication.

Examples of general policy issues concerning the Recovery Act include, according to OMB, discussions supporting funding of certain general populations, categories of projects or broad geographical areas.

5 The memorandum does not place any restrictions on communications by registered lobbyists concerning general questions about the logistics of Recovery Act funding or implementation. Such matters include, according to OMB, a request for a meeting, a request for the status of an action, or any other similar request, if the request does not include an attempt to communicate about Recovery Act policy or a particular project or application for funding under the Recovery Act.

The following general topics of discussion, for example, may fall within the category of general questions about logistics or implementation, which are not covered by the memorandum:

- How to apply for funding under the Recovery Act;
- How to conform to deadlines;
- To which agencies or officials applications or questions should be directed; and
- Requests for information about program requirements and agency practices under the Recovery Act.

6 The memorandum only applies to communications prior to the award of a grant or other Recovery Act funding, according to OMB; the memorandum does not restrict lobbyists' ability to communicate with officials regarding the administration of a grant that has already been awarded.

7 The memorandum does not apply to non-lobbyist employees of lobbyist organizations.

The Director of OMB is required to provide a review of the implementation of the memorandum, including any recommendations for modifications or revisions, to the president within 60 days.

President Obama's memorandum can be found at www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-20-09/. The OMB Directive, including useful FAQs, may be found at www.scribd.com/doc/14166351/m0916. ■

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GAO Reports on LDA Compliance (*continued from page 3*)

who previously held covered official positions, houses of Congress and federal agencies lobbied and names of individuals no longer acting as a lobbyist for the client. The GAO found that only an estimated 35% of lobbyists required to report in these categories could provide documentation for all items.

> The GAO found that only an estimated 35% of lobbyists required to report in these categories could provide documentation for all items.

For the April 2009 report, the GAO also reviewed a random sample of 100 semi-annual reports of contributions (LD-203 reports) filed for mid-year 2008. The GAO estimated that for approximately 65% of these reports the reporting lobbyists or lobbying organizations could support all entries with documentation. An estimated 16% of the semi-annual reports had errors or omissions or failed to disclose required contributions.

The GAO issued its first LDA compliance report in September 2008. In that initial report, the GAO estimated that lobbyists had written documentation to support income and expense entries in approximately 91% of the reports filed for first quarter 2008 (compared with the estimate of 99% for the first three quarters of 2008 as reported by the GAO in April 2009). As to whether accurate supporting information for income or expense entries existed in either written *or oral* form, the GAO estimated in September 2008 that such support was available for at least 95% of all first quarter 2008 reports. However, as in its April 2009 report, the GAO found in September 2008 that "the extent to which lobbyists could provide written documentation varied for different aspects of the reports." For example, regarding information in the LD-2 on who acted as a lobbyist, the GAO estimated that written documentation existed for only 35% of the first-quarter 2008 forms requiring this information.

HLOGA also tasked the GAO, through its annual LDA compliance report, to make recommendations to improve LDA compliance and to provide the Department of Justice with the resources and authorities needed for effective LDA enforcement. Regarding LDA enforcement, the GAO reported in April 2009 that the U.S. Attorney's Office for the District of Columbia "plans to put in place a system to better track, analyze, and report on its enforcement activities" and that it had assigned an additional staff member to assist with lobbying compliance issues. In its September 2008 report, the GAO had recommended that the U.S. Attorney's Office develop a "structured approach" to targeting its enforcement resources to the most significant noncompliance cases.

The GAO did not make any new recommendations regarding LDA compliance in its April 2009 report, although it did note that its "review of documentation and lobbyists' statements indicates some opportunities to strengthen lobbyists' understanding of the [LDA] requirements." ■

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Have You Been Bundling?

We'll find out starting May 20, when the first bundling forms—Forms 3L—are filed with the Federal Election Commission.

Revisions to the Code of Conduct for U.S. Judges (*continued from page 5*)

In Canon 2B, the revised Code states that a "judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment." Only "family" and "social" relationships were specifically cited in the old Code as potential sources of impermissible influence. The Code provides no elaboration on this change.

Canon 3(b)(5) of the revised Code sets forth the new requirement that a "judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened [the Code of Conduct] or a lawyer violated applicable rules of professional conduct." The Code states that "[a]ppropriate action may include direct communication with the judge or lawyer, other direct action if available" or "reporting the conduct to the appropriate authorities . . . ."

The revised Code of Conduct for United States Judges, which takes effect July 1, 2009, may be found at: www.uscourts.gov/library/codeOfConduct/Revised_Code_Effective_July-01-09.pdf. ■

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Upcoming Dates to Remember

May 15, 2009

IRS Form 990 due from nonfederal PACs with more than $100,000 in gross receipts

May 20, 2009

May Monthly FEC Report due for federal PACs

May Monthly IRS Form 8872 due for PACs filing monthly*

June 20, 2009

June Monthly FEC Report due for federal PACs

June Monthly IRS Form 8872 due for PACs filing monthly*

FEC and IRS 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.

Illinois Governor Rescinds Pay-to-Play Executive Order (*continued from page 1*)

the Illinois legislature is currently considering several proposals for more universal regulation of pay-to-play issues, some of which are based upon the recommendations of the Illinois Reform Commission. ■

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Upcoming Events

Lobbying Disclosure Compliance

Jan Witold Baran, Speaker
Caleb P. Burns, Speaker
American League of Lobbyists
May 11, 2009 | Washington, DC

ABCs of Political Law Compliance

Jan Witold Baran, Speaker
Robert L. Walker, Speaker
National Association of Business Political Action Committees (NABPAC)
July 14, 2009 | Washington, DC

Corporate Political Activities 2009: Complying with Campaign Finance, Lobbying & Ethics Laws

Jan Witold Baran, Co-Chair
Caleb P. Burns, Speaker
Practising Law Institute Seminar
September 24-25, 2009 | Washington, DC

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