

New York State Bans Most Gifts from Lobbyists and Lobbyist Employers and Makes Other Ethics and Lobbying Changes

By Carol A. Laham and D. Mark Renaud

On April 25, 2007, the majority of changes to the lobbying and ethics law of New York State became effective as a prelude to a major bureaucratic event this Fall—the merging of the State Ethics Commission and the New York Temporary State Commission on Lobbying into the new Commission on Public Integrity. The changes are the result of former A.B. 3736, signed by Governor Spitzer on March 26, 2007. The new law affects, among other things, gifts by lobbyists and lobbyist employers, gifts from other persons,

the receipt of honoraria, lobbyist registration, and contingency fees.

With respect to gifts to public officials from lobbyists and lobbyist employers, New York State has scrapped its old \$75 gift limit (which became a “per year” gift limit last year) and simply banned most such gifts “unless under the circumstances it is not reasonable to infer that the gift was intended to influence such public official.” At the same time, however, the state introduced several exceptions into the

definition of “gift” under the lobbying law, including exceptions for food and beverages of a nominal value offered as part of a meal and complimentary attendance at bona fide charitable or political events.

New York State also adjusted the gift rules for executive branch personnel. New York now prohibits all persons from offering statewide elected officials, state officers or employees, individuals whose names have been submitted by the governor to the

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PAC Internal Controls: FEC Suggests Additional Procedures

By Jan Witold Baran and Caleb P. Burns

The Federal Election Commission (FEC) recently issued guidance to political action committees (PACs) regarding internal controls they should consider to minimize reporting errors, and worse, the growing number of instances where political committee funds or assets are misappropriated. Although these requirements are not mandatory, and the FEC has not indicated that a PAC can

avoid liability solely by adopting any or all of the proposed controls, the advisory document is nevertheless a useful tool in reviewing whether a PAC has enough safeguards in place to protect its assets from misappropriation and to ensure that accurate, timely reports are filed with the Commission.

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Utah Changes Lobbying Reporting Requirement

By Carol A. Laham and D. Mark Renaud

On March 13, 2007, Utah Governor Huntsman signed former S.B. 246 into law. The law, which becomes effective on April 30, 2007, makes several changes to Utah's lobbyist reporting requirements.

Most importantly, the law changes the frequency of lobbyist filings. Starting

April 30, lobbyists (and lobbyist principals, if necessary) must file reports quarterly. Such reports are due on April 10, July 10, October 10, and January 10 of each year.

In addition, lobbyists must itemize all gifts to public officials for the cost or value of admission to a

professional or collegiate sporting event, regardless of the value of the tickets. Moreover, among other things, itemization on the lobbyist reports for food and beverage begins at \$50 per day, as does itemization for other expenditures other than tangible personal property. ■

FEC Adopts Policy to Reduce Penalties for Self-Reporting of Campaign Finance Violations

By Jan Witold Baran and Andrew G. Woodson

Recognizing the need “to provide appropriate incentives for [the] demonstration of cooperation and responsibility,” the FEC recently issued the final version of a Self-Reporting Statement of Policy designed to encourage more candidates and PACs to come forward when they uncover evidence of internal campaign finance violations. In exchange for bringing these matters to the Commission's attention *sua sponte*, the FEC will offer penalties between 25% and 75% lower than the Commission would otherwise have sought in identical matters arising by other means. Additionally, the Commission will expedite the conciliation process for self-reporters and, in many cases, will allow respondents to resolve matters short of a “reason to believe” finding by the Commission.

In its Statement of Policy, the Commission identified seven factors that it would examine when considering how to handle self-reported violations, including the type of violation (*e.g.*, a knowing and willful violation, an

inadvertent mistake, a mistake based on the advice of counsel, etc.) the magnitude of the violation (*e.g.*, the amount of people or money involved), and the origin of the violation (*e.g.*, whether there were compliance procedures in place to prevent the violation, and if so, why these procedures failed to stop or deter the wrongful conduct). The FEC will also look at the investigative and corrective actions that were taken by the respondent, any post-discovery compliance measures, whether there was full disclosure to the Commission, and whether the respondent fully cooperated with the FEC once any violations were disclosed.

