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ELECTION LAW *NEWS*

Developments in All Aspects of Political Law | January 2018

FEC Concludes Certain Facebook Ads Require Disclaimers; Rulemaking on Disclaimers Close at Hand

By Jan Witold Baran and Eric Wang

The Federal Election Commission (FEC) recently concluded in an advisory opinion that certain paid Facebook ads are required to include disclaimers under the campaign finance laws and regulations. Although the opinion addressed a relatively narrow set of circumstances, it should serve as a reminder to online political advertisers that their activities may trigger reporting and disclaimer requirements under federal and state laws.

The FEC opinion was requested by Take Back Action Fund (TBAF), a Section 501(c)(4) nonprofit advocacy group, which was represented by counsel at the Campaign Legal Center. Both organizations advocate for stricter campaign finance laws, and the request was an apparent attempt to spur the FEC to regulate online political activity more broadly. Perhaps

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ALSO IN THIS ISSUE

A Tale of Two Cities: Mayors Veto Pay-to-Play Ordinances, But Are Then Overridden by City Councils

By D. Mark Renaud and Ken Daines

After Mayor Tom Henry vetoed a recent Fort Wayne, Indiana pay-to-play ordinance, the City Council on December 12, 2017 voted by a 6-3 margin to override his veto, thus reinstating the ordinance. Designed to avoid the appearance of impropriety and cronyism in city government, the ordinance bars businesses that contribute over $2,000 per calendar year to elected city officials from bidding on city contracts. Included are donations to local officials' campaigns from so-called "key employers," or those individuals owning

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Illinois Implements New Sexual Harassment Policy and Training Requirements

By Carol A. Laham and Louisa Brooks

As we reported in December, as of January 1, 2018, the Illinois Lobbyist Registration Act requires registered lobbyist employers to adopt a written sexual harassment policy and requires individual lobbyists to undergo sexual harassment training within 30 days following registration. To comply with the law, an organization's sexual harassment policy must contain the following:

- A prohibition on sexual harassment;
- Details on how an individual can report an allegation of sexual harassment, including options for making a confidential report;
- A prohibition on retaliation for reporting sexual harassment allegations, including specific whistleblower protections provided by Illinois state law; and
- The consequences of a violation of the prohibition on sexual harassment, and the consequences for knowingly making a false report.

25 Ill. Comp. Stat. 170/4.7(c). In late December, the Illinois Secretary of State's Office published an emergency rulemaking implementing these changes to the Lobbyist Registration Act. The emergency regulations largely mimic the language in the statute, incorporating the policy and training requirements into the administrative code. New material in the regulations includes the compliance certification language that lobbyist employers will be required to confirm. The certification that appears on the 2018 registration form reads as follows:

"Submission of this registration certifies, under penalties pursuant to Section 1-109 of the Code of Civil Procedure, that the registrant is in compliance with the sexual harassment provisions of the Lobbyist Registration Act (25 ILCS 170) and acknowledges that the registrant, at a minimum:

- Has a sexual harassment policy as required by Section 4.7(c) of the Act on the prevention, prohibition and investigation of sexual harassment and retaliation, to include how an individual can report allegations; consequences for violations of the prohibition on sexual harassment or retaliation; availability of whistleblower protections; and the consequences of filing a false report;
- Provide all employees required to register as a lobbyist with a copy of the sexual harassment policy and secure an acknowledgment of receipt;
- Shall inform each employee registered as a lobbyist of his or her requirement to complete the anti-sexual harassment training, provided by the Secretary of State, within 30 days of the employee's registration;
- Shall provide a copy of the sexual harassment policy, within 2 business days, to any individual who has made a written request;
- Has procedures for the registrant and authorized agent to receive allegations of sexual harassment including options for where a report may be filed;
- Has a prohibition on retaliation for reporting sexual harassment allegations, including availability of whistleblower protections;
- Acknowledges that the Inspector General of the Secretary of State has jurisdiction to review allegations of sexual harassment;

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Strict New DOD Revolving Door Prohibitions Effective Now

