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House Ethics Committee Provides Gift and Travel Advice

By Jan Witold Baran and D. Mark Renaud

In February, the House Committee on Standards of Official Conduct issued a memoranda to provide guidance with respect to the new gift and travel rules adopted by the House in January. (See *Election Law News Alert*, dated January 8, 2007, available at www.wileyrein.com/docs/newsletter_issues/468.pdf.) The first memorandum addressed gift issues, while the second addressed travel issues.

Gift Guidance

In addition to describing the new House gift rules, the committee's February 6, 2007, memorandum (available at www.house.gov/ethics/m_gift_rule_amendments_02_06_2007.htm) provided several examples of how the gift ban would be implemented. In Example 4, for example, the committee indicated that a member or staffer should not accept a meal from a non-lobbyist employee of a company that employs or retains a lobbyist if the intent of the donor is to evade the gift ban simply by using personal funds to pay for the meal.

The committee also reiterated and described the exceptions to the gift rules that are still available to lobbyists and entities that retain or employ lobbyists. These exceptions include widely attended events, food or refreshment of a nominal value (the "reception" exception), and items of nominal value. Moreover, the Committee described the criteria that a member or staffer must consider in order for someone to provide him or her with a gift under the personal friendship exception. Those criteria are as follows:

- The history of his or her relationship with the donor, including any previous exchange of gifts;
- Whether, to the official's knowledge, the donor personally paid for the gift, or whether the donor sought a tax deduction or business reimbursement for it; and
- Whether, to the official's knowledge, the donor at the same time gave the same or similar gifts to other members or staff.

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Connecticut Amends Its Pay-to-Play Law

By Carol A. Laham and D. Mark Renaud

Through legislation (former SB 1112) signed by Governor Rell on February 8, 2007, (and effective on that date), Connecticut made several changes to its broad pay-to-play contribution and solicitation ban applicable to state contractors, prospective state contractors, and their principals. Among other things, the amendments implemented a cure provision so that certain impermissible contributions could be recalled and would not trigger contract debarment or other penalties. The new law also eliminated senior vice presidents as well as the minor children of principals from the coverage of the contribution and solicitation ban. In addition, as of February 8, 2007, the State Elections Enforcement Commission (SEEC) is no longer required to maintain lists of principals of state contractors or prospective state contractors. Finally, the state has ceased to mandate that a CEO of a state contractor or prospective state contractor certify future compliance by the principals or

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FEC Continues to Apply Controversial Legal Theories to Regulate 527 Organizations

By Thomas W. Kirby and Caleb P. Burns

In an apparent continuation of its negotiations with various 527 organizations accused of operating as federally regulated political committees (see *Election Law News* at www.wileyrein.com/ELN_527 (Jan. 2007)), the Federal Election Commission announced on February 28 that it had reached a settlement with the Progress for America Voter Fund, which agreed to pay a penalty of $750,000. (This case was designated Matter Under Review 5487, publicly available documents can be found at www.fec.gov/press/press2007/20070228MUR.html.)

As was the case with the previous settlements, the FEC again relied on controversial legal theories to find that the Progress for America Voter Fund engaged in political activity that triggered regulation as a political committee. The consequences of such regulation are severe. As a political committee, a 527 is required to abide by contribution limits that otherwise do not apply. The FEC claimed that political committee regulation attached to the Progress for America Voter Fund because it accepted "contributions," made "expenditures," and had the "major purpose" of electing or defeating federal candidates as those terms are defined by statute and understood by judicial precedent. As it had in the previous settlements with the other 527 organizations, the FEC reached these conclusions by applying (1) an interpretation of "expenditure" that had been struck down by numerous federal courts, (2) a previously ignored interpretation of "contribution" by a court from another jurisdiction, and (3) a "major

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FEC Requires PACs to Provide Additional Detail on "Purpose of Disbursements"

By Jan Witold Baran and Andrew G. Woodson

Political committees and other persons required to file reports with the FEC must itemize certain disbursements and, for each itemized disbursement, must include a brief description of the purpose of the disbursement. Importantly, the "purpose of disbursement" entry on the FEC report, when considered along with the identity of the disbursement recipient, must be sufficiently specific to make the purpose of the disbursement clear. On January 9, 2007, the FEC issued a Statement of Policy containing non-exhaustive lists of acceptable and unacceptable descriptions of disbursements that may be included by PACs on their FEC reports. This Statement of Policy—and the accompanying list of descriptions—is available from the Commission's website at: www.fec.gov/law/policy/purposeofdisbursement/notice_2006-23.pdf.

