Wiley Rein LLP

Election Law News

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New Lobbying and Gift Laws Signed Into Law

By Jan Witold Baran, Carol A. Laham and D. Mark Renaud

With President Bush's signature, the Honest Leadership and Open Government Act of 2007 (formerly S. 1) was enacted on September 14, 2007. Many provisions in this new law affect lobbyists, corporations, trade associations, and other organizations that employ lobbyists, and affect lobbying firms through changes in federal gift laws, lobbyist reporting requirements, and post-employment cooling-off periods, among other things. Several of the changes are effective immediately, although others don't kick in until later in 2008. The first Lobbying Disclosure Act (LDA) report under the new regime is not due until April 21, 2008, although a report under the old rules is still due on February 14, 2008. Below we highlight some of the provisions included in the new law.

Enforcement

- The new law increases civil penalties for violations of the LDA to $200,000 and adds criminal penalties.
- Under the new law, the Comptroller General is instructed to conduct random audits of LDA registrations and reports.

Gifts

- The new law directly prohibits the giving of a gift by a lobbyist or lobbyist employer that is not permissible under the applicable Congressional gift rules.
- Changes to the Senate gift rules ban gifts to Senators and Senate staff from lobbyists and entities that employ or retain lobbyists except as provided for in specific exceptions,

continued on page 6

In This Issue

Wiley Rein Reaches Settlement; Pennsylvania Campaign Finance Laws Cover Only Spending for "Express Advocacy" Communications

By Thomas W. Kirby, Caleb P. Burns and Kevin J. Plummer

Wiley Rein election lawyers and the Pennsylvania Attorney General's office have reached a settlement in a case filed on behalf of the Center for Individual Freedom. Under the terms of the stipulated judgment, signed by United States District Court Judge Anita Brody of the Eastern District of Pennsylvania on August 18, both parties have agreed that Pennsylvania campaign finance laws bar corporations from spending funds for express candidate advocacy, but do

continued on page 5

New York City Enacts Pay-to-Play and Other Restrictions

By D. Mark Renaud and Andrew G. Woodson

In early July, New York City Mayor Michael Bloomberg signed a bill (formerly Int. No. 586-A) into law making a number of changes to the city's campaign finance laws. Although a number of the provisions apply only to candidates (*e.g.*, increasing the amount of matching funds), several provisions apply directly to non-candidate individuals and entities.

Most important, the new law enacts a "pay-to-play" provision that severely restricts the ability of certain individuals and entities doing or seeking business with the city to make contributions to candidates for office as well as to transition and inaugural entities. Contributions from these covered persons and their senior management would be limited to $400 for city-wide races, $320 for borough-wide races, and $250 for City Council races, a 90% reduction over the current individual limits.

These restrictions go into effect 30 days after the Campaign Finance Board certifies that the database is up and running.

These restrictions apply to most individuals and entities that have or are bidding on city contracts, concessions, franchises, and grants aggregating to at least $100,000 over a 12-month period; land use ruling applicants; and parties to discretionary economic development agreements. To assist in monitoring these requirements, the Campaign Finance Board will develop a computerized database of all persons covered by the new restrictions.

In addition to the entities themselves, the database will contain the CEO, CFO/COO, any person employed in a senior managerial capacity, and any person with an interest in the entity that exceeds 10% of the covered entity. There are exceptions to these restrictions for contributions from the candidate and certain relatives. These restrictions go into effect 30 days after the Campaign Finance Board certifies that the database is up and running.

The new law also broadens the scope of the city's bundling provision by requiring that anyone who *solicits* contributions to a candidate or authorized committee—where such solicitation is known to the candidate or committee—be disclosed on the candidate's or committee's reports as an "intermediary." Formerly, New York City law only required disclosure of those individuals and entities that actually received and delivered the contributions. The new law contains a blanket exception for individuals who host a campaign fund raiser paid for in whole or in part by the campaign, although

continued on page 7

Alaska Amends Lobbying and Gift Laws

By Carol A. Laham and D. Mark Renaud

Pursuant to former HB 109 and effective on July 11, 2007, Alaska has amended its lobbying and gift laws in several ways. The highlights of this legislation are summarized below.

First, the gift prohibition that applies to lobbyists with respect to legislators and legislative employees is now applicable year-round and not solely during legislative sessions.

Second, lobbyists now must itemize food and drink provided to legislators and legislative employees (one of the exceptions to the gift ban) if the cost exceeds $15.

Third, lobbyists now must complete annual ethics training sessions.

