Wiley Rein & Fielding LLP

Election Law News

A PUBLICATION OF THE WRF ELECTION LAW PRACTICE GROUP

MAY 2006

Lobbying Reform Has Uncertain Future

House and Senate Must Reconcile Differences

On May 3, 2006, the U.S. House of Representatives passed its lobbying reform bill by a vote of 217-213. Although the House bill contains several provisions in common with the Senate version, there are a number of differences that will require reconciliation with the Senate bill once conferees are appointed.

Like the Senate version, the House bill requires lobbyists to file quarterly, online lobbying reports. A lobbyist also must disclose information about his or her contributions and any gifts to covered legislative branch officials that count toward the cumulative annual limit. The maximum penalties for failing to disclose this information are doubled to $100,000 in the new bill.

Unlike the Senate bill, which increases to two years the current lobbying ban on former lawmakers and employees, the House bill simply requires the clerk to notify individuals of the beginning and ending dates of the one-year prohibition. Subject to an exception requiring approval by two-thirds of the House Ethics Committee, all privately funded travel is suspended until June 15, 2006, the date by which the committee is required to report a list of recommendations for further changes to the travel rules. The bill also prohibits registered lobbyists from traveling on corporate flights with members of Congress. Earmark reform, a subject of intense debate in the days leading up to passage of the House bill, also is included in the final version.

The House bill, HR 4975, also includes the regulation of certain "527 political organizations." The bill would limit donations from individuals to certain 527s focused

continued on page 5

In This Issue

FEC Agrees on Coordination Regulations

On April 7, 2006, the Federal Election Commission (FEC) voted to amend its regulations with respect to coordinated communications, communications that are impermissible for corporations. The Commission, however, as of May 10, has yet to publish the regulations in their final form or to publish the accompanying and often illuminating Explanation and Justification. Nonetheless, from the discussions and amendments at the April 7, 2006 open meeting, the following details can be gleaned.

With respect to the broadest "content prong" of the coordination rule, which applies to public communications that mention or feature a federal candidate or political party, the Commission loosened its rules for Congressional candidates and tightened its rules for Presidential candidates. On one hand, the Commission shortened to 90 days before an election the coverage of the coordination regulations with respect to public communications that mention or feature Congressional candidates. Previously, the duration had extended to 120 days before an election. On the other hand, the Commission extended the coverage of the regulations vis-à-vis Presidential candidates well beyond the prior 120-day rule.

continued on page 4

FEC Exempts Uncompensated Internet Activity by Individuals

In a move widely praised in all quarters, the Federal Election Commission (FEC) unanimously approved a regulation to deregulate unpaid use of the Internet by individuals.

The campaign finance laws generally regulate political activity only if it constitutes a "contribution" or an "expenditure." In its new regulations, effective May 12, 2006, the FEC specifically exempted "uncompensated Internet activity by individuals" from the definitions of "contribution" and "expenditure."

The new regulatory exemption is broad in its coverage, stating:

> When an individual or a group of individuals, acting independently or in coordination with any candidate, authorized committee, or political party committee, engages in Internet activities for the purpose of influencing a Federal election, neither of the following is a [contribution or expenditure] by that individual or group of individuals: (1) The individual's uncompensated personal services related to such Internet activities; (2) The individual's use of equipment or services for uncompensated Internet activities, regardless of who owns the equipment and services.
>
> For the purposes of this section, the term "Internet activities" includes, but is not limited to: Sending or forwarding electronic messages; providing a hyperlink or other direct access to another person's Web site; blogging; creating, maintaining or hosting a Web site; paying a nominal fee for the use of another person's Web site; and any other form of communication distributed over the Internet.
>
> For the purposes of this section, the term "equipment and services" includes, but is not limited to: Computers, software, Internet domain names, Internet Service Providers (ISP), and any other technology that is used to provide access to or use of the Internet.