The following examples illustrate some of the descriptions that the FEC has approved in its recent Statement of Policy:

- "Door-to-Door Get-Out-the-Vote," "Get-Out-the-Vote Phone Calls," and "Driving Voters to the Polls" instead of the less descriptive "GOTV" or "GOTV Expenses."
- "Consultant-Media," "Consultant-Fundraising," "Consultant-Get-Out-the-Vote," "Consultant-Legal," or "Consultant-Polling" instead of the more general "Consultant-Political."
- "Catering Cost" instead of "Fundraising Expense" or "Event Expense."
- "Media" for a disbursement to a television or radio communication company rather than "Generic Campaign Activity."

Please note that this new policy will not affect the vast majority of corporate or trade association PACs whose only disbursements are for candidate contributions which may continue to be disclosed as such. ■

When Words Are Not Enough: FEC Fines Candidate Committee for Omitting Disclaimer Box in Mailings

By Carol A. Laham and Andrew G. Woodson

Disclaimers for Candidates; Specific Problems

On February 27, the FEC announced that former Congressman Martin Frost's campaign committee would pay a $6,000 civil penalty for failing to include the proper disclaimers on printed communications. The mailings to 100,000 individuals discussed various campaign themes raised during the 2004 election, including airline security and Republican efforts to outsource American jobs.

The FEC began its analysis of the campaign literature by noting that each mailing contained a disclaimer, "Paid for by the Martin Frost Campaign Committee," that properly identified the sponsor. Second, the Commission observed that each of the three mailings complied with the requirement that the disclaimer "be printed with a reasonable degree of color contrast between the background and the printed statement." According to the Commission's regulations, this requirement may be satisfied if the disclaimer is written in black text on a white background or "if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest text used in the communication." Third, the FEC determined that the communications were "clearly readable by the recipient," despite allegations that the disclaimers were too small and difficult to read. In particular, the FEC noted that the "safe harbor" font size (12-point) contemplated by the Commission's regulations was not required in this case because the mailings here were done on an 8 ½" x 11" piece of paper rather than the 24" x 36" materials that the "safe harbor" regulation contemplated.

Finally, the Commission's regulations provide that disclaimers on printed, public communications must be contained in "a printed box set apart from the other contents of the communication." Because the disclaimer in the Frost committee's mailings was not set apart in such a box, the FEC found that the committee had violated the law.

In a separate disclaimer-related matter publicized on the same day, the Commission exercised its prosecutorial discretion and dismissed a complaint against Senator Jim Talent's campaign. The complaint alleged that a newspaper advertisement advocating the senator's reelection failed to contain the appropriate disclaimer, but in response, the Talent campaign denied any knowledge, authorization or coordination of the ad.

MANY OF THE REQUIREMENTS THAT ARE APPLICABLE TO DISCLAIMERS ON PUBLIC COMMUNICATIONS ISSUED BY CANDIDATES ALSO APPLY TO PUBLIC COMMUNICATIONS BY CORPORATE AND NON-CONNECTED PACS.

Corporate and Non-connected PAC Disclaimers for Public Communications

Many of the requirements that are applicable to disclaimers on public communications issued by candidates also apply to *public* communications by corporate and non-connected PACs. The one key difference, however, is in the language of the disclaimer. If the public communication is authorized by a candidate, his or her authorized committee or an agent thereof but is paid for by any other person, the disclaimer must clearly state that the communication is paid for by such other person and is authorized by the candidate, committee or agent. An example of this disclaimer, which must be in the printed box, is as follows:

> *"Paid for by [name of PAC] and authorized by [name of candidate or candidate's committee]."*

If the communication is not authorized by a candidate, his or her committee or an agent thereof, the disclaimer must state the full name and permanent street address, telephone number or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee. An example of this disclaimer, which must be in the printed box, is as follows:

> *"Paid for by [name of PAC] and not authorized by any candidate or candidate's committee. [Street address of PAC] [or] [Telephone number of PAC] [or] [World Wide Web address of PAC]."* ■

Proposed Ethics Rule for Federal Contractors

By D. Mark Renaud and Kevin J. Plummer

Under a proposed rule now open for public comment, federal contractors who receive awards in excess of $5 million with performance periods exceeding 120 days would be required to have a written code of ethics, employee compliance training programs, and procedures for displaying an agency inspector general fraud hotline poster. If ultimately accepted, this rule, proposed by the Department of Defense, General Services Administration, and the National Aeronautics and Space Administration, would become part of the Federal Acquisition Regulation (FAR) and would become part of all contracts that meet the above thresholds. The proposed rule is FAR Case 2006-007, available at http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-698.pdf. Comments are due on or before April 17, 2007.