By Caleb P. Burns and Robert L. Walker

Section 1045 of the National Defense Authorization Act for Fiscal Year 2018 – signed into law as Public Law 115-91 on December 12, 2017 – imposes a so far little-known broad new set of post-government employment prohibitions on "lobbying activities" with respect to the U.S. Department of Defense (DOD) by certain former senior civilian officials of the DOD and officers of the U.S. Armed Forces. The scope of the post-employment restrictions imposed by Section 1045 on senior DOD and military personnel is broader – as to activities prohibited and the range of officials (both within and outside DOD) who may not be contacted – than the scope of restrictions already imposed by, for example, Title 18 U.S.C. Section 207(c), the criminal statute prohibiting certain former senior Executive branch officials, for one year after leaving office, from contacting their former employing office with the intent to influence. Significantly, Section 1045 does not contain any provisions for enforcement or sanctions. Nonetheless, whether violations of Section 1045 by covered former senior DOD civilian or military personnel could have suspension, debarment, or other consequences for an employing government contractor remains a significant open question.

Section 1045 imposes two tiers of post-employment restrictions, depending on the rank or seniority of the covered former DOD military or civilian personnel. For military officers in grade O-9 (Lieutenant General or Vice Admiral) or higher who retire or separate from service on or after the effective date of the statute (December 12, 2017), and for their DOD "civilian grade equivalents" who retire or separate on or after this date, Section 1045 imposes a two-year prohibition on "lobbying activities with respect to the Department of Defense." Citing and relying on the meaning of the term set forth in the Lobbying Disclosure Act (LDA), Section 1045 defines "lobbying activities" to include both "lobbying contacts" – that, is direct communications – and "lobbying activities" – that is, any activities, including behind-the-scenes research, advising of others, or strategizing with others, intended at the time engaged in to support any direct lobbying contact, even if by another. By prohibiting such behind-the-scenes activity, Section 1045 goes beyond the scope of Section 207(c) of Title 18, under which activities taking place entirely behind the scenes are permitted.

Under Section 1045, lobbying contacts and lobbying activities "with respect to the Department of Defense" also appears to have a two-part meaning. First, it clearly includes such contacts and activities on DOD-related matters with respect to "covered executive branch officials" (again, as defined by the LDA) in DOD itself and such contacts and activities on DOD-related matters with "covered executive branch officials" federal government-wide. Second, the phrase "with respect to the Department of Defense" may also be intended to cover lobbying contacts (but not lobbying activities) with covered officials within DOD on any other (i.e., non-DOD-related) matters. The language of Section 1045 simply is not clear on this second point and there is no relevant legislative history.

That Section 1045 prohibits covered former military and DOD officials from engaging in lobbying contacts and activities across DOD exposes another way in which the restrictions

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Strict New DOD Revolving Door Prohibitions Effective Now *continued from page 3*

imposed by Section 1045 go beyond the scope of Section 207(c). Under the criminal law provision, a former DOD employee is prohibited only from contacting with intent to influence his or her former employing office, or component, at DOD – not, typically, all of DOD. Section 1045, however, restricts contacts with "covered executive branch officials" throughout DOD, regardless of DOD office, Military Department, or Defense Agency. And, in capturing contacts and activities with respect to any DOD matter, Section 1045 also goes beyond the scope of Title 18 U.S.C. Section 207(a)(2), which is limited to contacts with respect to particular matters involving particular parties if such matters were pending under the former employee's official responsibility during his or her last year before leaving government service.

The second tier of restrictions set forth by Section 1045 covers military officers at grades O-7 (Brigadier General or Rear Admiral (lower half)) and O-8 (Major General or Rear Admiral (upper half)) at the time of their retirement or separation, and their "civilian grade equivalents." The restrictions imposed on these less-senior officers and civilian DOD officials apply only for one year after government service, but are otherwise identical in scope to the two-year restrictions described above.