Paid Internet activity will, nonetheless, be regulated by the campaign finance laws and could be subject to contribution and expenditure limits and prohibitions as well as coordination and disclaimer requirements.

THE FEC ALSO EXEMPTED FROM THE DEFINITION OF "PUBLIC COMMUNICATION" INTERNET COMMUNICATIONS THAT ARE NOT MADE "FOR A FEE ON ANOTHER PERSON'S WEB SITE."

Nonetheless, the FEC further amended its regulations to specifically exempt two areas from regulation where compensation may be paid, either directly or indirectly, for Internet activity. First, the FEC amended the so-called "media exemption" so that it would apply to persons or entities that meet the preexisting conditions for the exemption, but distribute their new stories, commentaries, or editorials over the Internet. The amended regulation states:

> Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, is not a [contribution or expenditure] unless the facility is owned or controlled by any political party, political committee, or candidate . . . .

Second, the FEC amended its regulations that permit "occasional, isolated, or incidental use" of corporate resources and time to specifically account for Internet activity. The amended regulation states:

> [T]he following shall be considered occasional, isolated, or incidental use of corporate facilities:
>
> Any such activity that constitutes voluntary individual Internet activity (as defined above), in excess of one hour per week or four hours per month, regardless of whether the activity is undertaken during or after normal working hours, provided that:
>
> (A) ... [T]he activity does not prevent the employee from completing the normal amount of work for which the employee is paid or is expected to perform;
>
> (B) The activity does not increase the overhead or operating costs of the corporation; and
>
> (C) The activity is not performed under coercion.

The FEC also exempted from the definition of "public communication" Internet communications that are not made "for a fee on another person's Web site." The term "public

continued on page 6

FEC Collects Its Largest Penalty in Corporate Activity Case

On April 18, 2006, the Federal Election Commission (FEC) announced the largest civil penalty in the agency's history. Freddie Mac, also known as the Federal Home Loan Mortgage Corporation, paid the FEC $3.8 million to settle civil charges under the Federal Election Campaign Act (FECA) and to avoid litigating the matter in federal court.

According to the conciliation agreement, the FEC alleged the following violations of the FECA:

- Freddie Mac paid outside consulting firms by retainer to prepare for, plan and/or run federal candidate fundraisers hosted by lobbyist Mitch Delk and other Freddie Mac executives and did not pass these costs on to the benefiting campaigns except, on occasion, in a nominal fashion.
- Freddie Mac directly paid for the blast fax and courier costs of one of the consultants in connection with 40 such events.
- Freddie Mac reimbursed company employees for incidental expenses related to fundraisers, such as cab fares.

In addition, the FEC alleged that Freddie Mac employees impermissibly collected contributions for federal candidates from company executives and forwarded those contributions to the intended campaigns in violation of the FEC regulations against corporate facilitation. Moreover, Freddie Mac impermissibly contributed $150,000 to a 527 political organization, the Republican Governors' Association (RGA), in violation of the FECA prohibition on any contributions or expenditures by Congressionally chartered corporations.

Freddie Mac did not contest the FEC's charges, but it also did not concede the charges except for the impermissible 527 contribution to the RGA, which Freddie Mac described as a mistake. Freddie Mac offered alternate factual explanations in the conciliation agreement.

The FEC admonished the former executives and outside consulting firms involved in the above-described activities but otherwise took no further action against these individuals and entities.

In an unrelated action, the FEC announced on March 28 that it had received $200,000 in civil penalties from LifeCare Management Services, LLC, and two of its officers. The civil penalties in MUR 5398 related to the admission that the two executives knowingly and willfully reimbursed approximately $50,000 in contributions between 1997 and 2002. The two executives also made criminal pleas in U.S. District Court for the same violations. The company's civil penalty reflected the fact that it voluntarily disclosed the violations. ■

Jan Witold Baran
202.719.7330 | jbaran@wrf.com

D. Mark Renaud
202.719.7405 | mrenaud@wrf.com

Loosening of FEC Policy on Maintenance of Payroll Deduction Forms

At its April 20, 2006 open meeting, the Federal Election Commission (FEC) revealed that it had changed its internal policy requiring maintenance of Payroll Deduction Authorization forms (PDAs) signed by individuals who participate in a PAC payroll deduction program. At this time, however, the new policy does not appear to be publicly available.