Absent unusual circumstances, the Statement of Policy notes that the Commission will grant a civil penalty reduction of 50% to an organization that complies with the following steps:

- Respondents alert the Commission to potential violations before the violation had been or was about to be discovered by any outside party, including the Commission;

- The violation immediately ceased and was promptly reported to the Commission upon discovery;
- Respondents take appropriate and prompt corrective action(s) (*e.g.*, changes to internal procedures to prevent a recurrence of the violation; increased training; disciplinary action where appropriate);
- Respondents amend reports or disclosures to correct past errors, if applicable;
- Any appropriate refunds, transfers, and disgorgements are made and/or waived; and
- Respondents fully cooperate with the Commission in ensuring that the *sua sponte* submission is complete and accurate.

Although indicating that the typical penalty reduction would be 50%, the Commission indicated that a reduction of up to 75% may be made available to respondents that undertake additional steps, such as hiring independent experts to conduct a thorough review,

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The FEC's Safe Harbor Policy for Misreporting Due to Embezzlement

By Carol A. Laham and Andrew G. Woodson

In response to a recent increase in the number of enforcement actions that involve the misappropriation of committee funds, the FEC published a Statement of Policy on April 5, 2007, outlining a series of precautionary steps for PACs to take to protect themselves from potential liability. Under this new Statement of Policy, the FEC will not hold a committee liable for reporting errors arising out of an employee's misappropriation of committee funds provided that the committee adopts certain safeguards. These safeguards—which are detailed below—were developed based on general accounting principles and in consultation with other government agencies and the regulated community. If a committee adopts some—but not all—of the following safeguards, the FEC will consider that as a mitigating factor in determining the amount of liability resulting from the misappropriation.

Specifically, in order to be completely protected under the safe harbor, a

PAC must adopt each of the following internal controls as part of its regular operating procedure:

- All bank accounts are opened in the name of the committee, never an individual, using the committee's Employer Identification Number, not an individual's Social Security Number.
- Bank statements are reviewed for unauthorized transactions and reconciled to the accounting records each month. Further, bank records are reconciled to disclosure reports prior to filing. The reconciliations are done by someone other than a check signer or an individual responsible for handling the committee's accounting.
- Checks in excess of \$1,000 are authorized in writing and/or signed by two individuals. In addition, all wire transfers are authorized in writing by two individuals. The individuals who may authorize the disbursement checks should be identified in writing in the committee's internal policies.

- An individual who does not handle the committee's accounting or have banking authority receives incoming checks and monitors all other incoming receipts. This individual makes a list of all committee receipts and places a restrictive endorsement, such as: "For Deposit Only to the Account of the Payee" on all checks.
- If the committee has a petty cash fund, an imprest system is used, and the value of the petty cash fund should be no more than \$500.

In addition to these preventative measures, the political committee must notify both the FEC and relevant law enforcement officials of the misappropriation as soon as it is discovered in order to qualify for the safe harbor. Finally, the PAC must file reports to correct any reporting errors due to the misappropriation. The statement of policy can be found at: http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-9.pdf ■

Self-Reporting (continued from page 2)

investigation, or audit, or conducting an equally comprehensive internal review, investigation, or audit. In order to qualify for the 75% reduction, however, all documentation of the experts' review, investigation or audit must be provided to the Commission. As an example of a

"thorough" review, the Commission noted that an organization that has misstated financial information in its reports must conduct both an audit reconciling bank and internal records with FEC reports for at least a year prior to the error and a review specifically

addressing internal controls and reporting procedures. A copy of the FEC's policy on self-reporting can be found at: http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-8.pdf. ■

FEC Fines Company for Using Corporate Funds to Pay for Candidate Fundraising Events

By Jan Witold Baran and Kevin J. Plummer

On April 11, the Federal Election Commission (FEC) announced the collection of nearly \$75,000 in fines from Highmark, Inc., an insurance company, and its former company vice president for improper usage of corporate funds. A fine of \$7,500 was imposed upon America's Foundation, a federal PAC, for failure to disclose the receipt of in-kind contributions from Highmark.