Finally, a gift from a lobbyist to an executive branch official is presumed to be intended to influence the official's performance unless the donor is a member of the recipient's immediate family. ■

FEC Admonishes Corporation for Late Reimbursement

By Carol A. Laham and Kevin J. Plummer

In Matter Under Review (MUR) 5789, the Federal Election Commission admonished Bacardi U.S.A., Inc. for failing to procure advance payment for $473.28 in food and beverages served at a candidate fund raiser at the company's corporate headquarters in Miami. The Complaint in the Matter was filed by Citizens for Responsibility and Ethics in Washington (CREW) in August 2006.

According to the materials released by the FEC on August 22, 2007, the FEC considered the lack of a pre-payment for the stated amount to involve only a *de minimis* violation of the campaign finance laws (since the campaign ultimately paid the bill) and only admonished the company. The admonishment did not come, however, until the General Counsel filed an affidavit and the company filed a response as to the late payment and as to a related issue.

> Under federal law, it is impermissible for corporations to make contributions and expenditures and to facilitate the making of contributions.

The related issue involved the accusation that the company used a list of vendors to invite outside individuals to the fund raising event. The FEC found this not to be the case, however, and accepted the facts offered by the company that two employees acting as volunteers organized the events and invited personal and business contacts to the fund raiser. Bacardi also testified that it did not maintain a list of vendors. (From the FEC materials, it appears that the FEC at least briefly also looked in to whether the employees' activities were truly voluntary or whether they were part of a corporation-directed project.)

continued on page 5

Businessmen Plead Guilty to Federal Charges Stemming from Illegal Contributions Made in the Name of Another

By Jan Witold Baran and Kevin J. Plummer

According to an August 3, 2007, Department of Justice press release available at http://www.usdoj.gov/opa/pr/2007/August/07_crm_580.html, David Collier and Robert Price III, two South Carolina businessmen, pled guilty on July 31 to one count each of causing a false statement to be made to the Federal Election Commission (FEC). Press reports indicate that these charges stemmed from an FBI, rather than an FEC, investigation into election fraud concerning the Catawba tribe in South Carolina and certain business entities connected with the tribe. Collier and Price, through New River Management and Development, operated the Catawba's bingo hall. In order to garner support for a larger gaming facility, the men solicited family, friends, and business associates to make campaign contributions to federal candidates and elected officials. The contributors were later reimbursed for their contributions with money from the tribe, totaling over $65,000. Federal law prohibits the reimbursement of campaign contributions. Because the contributions actually came from the Native American tribe rather than the individuals who gave the money to the federal campaigns, those campaigns improperly, though unknowingly, reported contributions from the individuals, rather than from the tribe.

Both men, who are scheduled to be sentenced in November, face up to five years in prison, a $250,000 fine, and three years' supervised release. ■

Missouri Supreme Court Strikes Down Portions of New Campaign Finance Law

By Caleb P. Burns and Andrew G. Woodson

In a July decision resting largely on procedural issues, the Missouri Supreme Court reinstated the limits on campaign contributions to Missouri candidates that had been repealed by the legislature in 2006. As initially enacted, the bill repealed the general limits on contributions to candidates while prohibiting political parties from making any monetary contributions to candidates. With the limits restored, contributions to candidates for statewide office, state Senate, and the state House of Representatives are limited to $1,275, $650 and $325 per election, respectively.

At the time the legislation was passed, supporters argued that the measure would increase transparency in the political process by requiring candidates to identify more donors to their campaigns on their reporting forms. Under the old system, the bill's proponents argued, contributors could give large sums of money to political parties, which in turn, could make unlimited contributions to individual candidates without identifying the original donor. Opponents disagreed, criticizing the bill as overturning the results of a campaign finance measure approved by voters in the 1990s. By eliminating the candidate contribution limits, the Democratic opposition argued that politicians would now be beholden to large contributors and special interests.

As initially enacted, the bill repealed the general limits on contributions to candidates while prohibiting political parties from making any monetary contributions to candidates.

The Missouri Supreme Court's decision did not address the legal merits of the repeal, instead finding that the provision eliminating the contribution limits was inseparable from another provision held unconstitutional by a lower state court that prohibited certain candidates from accepting contributions during a legislative session. After reviewing the legislative history of the provisions in question, the court found that "the campaign contribution limits would not have been repealed without the coterminous enactment of the [legislative] black-out period."

continued on page 7

New Jersey Pay-to-Play Annual Filing Due September 28

By Carol A. Laham and D. Mark Renaud

Business entities that received $50,000 or more in contracts with governments in New Jersey (all levels) in 2006 must file with the New Jersey Election Law Enforcement Commission by September 28, 2007, an annual disclosure statement of political contributions. The information required on this report includes certain contributions made by owners of more than 10% of the business entity; principals, partners, officers, directors, and trustees of the business entity (and their spouses); subsidiaries directly or indirectly controlled by the business entity; and a continuing political committee that is directly or indirectly controlled by the business entity. Unlike several of the pay-to-play contribution prohibitions applicable in New Jersey, there is no exception from this annual reporting requirement for "fair and open" contracts.