A description of the policy, which appeared in the Final Audit Report on CWA COPE Political Contributions Committee, said:

> Prior to considering this audit report, the Commission reconsidered its policy regarding records required to be kept by PACs that receive contributions through automatic payroll deduction and concluded that documents other than PDAs can be used to verify such contributions. An example of other acceptable documentation is a listing provided to the PAC by the member's employer containing the contributors' names, along with the dates and amounts of the contributions that are included in the transmittal.

CWA COPE Political Contributions Committee is a labor union, and the example provided above applies specifically to labor union PACs. To date, the FEC has not provided any guidance as to what "documents other than PDAs can be used to verify such contributions" to corporate PACs. ■

Jan Witold Baran
202.719.7330 | jbaran@wrf.com

Caleb P. Burns
202.719.7451 | cburns@wrf.com

FEC Allows Whirlpool to Use Common Username and Password for PAC Website

On March 24, 2006, the Federal Election Commission (FEC) approved Advisory Opinion 2006-3, which provided guidance to Whirlpool Corporation concerning the type of username and password it may use to protect access to a website documenting its affiliated PAC's activities. In the opinion, the FEC concluded that Whirlpool may use a common username and password, distributed to all members of Whirlpool Corporation Political Action Committee's (WCPAC) solicitable class in order to secure access to the PAC's website.

Whirlpool had requested guidance from the FEC on the username and password requirements adopted by the FEC in Advisory Opinion 2000-7 (Alcatel USA, Inc.). That opinion determined that a corporation may use a password-protected website, accessible from corporate computers, to document the activities of its affiliated PAC and provide information about donating to the PAC. Alcatel had distributed a unique username and password to each member of its PAC's solicitable class as a means of ensuring that only class members could access the PAC's website. In the Advisory Opinion, the FEC established that providing unique usernames and passwords to the solicitable class was sufficient for Alcatel to meet the federal requirement that a corporate PAC only solicit funds from members of its solicitable class.

The FEC decided that the common username and password were sufficient to meet the requirements of the Alcatel Advisory Opinion.

Whirlpool sought guidance concerning whether a company must distribute unique usernames and passwords to its solicitable class to meet the requirements of federal law. It proposed to distribute one common username and password to the corporation's solicitable class for access to WCPAC's website. The website would contain information regarding how solicitable class members can make donations to WCPAC, along with information on the current activities of the PAC. The access portal to WCPAC's website, where the username and password would have to be entered, would include a disclaimer to Whirlpool employees that only solicitable class members can access WCPAC's website and make donations to the PAC. The FEC decided that such a disclaimer did not violate federal requirements that a PAC only solicit contributions from the solicitable class twice each year and that the common username and password were sufficient to meet the requirements of the Alcatel Advisory Opinion.

The FEC also determined that Whirlpool could give its solicitable class members access to WCPAC's website through a link placed on its corporate government relations website, accessible to every Whirlpool employee. The FEC advised Whirlpool, however, that it must "take steps to ensure that the common username and password will not be disseminated beyond the solicitable class." ■

Jan Witold Baran
202.719.7330 | jbaran@wrf.com

Shawn A. Bone*
202.719.7243 | sbone@wrf.com

Coordination Regulations

(continued from page 1)

With respect to one of the "conduct prongs" of the coordination regulations that governs what type of activity constitutes coordination, the Commission reduced the reach of the common vendor and former employees factors to persons who had held such positions within the previous 120 days instead of the much longer "election cycle" rule that had previously existed. Also, the FEC put in its regulations a rule that would allow organizations such as PACs to undertake both coordinated and independent activity with respect to the same candidate or candidates as long as certain rules about partition and separation were observed. Such separation and partition rules apply to personnel and information. The Commission refers to their artificial but necessary divisions as "firewalls." ■