This action, as described in Matter Under Review (MUR) 5645, stemmed from various golf tournaments and other fundraising events held

to support former Senator Rick Santorum and America's Foundation. Highmark's vice president chaired these tournaments, the expenses of which Highmark ultimately reimbursed. According to the conciliation agreement, these costs included greens fees, golf carts, food, drink, printouts, and invitations for the golf tournaments, as well as catering and alcohol for the other fundraising event. Such corporate contributions, even if merely reimbursements, are impermissible. Further, America's Foundation failed to report its receipt of the in-kind contributions—greens

fees, golf carts, meals, prizes, handouts, and invitations—from Highmark that resulted from one of the aforementioned golf tournaments. For these violations, each entity received fines: \$54,000 for the company; \$20,000 for the vice president; and \$7,500 for the PAC. The Santorum campaign committee was not disciplined because the FEC did not believe that the committee had any reason to believe that an outside party had paid any prohibited costs, and, therefore, no knowing acceptance of a contribution from a prohibited source occurred. ■

FEC Fines Association for Omitting Required PAC Disclaimers

By Jan Witold Baran and Kevin J. Plummer

On April 5, the Federal Election Commission (FEC) announced that the High Point Regional Association of Realtors (HPRAR) would pay a \$4,500 fine for failing, in its August 2005 newsletter and subsequent monthly meetings, to include the proper disclaimers informing those solicited of the political purposes of the PAC and the right to refuse to contribute without reprisal. Neither the National Association of Realtors nor its PAC (RPAC), the entity for which HPRAR was soliciting contributions, was found to have committed any wrongdoing.

In its August 2005 newsletter, according to the conciliation agreement reached in Matter Under Review (MUR) 5681, HPRAR listed each of its members who had not contributed

to RPAC, provided information about upcoming state legislation, and profiled a particular member for her monetary support to RPAC. The section of the newsletter concluded by asking whether each member had given RPAC his or her "fair share." In addition, HPRAR displayed the names of non-contributing members at its monthly meetings and its annual meeting, held in September 2005.

Federal law and the rules of the FEC require that solicitations for contributions from trade associations or a corporation's restricted class, whether written or oral, include information about the PAC's political purposes and that each member has the right to refuse to contribute without reprisal from the soliciting entity. In addition,

all contributions must be voluntary and those solicited must be so informed. None of the above solicitations included the requisite information.

These are not the only disclaimer requirements. Disclaimers should also include a statement that contributions are not tax deductible, although this requirement is enforced by the IRS and not the FEC. Further, if contribution guidelines are suggested, then an additional disclaimer must be included. This disclaimer must state that all guidelines are suggestions, that a contributor is free to contribute more or less than the suggested amount, and that the employer will not favor or disfavor the individual based on the contribution amount or a decision not to contribute. ■

FEC Admonishes PAC Regarding Pictures from Candidate's Website

By D. Mark Renaud and Andrew G. Woodson

In an April 11 press release, the Federal Election Commission announced that, while it had dismissed complaints raised against the candidate committee for Betty Sutton and against EMILY's List, it had admonished EMILY's List with regard to in-kind contributions, reminding the political committee that in-kind contributions that exceed applicable contribution limits violate federal law.