For calendar year 2007 and subsequent years, the annual report will be due by the following March 30. For more information, see the New Jersey Election Law Enforcement Commission website at https://wwwnet1.state.nj.us/lpd/elec/ptp/Form.aspx. ■

FEC Proposes New Rules Regarding Issue Advertisements in the Wake of *Wisconsin Right to Life*

By Carol A. Laham and Andrew G. Woodson

In a notice of proposed rule making (NPRM) announced on August 23, the Federal Election Commission ("FEC" or "Commission") has put forward for public comment two separate proposals in the wake of the Supreme Court's decision in *Federal Election Commission v. Wisconsin Right to Life*. Under one option, the FEC would allow corporations and unions to pay for issue advertisements that refer to candidates but would require payments for such advertisements to be publicly disclosed. The second alternative would allow corporations and unions to pay for such issue ads without having to comply with the disclosure requirements.

Separate from the above proposals, the NPRM also seeks public comment on a number of related issues, including a proposed exemption for true business advertisements featuring a candidate for federal office (*e.g.*, "Buy your next car from Joe Smith Cadillac"). The NPRM also asks what types of ads should be covered by the grass roots lobbying exemption. To this end, the Commission has asked for comment on whether specific examples of protected grass roots lobbying communications would be helpful, and, if so, whether the language of certain advertisements drawn from prior court cases would satisfy the Commission's criteria.

The deadline for public comments on the proposed alternatives is October 1, 2007, and the Commission will listen to public testimony at a hearing scheduled for October 17, 2007. The FEC anticipates voting on a final rule by November. ■

Wiley Rein Reaches Settlement (***continued from page 1***)

not bar corporations from engaging in issue advocacy that might otherwise refer to a political candidate.

The U.S. Supreme Court's 1976 *Buckley* decision held that restrictions on spending for independent speech had to be precise, objective and narrow. The Court limited vague identification of regulated spending, such as "in connection with an election," to include only "express advocacy," which is sometimes called the "magic words" test. While the Supreme Court's 2003 *McConnell* decision allowed Congress to regulate a new category of speech because the statute's detailed definition of "electioneering communications" drew a bright line that was at least as precise and objective as the "express advocacy" standard, *McConnell* did not eliminate the "magic words" test for use in those instances where the laws in question were as vague as were found in *Buckley*.

Despite *McConnell*, many states continue to include vague standards and definitions in their campaign finance statutes. Pennsylvania, for example, defines regulated speech as including spending "in connection with the election of any candidate or for any political purpose whatsoever," or "for the purpose of influencing the outcome of an election." In those instances, the *Buckley* "magic words" test or "express advocacy" standard should still govern. The stipulated judgment that Wiley Rein reached with the Pennsylvania Attorney General's office expressly declares that Pennsylvania law will be limited to include only spending on "express advocacy" as defined in *Buckley*. ■

Late Reimbursement (***continued from page 3***)

Under federal law, it is impermissible for corporations to make contributions and expenditures and to facilitate the making of contributions. Such illegal facilitation includes, among other things, providing catering services to a candidate or committee without receiving pre-payment from the campaign or other committee (if the normal business of the corporation is not catering).

The documents related to this case, including a copy of the Complaint, can be found at http://eqs.nictusa.com/eqs/searcheqs under MUR 5789. ■

including a new exception for constituent events.

- The new law requires a lobbyist employer and its lobbyists to certify they have not provided any travel or gift to Congressional Members or staff that violates the applicable Congressional gift rules.
- Changes to relevant gift rules ban Members of Congress from attending convention events in their honor if paid for by lobbyists or entities that employ or retain lobbyists.

Lobbyist Reporting

- The new law requires **quarterly** LDA filings, beginning with the first quarter of 2008.
- Changes to the LDA require an analysis of whether in-house employees qualify as lobbyists (*i.e.*, the 20% lobbying activities threshold) over a three-month period instead of a six-month period.
- The LDA now requires lobbyist employers to list all of the past covered executive and legislative branch positions held by their listed lobbyists in the past 20 years. Currently, only the positions held in the past two years are required to be listed.
- The new law requires lobbyist employers and lobbyists to certify that they have read and are familiar with the gift and travel rules of the Senate and the House.
- One provision in the new law changes the statutory language that pertains to affiliated entities, coalitions and associations, thereby determining what entities must be disclosed on LDA registrations and reports. The former statutory language required coalitions to disclose persons who contributed over $10,000 in a semiannual period to the coalition's lobbying activities and "in whole or in major part plan[ned], supervise[d], or control[led] such lobbying activities." The new law requires disclosure of any person who contributes more than $5,000 in a calendar quarter to the lobbying activities of a coalition and "actively participates in the planning, supervision or control of such lobbying activities."
- Congress added additional **semiannual** reporting of lobbyist employer and lobbyist activity (including a corporation's PAC) with respect to the following:
  - Contributions to federal candidates or officeholders, leadership PACs, and political party committees;
  - Events to honor covered officials;
  - Payments to an entity named for a covered legislative branch official;
  - Payments to an entity established, financed, maintained, or controlled by a covered official;
  - Certain meetings, retreat, conferences, and other events for covered officials; and
  - Donations to Presidential libraries and inaugural committees.