Jan Witold Baran
202.719.7330 | jbaran@wrf.com

D. Mark Renaud
202.719.7405 | mrenaud@wrf.com

Pennsylvania Establishes Executive Branch Lobbying Rules

Acting where the state legislature so far has not, Governor Edward Rendell of Pennsylvania established new executive branch lobbying rules by executive order on March 15, 2006. Pennsylvania has been without a state-wide lobbying statute of any kind since the state supreme court declared the old regime void in 2002.

Effective April 1, 2006, the Executive Order amends the Executive Branch Code of Conduct and can be found at www.oit.state.pa.us/lobbyistregister/site/default.asp. Registration also can be accomplished through the Governor's Office of Administration website.

The new rules cover all aspects of executive branch lobbying, including grassroots lobbying as well as certain efforts to influence "the awarding, rejection or rescission of a grant, loan or contract or amendment thereto." There are a number of exceptions to the coverage of the new rules, including an exception for certain in-house employees. There also is a registration salary or payment threshold of $2,500 per calendar quarter.

Under the new Executive Order, registration is to be accomplished five days before lobbying. Reporting is to be done on a quarterly basis. ■

Carol A. Laham
202.719.7301 | claham@wrf.com

D. Mark Renaud
202.719.7405 | mrenaud@wrf.com

Lobbying Reform

(continued from page 1)

on federal candidates and elections to $25,000 in any calendar year and would prohibit corporate contributions to these 527s.

Although most of the language in the final version of the bill was a result of mark-ups in five separate House committees, several amendments were offered and accepted on the House floor. One of the amendments that passed would subject lobbyists to civil penalties of up to $50,000 for knowingly offering a gift to a member or employee in violation of the gift ban. A second amendment adopted by the full House requires lobbyists to complete eight hours of ethics training each Congress. On the other hand, the House did not consider proposed amendments on a number of topics, including the establishment of a separate Office of Public Integrity and the disclosure of grassroots lobbying activities.

S 2349 was passed by the Senate on March 29, 2006. In addition to changing certain rules about earmarks and internal procedures, the bill touches on many aspects of the federal lobbying and ethics laws.

For the first time, the legislation would regulate federal grassroots lobbying. Those entities engaging in grassroots lobbying at the federal level would, among other things, be required to report the expenses incurred in such activity. Certain outside vendors also would have to register as "grassroots lobbying firms" upon exceeding a $25,000 threshold. The provisions contain a narrow exception for member communications. Lobbyists, under the proposed bill, would be prohibited from giving gifts to members of Congress and their staff. The proposed bill also extends to two

continued on page 8

UPCOMING DATES TO REMEMBER

May 20, 2006
- May monthly FEC report due for federal PACs filing monthly
- May monthly IRS Form 8872 due for nonfederal PACs filing monthly*

June 20, 2006
- June monthly FEC report due for federal PACs filing monthly
- June monthly IRS Form 8872 due for nonfederal PACs filing 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.

Rudy Guilty of Bribery, Violating Revolving Door Rules

On March 31, 2006, Tony Rudy, a lobbyist at the now-disbanded lobbying firm Alexander Strategy Group and the former Deputy Chief of Staff in the leadership office of Representative Tom DeLay, signed a guilty plea in which he admitted that he received bribes when he was in Congressman DeLay's office and that, once he left the Congressman's office, he lobbied that office within one year of leaving the government and provided items of value to public officials in exchange for favorable governmental action.

Mr. Rudy worked for and with both Jack Abramoff and Michael Scanlon, who previously pled guilty to various ethics law violations. While his violations stem directly from those connections, Mr. Rudy himself also committed specific illegal acts while he was working both inside and outside the government.