As described in Matter Under Review (MUR) 5743, photographs

in communications by EMILY's List appeared to be similar or identical to those included on communications and the website of the candidate, Betty Sutton. Replication of pictures or other materials prepared by a candidate committee is considered a contribution. Despite the fact that EMILY's List had contributed the maximum amount to the candidate's committee for the primary election, which would mean that any additional contribution would have exceeded the contribution limit, the

FEC determined that the use of a photograph from a publicly available website with no coordination between the campaign committee and the contributing committee was of *de minimis* value. As such, the FEC elected to dismiss the complaint against EMILY's List, but not before admonishing the committee as to the ramifications of exceeding applicable contribution limits. Because the FEC found no evidence of coordination, it dismissed the matter against Ms. Sutton's campaign committee. ■

NY Changes (continued from page 1)

Senate for confirmation to become a state officer or employee, members of the legislature and legislative employees any gift (including meals, entertainment, travel, lodging, refreshments, discounts, and forbearance) having more than nominal value under circumstances in which it could reasonably be inferred that the gift was intended or expected to influence or reward the state official or employee. This, too, replaces a previous \$75 per year gift rule. Since the State Ethics Commission has issued several advisory opinions and provided other guidance with respect to the old gift law, there are some remaining questions as to the ultimate real-world reach of this new gift prohibition. The legislature, though, has given the new Commission on Public Integrity until April 1, 2008 to review the previous regulations and

advisory opinions of both the State Ethics Commission and the Lobbying Commission, address the consistency among the regulations and opinions and with the new law, and to issue new opinions as necessary.

The new law also bans honoraria for certain public officials and requires organizations registered as lobbyists to register the name of any employee engaging in lobbying for the organization or who is employed in the organization's division that engages in the lobbying activities of the organization. Further, among many other things, the new law expands the ban on contingency fees to prohibit fees received from lobbying for a state or local grant, loan, or other agreement that involves the disbursement of public monies. ■

2007 STATE LOBBYING AND GIFTS SURVEY

The Election Law & Government Ethics Practice recently completed its annual Survey of State Lobbying and Gifts Laws for each of the 50 states as well as the District of Columbia and Puerto Rico.

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Internal Controls *(continued from page 1)*

The guidance is available at http://www.fec.gov/law/policy/guidance/internal_controls_polcmtes_07.pdf. A summary of the specific recommendations follows. Please note that Wiley Rein LLP offers legal audit services to its clients to ensure political committee compliance with the campaign finance laws and regulations.

Bank Accounts

- A. Limit the number of bank accounts to those absolutely required to manage the committee's business.
 - B. All committee bank accounts should be in the name of the committee and utilize the committee's Employer Identification Number. Accounts should not be in the name of an individual or use an individual's Social Security Number.
 - C. Limit the number of persons authorized to sign checks. In addition, checks in excess of a certain dollar amount should require the signature of two responsible individuals.
 - D. Maintain careful control over debit and credit cards. Consider dollar restrictions on cards, both on a per transaction basis and a cumulative limit. Once expenditures are approved, the limit can be re-established.
 - E. Review the transactions on bank statements and reconcile the statements to the accounting records each month in a timely manner. Someone should reconcile the bank statement other than the check signers and those controlling the checking account and processing transactions.
 - F. Prior to filing each report, a reconciliation between bank and accounting records and the disclosure reports should be undertaken.
 - G. Require all wire transfers to be pre-authorized by two responsible individuals and immediately recorded in the accounting records.
 - H. Finally, investigate other control-related services that the committee's bank may be able to provide.
- Prepare a list of the money, checks, and other receipts.
 - Forward all receipts to the person responsible for preparing and making the daily bank deposits.
- C. If the committee receives contributions via debit and credit card, the same type of information described above for checks and cash should be assembled for those contributions.
 - D. Prohibit delivery of unopened business mail to employees having access to the accounting records.
 - E. Contributions that are received by committee personnel at events and in person should be subject to the same procedures as those received via mail.
 - F. Secure undeposited receipts in a locked cabinet at all times.
 - G. Cash refunds should require approval.
 - H. Locations where the physical handling of cash takes place should be reasonably safeguarded.

Receipts

- A. Make a list of receipts when the mail is opened. Ideally, the person opening the mail and preparing the list should be independent of the accounting function. A responsible official should periodically (during the monthly bank reconciliation if not more often) compare the list with the recorded amount for the deposit and the deposit amount on the bank statement.
- B. The employee responsible for opening the mail should complete the following:
 - Place restrictive endorsements, such as For Deposit Only to the Account of the Payee, on all checks received.