The Departments of Defense, Veterans Affairs and the Environmental Protection Agency already have similar types of agency-specific ethics rules. The proposed rule, however, would apply a uniform contract dollar threshold for all agencies and provide one address and telephone number for the Office of Inspector General from which a fraud hotline poster could be obtained.

The proposed rule first provides a general policy that "[g]overnment contractors must conduct themselves with the highest degree of integrity and honesty." Contractors who would be covered by the uniform dollar and performance period thresholds would have 30 days from contract award to institute a written code of ethics and 90 days from contract award to institute an employee ethics and training compliance program, along with an internal control system. That internal compliance system is to include periodic reviews of business policies and practices, an internal reporting mechanism for employees to use for reporting improper conduct, internal and external audits when necessary, disciplinary measures for those who act improperly, and timely reporting and full cooperation with government agencies and investigators.

The proposed rule first provides a general policy that "[g]overnment contractors must conduct themselves with the highest degree of integrity and honesty."

All federal contractors with contracts that meet the above monetary threshold would also be required to display a fraud hotline poster designed by the agency with whom they are contracting. The proposed rule also includes specific remedies for failure to comply, including the withholding of contract payments or loss of award fee during the performance period in which compliance did not occur. Finally, federal contracts would be required to include a flow-down provision, imposing the above requirements on all subcontracts that meet the same $5 million threshold.

While the proposed federal rule would mandate the implementation of certain ethics policies for federal contractors, ethics and lobbying rules for those companies that contract with certain state governments and agencies also exist. In New York, for example, state lobbying and gift laws apply to state contractors. New Jersey and Connecticut, among other states, impose substantial campaign finance limitations upon contractors, prospective contractors, and, in the case of Connecticut, the principals of contractors or prospective contractors. Ethics and lobbying rules for contractors also exist at the municipal level. For example, New York City prohibits its officials and employees from accepting gifts over $50 from contractors who do or seek to do business with the city. ■

Contribution Limits for 2007-2008

(from the Federal Election Commission website)

Donors	Recipients				Special Limits
	Candidate or Candidate Committee (per election)	National Party Committee (per calendar year)	State, District & Local Party Committee (per calendar year)	Any Other Political Committee (per calendar year[1])	
Individuals	$2,300*	$28,500*	$10,000 (combined limit)	$5,000	$108,200* overall biennial limit: • $42,700* to all candidates • $65,500* to all PACs and parties[2]
PAC Multicandidate[3]	$5,000	$15,000	$5,000 (combined limit)	$5,000	No limit
PAC Not Multicandidate	$2,300*	$28,500*	$10,000 (combined limit)	$5,000	No limit

* These contribution limits are increased for inflation in odd-numbered years.

[1] A contribution earmarked for a candidate through a political committee counts against the original contributor's limit for that candidate. In certain circumstances, the contribution may also count against the contributor's limit to the PAC. 11 CFR 110.6. *See also* 11 CFR 110.1(h).

[2] No more than $42,700 of this amount may be contributed to state and local party committees and PACs.

[3] A multicandidate committee is a political committee with more than 50 contributors which has been registered for at least six months and, with the exception of state party committees, has made contributions to five or more candidates for federal office. 11 CFR 100.5(e)(3).

Accessible at www.fec.gov/pages/brochures/contrib.shtml#Chart

House Letter on Gifts and Travel

(*continued from page 1*)

In the February 6 memorandum, the committee indicated that an exception for charity events did not apply to charities that retain or employ lobbyists or to events sponsored by other organizations that retain or employ lobbyists. Finally, with respect to the political event exception, the committee stated as follows:

> *A meal with a lobbyist where the lobbyist provides a campaign contribution is not a "fundraising or campaign event" under this provision of the gift rule unless the meal is sponsored and paid for by a political organization, and the expenditures are reported as required by FEC rules or applicable state or local rules.*

Travel Guidance

In a memorandum dated February 20, 2007, (available at www.house.gov/ethics/Travel_Guidelines.pdf), the Committee provided guidance and regulations for the new House travel rules, which became effective March 1, 2007.