While a member of Congressman DeLay's office, Mr. Rudy established a consulting company for his wife through which money was funneled to Mr. Rudy and his wife by both Mr. Abramoff and non-profit organizations to which Mr. Abramoff directed client payments in exchange for benefits for himself and his clients. The consulting company and the non-profit organizations served as a means by which the origins of payments to Mr. Rudy could be concealed.

In addition, Mr. Rudy, as a government official, participated in what the plea agreement describes as a scheme to provide "a stream of things of value to public officials with the intent to influence or reward a series of official actions and agreements to perform official action." That stream included travel, meals, greens fees, entertainment and election contributions for government officials, along with employment for their spouses and family members.

According to the plea agreement, the illegal scheme, and Mr. Rudy's participation in it, continued after he left Congressman DeLay's office. He began lobbying that office soon after he left, in violation of the one-year "revolving door" ban on such lobbying communications. Further, he became more heavily involved in the solicitation of funds from clients to non-profit organizations under the control of Mr. Abramoff in order to pay for impermissible lobbying activities. He also continued to use his wife's consulting firm as a conduit through which to receive additional payments for lobbying, though the firm provided no services in exchange for those payments. The plea agreement provided five examples of these solicitation and laundering techniques in 2002 alone, with nearly $100,000 funneled to Mr. Abramoff and Mr. Rudy. ■

Jan Witold Baran
202.719.7330 | jbaran@wrf.com

Kevin J. Plummer*
202.719.7343 | kplummer@wrf.com

FEC Exempts

(continued from page 2)

communication" is most notably used in the FEC's regulations to define the reach of the coordination provisions. Thus, only Internet communications that are made "for a fee on another person's Web site" may be subject to regulation as a coordinated communication.

These new regulations are a significant first step by the FEC to clearly remove from regulation uncompensated individual Internet activity. This is not likely the last word on the issue. Stay tuned for updates on Internet regulation issued by the FEC in subsequent advisory opinions or perhaps even more rulemaking proceedings.

A new FEC brochure on Internet activities can be found at www.fec.gov/pages/brochures/internetcomm.shtml.

Jan Witold Baran
202.719.7330 | jbaran@wrf.com

Caleb P. Burns
202.719.7451 | cburns@wrf.com

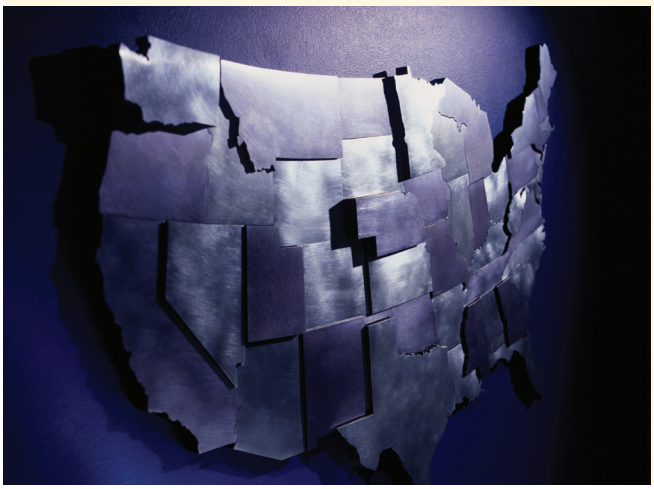
Wisconsin

Wisconsin Increases Reporting for Nonresident PACs

In March 2006, Wisconsin Governor Jim Doyle signed into law Assembly Bill 65, which increases the reporting obligations for all nonresident PACs (including most federal PACs) in Wisconsin.