Disbursements

- A. Generally, disbursements should be made with pre-numbered checks, with the exception of petty cash.
- B. If a mistake is made when preparing a check, void the check before preparing a new one. The voided check should then be altered to prevent its use, retained to make sure all pre-numbered checks are accounted for, and filed with other checks for a permanent record.
- C. If possible, check signing should be the responsibility of individuals having no access to the accounting records.
- D. Draw checks according to procedures prescribing adequate supporting documentation and authorization.
- E. All supporting documents should be canceled or marked "paid" once a disbursement is made to avoid double payments.
- F. Mail all checks promptly and directly to the payee or, if they are to be delivered by committee staff, require that the person taking control of the checks signs for them. The person mailing the check should be independent of those requesting, writing, and signing it.

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UPCOMING DATES TO REMEMBER

May 15, 2007

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

May 20, 2007

May monthly IRS Form 8872 due for nonfederal PACs filing monthly*

June 20, 2007

June monthly IRS Form 8872 due for nonfederal PACs filing monthly*

May 20, 2007

May monthly FEC report due for federal PACs filing monthly

June 20, 2007

June monthly FEC report due for federal 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.*

Internal Controls *(continued from page 6)*

Petty Cash

Use an imprest petty cash fund with one custodian. The imprest fund involves replenishing petty cash only when properly approved vouchers and/or petty cash log entries are presented justifying all expenditures.

Payroll

Many non-connected committees use a payroll service for much of the payroll function. Where there are more than a few employees, a service can be a very effective way of handling payroll and maintaining a separation of duties within the payroll operation. If the committee chooses to handle payroll in-house, the signing and distribution of the checks must be properly handled to prevent their theft. The controls should include limiting the authorization for signing the checks to a responsible person who does not have access to timekeeping or the preparation of the payroll, the distribution of the payroll by someone who is not involved in the other payroll functions, and the immediate return of unclaimed checks for redeposit.

Payables

The accounts payable/notes payable procedures are clearly related to the procedures for cash disbursements and payroll. The control concern is to make certain that all liabilities are properly recorded and ultimately paid. There should be a proper segregation of duties over the performance of the functions of comparing receiving reports, purchase orders and invoices and the handling of the actual disbursement functions.

Computerized Systems

All of the same control considerations that apply to a manual transaction system apply to an automated system. In particular, separating functions so that data files are reconciled to other records by someone independent of the transaction processing and reporting functions is critical. Furthermore, electronic data must be regularly backed up to avoid a loss of data that can interfere with a committee's ability to file timely and accurate disclosure reports. ■

ABA's Section of International Law CLE Program: International Election Standards

Jan Witold Baran, Co-Moderator

This panel will discuss ways in which the Section can work to improve the rule of law globally by crafting international standards by which to judge free and fair elections. Topics will include voter and candidate eligibility, campaign practices, administration/election practices, dispute resolution, and the emerging international legal framework for elections. Recent high-profile election experiences, ranging from the setup of the historic Iraqi elections to the dispute following the Mexican Presidential election, will be highlighted.

May 2, 2007 | Washington, DC

Maintaining Compliance in Federal/State Legislative Activities Workshop

Caleb P. Burns, Speaker

ExL Pharma 2nd Annual Advocacy & Policy Forum for Pharmaceutical, Biotech and Medical Device Companies

May 14, 2007 | Washington, DC

Campaign Fundraising Laws—Compliance When Supporting Future Legislators

Caleb P. Burns, Speaker

CBI's Bio/ Pharmaceutical and Medical Device Government Affairs and Lobbying Compliance Congress: Strategies to Communicate Important Industry Values to State and Federal Legislators in a Changing Environment

July 30-31, 2007 | Washington, DC

PLI's Corporate Political Activities 2007: Complying with Campaign Finance, Lobbying & Ethics Laws

Jan Witold Baran, Co-Chair

October 4 - 5, 2007 | Washington, DC

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