What are the "civilian grade equivalents" of the specific military ranks covered by the provisions of Section 1045? Section 1045 itself does not define or describe this category, nor does there appear to be any other existing source explaining what this category is intended to include. The DOD Standards of Conduct Office, however, is expected to release shortly a summary of Section 1045 and a set of Q&As which, among other essential guidance, should clarify some of the apparent inconsistencies in the language of the new statute and detail the categories of senior civilian DOD employees subject to this new – and complicating – layer of post-government employment prohibitions. ■

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Illinois Implements New Sexual Harassment Policy and Training Requirements *continued from page 2*

- Acknowledges that violations with regard to sexual harassment are subject to the jurisdiction of the Executive Ethics Commission and are subject to the penalties of the State Officials and Employees Ethics Act (5 ILCS 430).

Acknowledging the points of this certification is not a substitute for being aware of all the provisions within the Lobbyist Registration Act on sexual harassment policy, and other requirements of the Act."

We continue to monitor these developments in Illinois and are available to answer any questions. ■

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because of the recent revelations of Russian attempts to interfere with the 2016 elections through Facebook ads (among other media), TBAF's request represented that it intended to sponsor Facebook ads expressly advocating the defeat of certain federal candidates.

Under the federal campaign finance law, anyone who pays for ads that expressly advocate the election or defeat of a federal candidate must include a disclaimer. (Federal political action committees (PAC) also are required to include disclaimers on most of their public communications.) If an express advocacy ad is made independently of a candidate or political party, reporting requirements for "independent expenditures" also will apply if more than $250 is spent in a calendar year.

At issue in the TBAF advisory opinion are the FEC's "small items" and "impracticability" exemptions to the disclaimer requirements. Written in the pre-Internet era, these exemptions apply to a non-exhaustive list of items such as bumper stickers, pins, buttons, pens, skywriting, water towers, and wearing apparel. The exemptions are important because the requisite disclaimer must be displayed in a clear and conspicuous manner and can be quite lengthy, especially for independent non-PAC entities that have to include more information in their disclaimers.

In the digital era, the FEC concluded in 2002 that political ads in the form of text messages (SMS) were exempt as "small items." However, the FEC struggled as digital technology progressed. In 2010, the FEC narrowly concluded that character-limited Google "AdWords" did not have to contain disclaimers on the face of the ads if the ads contained a "click-through" hyperlink to a "landing page" that displayed the required disclaimer. In 2011 and 2013, the FEC failed to issue any opinions as to whether Facebook and mobile ads could be exempt altogether from the disclaimer requirements.

Against this backdrop, the latest request from TBAF focused specifically on Facebook "Image" and "Video" ads. Both of the alternative analyses supported by the FEC commissioners noted that: (1) these ads may cover the full screen of a mobile device and take up several inches in width and height on standard desktop monitors, and a video ad may run for up to 240 minutes; and (2) there are no limits on the number of text characters that appear above and below image ads, and text also may be embedded within the images and videos. In addition, while an excess of embedded text may result in Facebook reducing delivery of these ads to users or truncation of text, this does not affect any applicable "legal text."

All of the FEC commissioners agreed that the disclaimer requirement would apply under these circumstances. However, three of the commissioners endorsed a narrow analysis emphasizing that their conclusion was based on the fact that TBAF did not represent that the "small items" or "impracticability" exemptions applied here. The other two commissioners endorsed a broader analysis expressly concluding that neither exemptions applied here given the unrestrictive digital media at issue. Both groups of commissioners also noted the distinction between the much larger Facebook ads at

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issue in the latest request and the much smaller ads at issue in Facebook's 2011 request, in which the company proposed to exempt its ads under the "small items" and "impracticability" exceptions.

Given the very specific forms of online ads at issue in the TBAF opinion, it is not possible to conclude whether other forms of digital ads with more space or length constraints may nonetheless qualify for one of the disclaimer exemptions. The TBAF opinion also does not address the related issue of the FEC's "Internet exemption," under which most forms of unpaid Internet communications are exempt from any applicable disclaimer and reporting requirements. Under this exemption, the FEC has struggled to agree on whether unpaid YouTube videos or social media profile pages, for example, are regulated.