Restrictions on Lobbying

- Rule changes prohibit "lobbying contacts" by a Senator's spouse or immediate family member with the personal, committee, or leadership staff of that Senator if the spouse or immediate family member is a registered lobbyist or retained or employed by an entity that employs or retains lobbyists.
- House rule changes prohibit "lobbying contacts" by the spouse of a Member of the House with the personal, committee, or leadership staff of that Member if the spouse is a registered lobbyist or employed or retained by a lobbyist for the purpose of influencing legislation.
- Statutory and rule changes increase to two years the post-employment cooling-off period for very senior executive branch personnel and Senators.
- Statutory and rule changes also expand the post-employment cooling-off period for Senate officers and highly paid Senate staff to encompass contacts with the entire Senate.
- The House prohibits an entity whose employee or member is a party to a consultant contract with the House of Representatives from lobbying the contracting committee or Members or staff of the contracting committee on

continued on page 7

New York City Enactment

(*continued from page 2*)

non-campaign sponsored events must designate one individual host as the intermediary.

Among a number of other minor changes, the new law extends the ban on corporate contributions to include Limited Liability Companies (LLCs), Limited Liability Partnerships, and other forms of non-incorporated businesses. The law specifically notes that a contribution from an individual whose name is followed by a professional designation (*e.g.*, "M.D.," "Esq.," "C.P.A.," etc.) will not be treated as a prohibited corporate contribution absent specific evidence to the contrary. ■

Missouri Supreme Court

(*continued from page 4*)

Accordingly, despite the inclusion of a severability clause in the legislation, a unanimous state supreme court found that both provisions must be struck down.

With the new law invalidated and the contribution limits restored, the Missouri Supreme Court now must consider whether contributions already received by the candidates in excess of the current contribution limits must be returned. The court has not set a firm timetable for its decision, although briefs on this issue were filed with the court in early August. ■

New Federal Lobbying and Gift Laws

(*continued from page 6*)

any topic during the term of the contract.

Political Activities

- Changes to the Federal Election Campaign Act (FECA) prohibit House candidates and the leadership PACs of House candidates from using private aircraft for campaign travel, with an exception for aircraft owned or leased by a candidate or his or her immediate family.
- Other changes to the FECA require Presidential and Senate candidates to pay the pro rata share of the normal charter or rental charge for the use of a private aircraft.

Travel

- Changes to the Senate's gift rules limit travel for Senators and Senate staff that is paid for by a lobbyist client. Trips sponsored by 501(c)(3) organizations would not be limited to one day. (Note that the House adopted a similar travel rule in January.)
- Changes to the Senate rules ban the acceptance of free travel on private aircraft for officially connected travel. ■

Upcoming Dates to Remember

September 20, 2007	September monthly FEC report due for federal PACs filing monthly
	September monthly IRS Form 8872 due for nonfederal PACs filing monthly*
October 15, 2007	Third-quarter FEC report due from candidates
October 20, 2007	October monthly FEC report due for federal PACs filing monthly
	October 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.*

Upcoming Events

Pay to Play: Contractors and Contributions

D. Mark Renaud, Panelist
2007 Council on Governmental Ethics Law Conference
September 17, 2007 | Victoria, British Columbia

Election Law and Fundraising

Jan Witold Baran, Panelist
Conference on Running for Office sponsored by the ABA Commission on Racial and Ethnic Diversity in the Profession and The Charles Hamilton Houston Institute for Race and Justice at the Harvard Law School
October 3, 2007 | Cambridge, MA

Complying with Campaign Finance, Lobbying & Ethics Laws

Jan Witold Baran, Co-Chair
Caleb P. Burns, Speaker
Practicing Law Institute (PLI)
Corporate Political Activities 2007
October 4-5, 2007 | Washington, DC

Compliance with the New Federal Lobbying and Gift Law

Jan Witold Baran, Speaker
The Business-Government Relations Council (BGRC)
October 19, 2007 | White Sulfur Springs, WV

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