Among other things, the memorandum described in minute detail what expenditures for transportation, lodging, and food would be "reasonable" and therefore acceptable by members and staffers under the new rules. For example, travel on private aircraft or charter aircraft for fact-finding trips and other officially-connected travel is only reasonable under a very narrow set of circumstances. Also, the reasonableness of lodging depends on whether the event was organized without regard to congressional participation (the latter being an annual board meeting and the like) in addition to the room's location, etc.

AMONG OTHER THINGS, THE MEMORANDUM DESCRIBED IN MINUTE DETAIL WHAT EXPENDITURES FOR TRANSPORTATION, LODGING, AND FOOD WOULD BE "REASONABLE" AND THEREFORE ACCEPTABLE BY MEMBERS AND STAFFERS UNDER THE NEW RULES.

The February 20 advice also outlined the factors that determine whether the committee will approve a two-night stay in connection with travel sponsored by an entity that retains or employs a lobbyist. One factor is whether the travel is across two or more time zones.

The committee also released on February 20 forms to be filled out by sponsors of private travel (to be submitted to the traveling member's or staffer's office) and forms to be filled out by the member or staffer and submitted to the committee. Those documents can be found at www.house.gov/ethics/travel_page.htm. ■

Upcoming Speeches

Congressional Ethics Rules
Jan Witold Baran, Speaker
Republican Congressional Spouses
March 21, 2007 | Washington, DC

Keeping Out of the Penalty Box: Staying Current on Lobbying Laws
Carol A. Laham, Speaker
State Government Affairs Council Annual Meeting
March 22, 2007

Ethics: Compliance and the General Counsel—What to Do When the Client Is Noncompliant
Barbara Van Gelder, Speaker
National Association of College and University Attorneys Workshop: Managing and Implementing Corporate and Institutional Compliance on Campus
April 20, 2007 | Boston, MA

FEC Regulates 527 Organizations

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purpose" test even though it has failed to articulate the parameters of such a test in rulemaking proceedings.

The lengths the FEC has gone to regulate these organizations is troublesome given the sensitive area in which the FEC is charged with regulating—political speech and association. Though these settlements will not be directly reviewed by a court, the legal theories employed by the FEC may still be subject to review as part of the ongoing legal proceedings in *Shays v. FEC,* 424 F. Supp. 2d 100 (D.D.C. 2006) (*Shays II*). The FEC recently relied on these settlements to justify to the court in *Shays II* that the FEC's treatment of 527s is adequate. However, it remains to be seen whether—or to what extent—the court in *Shays II* will examine the particulars of these settlements. ■

Connecticut Amends Contract Bans

(continued from page 1)

submit a list of covered "principals" to the SEEC. Nonetheless, the CEO must continue to notify the "principals" of the company, as redefined, that they may not make or solicit contributions to covered officials or committees.

As noted in the November 2006 issue of *Election Law News,* available at www.wileyrein.com/docs/newsletter_issues/455.pdf, Connecticut's law imposes a contribution and solicitation ban on state contractors, prospective state contractors, and their principals. A few, but not all, of the principals now covered under the law are as follows:

> Among other things, the amendments implemented a cure provision so that certain impermissible contributions could be recalled and would not trigger contract debarment or other penalties.

- Members of the company's Board of Directors;
- Individuals owning 5% or more of the company's stock;
- Individuals at the company living or working in Connecticut with the title of president, treasurer, or executive vice president;
- Spouses, civil union partners, and dependent children (age 18 or older and living at home) of the above; and
- A political committee established or controlled by an individual described above or by the state contractor or prospective state contractor.

Under a different provision, a complete state contribution and solicitation ban applies to all "communicator lobbyists," the lobbyists' immediate families and any PAC controlled by the lobbyists or their family members. ■

Upcoming Dates to Remember

March 15, 2007…
IRS Form 1120-POL due for all federal and state PACs and other political organizations having more than $100 in taxable income (*e.g.*, interest and dividends)

March 20, 2007…
March monthly FEC report due for federal PACs filing monthly

March 20, 2007…
March monthly IRS Form 8872 due for nonfederal PACs filing monthly*

April 15, 2007…
Quarterly FEC report due from federal candidate campaign committees

April 20, 2007…
April monthly FEC report due for federal PACs filing monthly

April 20, 2007…
April monthly IRS Form 8872 due for nonfederal 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.*

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