The FEC's general counsel's office is currently drafting a notice of proposed rulemaking (NPRM) which will attempt to more broadly address the disclaimer requirement for paid Internet and digital advertising. How the agency ultimately comes down on many of these unresolved issues remains to be seen, and may depend on public comments and testimony in response to the NPRM once it is released.

It is also important to note that online political communications in connection with state and local candidates and ballot measures are governed by state (and in some cases local) law. Many states' laws may address reporting and disclaimer requirements for online activity differently from how federal law handles these issues. In addition, various bills have been introduced in Congress and state legislatures that would further regulate digital political communications.

Wiley Rein's Election Law Group continuously monitors legislative and regulatory agency developments at the federal and state levels affecting Internet political activity. We assist clients interested in submitting public comments or testifying at hearings on these issues, as well as complying with the existing laws and regulations that apply to digital media. ■

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FINRA's Capital Acquisition Broker Pay-to-Play Rules Now Effective

By Michael E. Toner and D. Mark Renaud

Aiming to ensure that there is no path to investments or financial advisory business from state or local agencies or retirement funds without a ban on certain political activities, the Financial Industry Regulatory Authority (FINRA) recently extended pay-to-play restrictions to Capital Acquisition Brokers (CABs) if they solicit such state or local government business.

The U.S. Securities and Exchange Commission (SEC) approved FINRA's CAB Rule 203 (Engaging in Distribution and The U.S. Securities and Exchange Commission (SEC) approved FINRA's CAB Rule 203 (Engaging in Distribution and Solicitation Activities with Government Entities) and CAB Rule 458 (Books and Records Requirements for Government Distribution and Solicitation Activities), which **became effective** on December 6, 2017.

FINRA has **explained** that this rule change subjects CABs to the same pay-to-play rules as non-CAB member firms, making them "regulated persons." CABs thus now join a long list of persons in the financial services industry subject to pay-to-play rules, including investment advisers, municipal advisors, broker-dealers, swap dealers, security-based swap dealers, registered reps, and investment advisor representatives. The federal rules overlap with state pay-to-play rules in 20-plus states, and local rules in scores of jurisdictions around the country. ■

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Use Caution on Classic FEC Website

By Karen E. Trainer

Although the Federal Election Commission (FEC) transitioned to a new website several months ago, the FEC's old website is currently available at classic.fec.gov. Many persons involved with political action committees (PACs) and other aspects of campaign finance law continue to use the classic website, given difficulties with the user interface for much of the new website. Please be aware, however, that not all portions of the classic website are being updated. Before relying on information on the classic website, be sure to confirm whether the information is current. Most pages on the classic website include a note at the top indicating whether the page is being updated. For example, as of publication, the individual contributor search page on the classic website notes, "This page is being maintained by the FEC and contains the most up-to-date information." However, the main regulations page notes, "This page is no longer being updated by the FEC and may contain outdated information."

If it is unclear whether information on the classic website is current, please contact us for assistance. ■

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over 7.5 percent of a given company, which will count toward that firm's $2,000 ceiling. Contributions from key employers' spouses and children will likewise be counted as contributions from their respective firms.

In a letter explaining his veto to the council, Mayor Henry noted that while he agreed with the council's "admirable" intent, he had several concerns with the ordinance, including that it 1) violates a provision in Indiana's Home Rule Act that local governments have no regulatory power over campaign finance; 2) violates state law because local governments cannot regulate conduct that has been assigned by the Indiana General Assembly to other units and agencies of the state government; and 3) violates both the Indiana and federal constitutions. Instead, he proposed returning the bill to the City Council to make the appropriate adjustments that would avoid likely legal challenges while also making the campaign contribution process more transparent through stricter disclosure requirements.