Prior to April 6, 2006, the effective date of the bill, Wisconsin law only required nonresident PACs to disclose contributions from contributors in Wisconsin and disbursements made in connection with an election for state or local office in Wisconsin. The new law changes this and requires nonresident PACs to report *all* of the information that is required of resident PACs. Specifically, nonresident PACs are now required to report information on contributions and expenditures made outside of Wisconsin as well as those made inside the state. Moreover, all contributions and expenditures in excess of $20 must be itemized. Officials with the Wisconsin State Elections Board have advised that the first report affected by the new law will be the fall pre-primary report, which is due on September 5, 2006. In order to comply with the new requirements, nonresident PACs making contributions or expenditures in Wisconsin must begin keeping the additional records beginning on July 1, 2006, the first date covered by this report.

The Board expects to issue a final decision on the acceptable filing methods for federal PACs in the next several weeks. ■



Washington

Washington State Imposes Reporting Requirements on Federal PACs

In March 2006, Washington Governor Christine Gregoire signed into law House Bill 1226, which makes several changes to the state's campaign finance laws. Effective June 7, 2006, federal PACs *will no longer be exempt* from Washington state's reporting obligations. Rather, "out-of-state committees" (federal or otherwise) will be required to disclose the name, address and employer of each person or corporation residing outside of Washington that contributes more than $2,500 in the aggregate in a calendar year to the out-of-state committees, as well as the identity of all in-state contributors who contributed more than $25 to the committee.

The bill also applies the campaign contribution limits for legislative and statewide candidates to candidates for certain county offices, special purpose district offices and judicial offices. Specifically, contributions to a candidate for county office in a county that has more than 200,000 registered voters are limited to $700 per election from an individual, union, business or PAC. These same entities may contribute up to $1,400 per election to a candidate for judicial office or to a candidate running for office in a special purpose district in districts authorized to provide freight and passenger transfer and terminal facilities that have more than 200,000 registered voters.

A second bill, Senate Bill 6152, increases the penalties for failing to comply with the state's campaign finance laws. As of June 7, 2006, the maximum penalty for a single violation is $1,700 and the maximum aggregate penalty imposed by the Commission may not exceed $4,200. ■

Carol A. Laham
202.719.7301 | claham@wrf.com

Andrew G. Woodson
202.719.4638 | awoodson@wrf.com

Lobbying Reform

(continued from page 5)

years the revolving door lobbying prohibition for former members, Congressional officers, and certain senior executive branch officials. For Congressional staff, the lobbying ban would extend to lobbying any member, officer or employee of the house where the individual was formerly employed.

If signed into law, S 2349 also would impose certain conditions on the ability of Senators and staff to accept privately funded travel and lodging, and would authorize the comptroller general to audit lobbying registrations and reports. ■

Jan Witold Baran
202.719.7330 | jbaran@wrf.com

D. Mark Renaud
202.719.7405 | mrenaud@wrf.com

UPCOMING SPEECH

On September 14-15, 2006, **Jan Witold Baran** will moderate the Practising Law Institute's "Corporate Political Activities 2005: Complying with Campaign Finance Lobbying & Ethics Laws." For more information, please visit www.wrf.com/events.

WRF'S ELECTION LAW PROFESSIONALS

Jan Witold Baran
202.719.7330
jbaran@wrf.com

Carol A. Laham
202.719.7301
claham@wrf.com

Thomas W. Kirby
202.719.7062
tkirby@wrf.com

Barbara Van Gelder
202.719.7032
bvangeld@wrf.com

Jason P. Cronic
202.719.7175
jcronic@wrf.com

Bruce L. McDonald
202.719.7014
bmcdonal@wrf.com

Thomas W. Antonucci
202.719.7558
tantonucci@wrf.com

Caleb P. Burns
202.719.7451
cburns@wrf.com

D. Mark Renaud
202.719.7405
mrenaud@wrf.com

Andrew G. Woodson
202.719.4638
awoodson@wrf.com

Shawn A. Bone*
202.719.7243
sbone@wrf.com

Brian J. Hooper*
202.719.7435
bhooper@wrf.com

Kevin J. Plummer*
202.719.7343
kplummer@wrf.com

*District of Columbia Bar pending
(Supervised by principals of the firm)