The council was unpersuaded, however. According to The Journal Gazette, ordinance proponents argued that the measure is necessary to help restore citizens' faith in the government contracting process, especially given the negative publicity that can ensue when large contributors receive lucrative contracts to be city vendors. Proponents also argued that it does not actually impair free speech or limit how much any donor can give to an elected city official's campaign, but rather simply limits the city's ability to contract with certain large contributors. One of the ordinance's sponsors on the council further observed, "Our ordinance is not perfect and cannot stop all money influence in government. But it will help . . . . The alternative is to throw up our hands, saying we cannot do anything" because "it might not be legal and it's not perfect . . . . But seeing a problem and not trying to do your best to fix what you can by declaring it hopeless is just a form of cowardice."

Separately, on the West Coast, a similar ordinance was recently vetoed by the mayor of Spokane, Washington – and the veto was then overridden by the Spokane City Council on January 8, 2018. The ordinance prohibits any company with more than $50,000 in contracts with the City of Spokane from contributing to local campaigns, while also imposing new reporting requirements and lowering the maximum campaign contribution limit to half of what the State of Washington currently allows. In explaining his veto to the Inlander, Mayor David Condon asserted that the ordinance violated free speech because it imposes contribution restrictions on city contractors but not on city unions, and that campaign finance restrictions should be handled at the state level.

The same six city council members who initially voted in favor of the ordinance then voted to override the veto, clearing the necessary five-vote hurdle to reinstate the ordinance without Mayor Condon's backing. ■

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FEC, IRS, and Lobbying Disclosure Filing Dates for 2018

Monthly FEC Filing Dates for PACs

1/31/18	2017 Year-End Report	8/20/18	August Report
2/20/18	February Report	9/20/18	September Report
3/20/18	March Report	10/20/18	October Report
4/20/18	April Report	10/25/18	12-Day Pre-General Election Report
5/20/18	May Report	12/06/18	30-Day Post-General Report
6/20/18	June Report	1/31/19	2018 Year-End Report
7/20/18	July Report		

Note: Filing dates that fall on a weekend or holiday are not extended to the next business day. Paper filers must submit their reports on the previous business day. In addition, reports must be received by these filing dates. Only reports sent by registered or certified mail may be postmarked by the filing date, and reports sent by overnight mail must be received by the delivery service by the filing date.

Additional information on FEC reporting is available at https://www.fec.gov/help-candidates-and-committees/dates-and-deadlines.

Monthly IRS Filing Dates

1/31/18	2017 Year-End Form 8872	7/20/18	July Form 8872
2/20/18	February Form 8872	8/20/18	August Form 8872
3/15/18	Form 1120-POL[1]	9/20/18	September Form 8872
3/20/18	March Form 8872	10/20/18	October Form 8872
4/20/18	April Form 8872	10/25/18	12-Day Pre-General Form 8872
5/15/18	Form 990[2]	12/06/18	30-Day Post-General Form 8872
5/20/18	May Form 8872	1/31/19	2018 Year-End Form 8872
6/20/18	June Form 8872		

Note: Federal PACs and most state PACs are not required to file Form 8872.
[1] For political organizations that account on a calendar-year basis.
[2] Need not be filed by Federal PACs registered with the FEC.

Additional information on IRS reporting, including semi-annual/quarterly reporting dates, is available at https://www.irs.gov/charities-non-profits/political-organizations/periodic-reports-form-8872.

Semiannual/Quarterly FEC Filing Dates for PACs

01/31/18	2017 Year-End Report	10/25/18	12-Day Pre-General Election Report
04/15/18	First Quarter Report	12/06/18	30-Day Post-General Election Report
07/15/18	Second Quarter Report	01/31/19	2018 Year-End Report
10/15/18	Third Quarter Report		

Note: A PAC that is a semiannual/quarterly filer and makes contributions in connection with special elections or primary elections will have additional reports due. The 12-Day Pre-General Election Report is only required if a PAC makes contributions or expenditures in connection with the general election during the reporting period. Filing dates that fall on a weekend or holiday are not extended to the next business day. Paper filers must submit their reports on the previous business day. In addition, reports must be received by these filing dates. Only reports sent by registered or certified mail may be postmarked by the filing date, and reports sent by overnight mail must be received by the delivery service by the filing date. Additional information on FEC reporting is available at www.fec.gov/info/report_dates.shtml.

Quarterly U.S. House of Representatives and U.S. Senate Candidate Committee Filing Dates

01/31/18	2017 Year-End Report	10/25/18	12-Day Pre-General Election Report
04/15/18	First Quarter Report	12/06/18	30-Day Post-General Election Report
07/15/18	Second Quarter Report	01/31/19	2018 Year-End Report
10/15/18	Third Quarter Report		

Note: Campaigns for a candidate participating in a primary, special, or runoff election are subject to additional pre-election reporting requirements. Campaigns for candidates that are not participating in the 2018 general election are not required to file pre- and post-general reports. Filing dates that fall on a weekend or holiday are not extended to the next business day. Paper filers must submit their reports on the previous business day. In addition, reports must be received by these filing dates. Only reports sent by registered or certified mail may be postmarked by the filing date, and reports sent by overnight mail must be received by the delivery service by the filing date. Additional information on FEC reporting is available at https://www.fec.gov/help-candidates-and-committees/dates-and-deadlines.

Lobbying Disclosure Act Filing Dates

01/22/18[1]	2017 Fourth Quarter Activity Report (LD-2) covering October 1-December 31, 2017
01/30/18	Second Semiannual § 203 Contribution Report (LD-203) covering July 1-December 31, 2017
04/20/18	First Quarterly Activity Report (LD-2) covering January 1-March 31, 2018
07/20/18	Second Quarterly Activity Report (LD-2) covering April 1-June 30, 2018
07/30/18	First Semiannual § 203 Contribution Report (LD-203) covering January 1-June 30, 2018
10/22/18[1]	Third Quarterly Activity Report (LD-2) covering July 1-September 30, 2018
01/22/19[1]	Fourth Quarterly Activity Report covering (LD-2) October 1-December 31, 2018
01/30/19	Second Semiannual § 203 Contribution Report (LD-203) covering July 1-December 31, 2018

Note: When the due date falls on a weekend or holiday, it is extended to the next business day. Additional information on Lobbying Disclosure Act reporting is available online at http://lobbyingdisclosure.house.gov/ and http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm.

[1]Due date extended to the next business day.

Our Election Law & Government Ethics Practice is Pleased to Announce Our Newest Partner

Wiley Rein is pleased to announce the promotion of a new partner—Brandis L. Zehr—effective January 1, 2018. We congratulate her on this well-deserved accomplishment and applaud the dedication she has shown to her clients and the firm.

Brandis L. Zehr

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Brandis L. Zehr promoted from associate, is a member of the Election Law & Government Ethics Practice. Brandi advises candidates, officeholders, political parties, PACs, corporations, trade associations, and non-profit organizations on compliance with all aspects of law concerning the political process, including state and federal campaign finance, ethics, lobbying, pay-to-play and non-profit tax laws. Brandi previously served as counsel to Commissioner Lee E.Goodman at the Federal Election Commission and deputy general counsel of Governor Jeb Bush's presidential campaign. She received her J.D. from William & Mary Law School, where she served as senior articles editor for the *William & Mary Bill of Rights Journal*. She received her B.A. from the College of William & Mary.

Events & Speeches

Lobbying Compliance for Government Contractors: the FAR, Byrd Amendment, Form LLL & More

D. Mark Renaud, Speaker

George E. Petel, Speaker

Wiley Rein Webinar

February 8, 2018 | Webinar

Compliance for Association Programs

Michael E. Toner, Speaker

Public Affairs Council 2018 National PAC Conference

March 5, 2018 | Miami, FL

The Lawyer is In: Legal Advice and Guidance for Your PAC

Michael E. Toner, Panelist

Carol A. Laham, Panelist

Public Affairs Council 2018 National PAC Conference

March 5, 2018 | Miami, FL

Women Who Lead: Navigating Challenges, Setbacks and Success to Elevate Your Career

Carol A. Laham, Speaker

Public Affairs Council 2018 National PAC Conference

March 7, 2018 | Miami, FL

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**Not admitted to the DC bar. Supervised by the principals of the firm.*