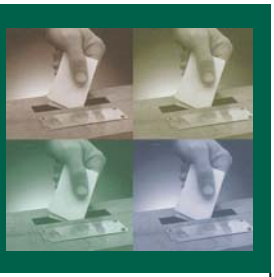
November 2003

Election Law News

A Publication of the WRF Election Law Practice Group



Payroll Deduction for Trade Association PACS?

The Federal Election Commission (FEC) approved on October 16, 2003, a Notice of Availability in relation to a petition by America's Community Bankers and its separate segregated fund, COMPAC. America's Community Bankers' Petition for Rulemaking asks the FEC to revise its regulations at 11 CFR 114.8(e)(3) and specifically permit, rather than prohibit, the use of payroll deductions by a member corporation of a trade association in order to collect contributions from the corporation's restricted class for the trade association's separate segregated fund. The Petition is based upon (1) the fact that the current FEC prohibition is not mandated by federal statute; (2) the growing popularity, low cost and ease of use of payroll deduction plans; and (3) the fact that BCRA emphasizes separate segregated funds and takes away other types of corporate activities.

The Notice of Availability provides interested persons with 30 days from the publication of the Notice in the Federal Register in which to comment on the Petition for Rulemaking. The comment period closes on November 24, 2003. Only after the close of the comment period will the FEC act on the merits of the Petition.

The Notice of Availability can be found at **www.fec.gov/pdf/nprm/payroll_deduction_trade_ssf/fr68n206p60887.pdf**. The Petition can be found at **www.fec.gov/pdf/nprm/payroll_deduction_trade_ssf/orig_petition.pdf**. ✦

For more information, contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or D. Mark Renaud (202.719.7405 or mrenaud@wrf.com).

New FCC Fax Rule Update

The Federal Communications Commission has clarified that until January 1, 2005, entities, including political committees, may send unsolicited fax advertising messages to those with whom they have an "established business relationship" (EBR), regardless of the expiration date for such relationships under the FCC's rules. An EBR usually expires eighteen months after a customer's last payment or transaction, or three months after an individual's last inquiry or application. In the context of unsolicited faxes, these EBR time limits will not apply, at least not until January 1, 2005.

Since 1992, the FCC has banned faxing "unsolicited ads," defined broadly to cover any material advertising the commercial availability or quality of any property, goods or services. The FCC's ban on fax ads applies regardless of whether the sender or recipient of a fax is an individual, business, or non-profit organization.

Exceptions to the general ban are currently in flux. Since the mid-1990s, the rule against unsolicited ad faxes included two exceptions which allowed businesses to send faxes to recipients: (1) with whom they had an EBR; or (2) from whom they have received a "prior express invitation or permission." In July 2003, the FCC decided to alter the EBR exception and raise the bar on the consent exception. Under a new rule, a fax recipient would have to agree explicitly to receive ad faxes by signing a written permission form and disclosing the fax number to be called. FCC staff made public comments indicating that these requirements could apply to political

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Also in This Issue

Three FEC Commissioners Support Broad Interpretation of "Media Exemption"

Three Federal Election Commission (FEC) Commissioners recently issued a non-binding opinion of importance for any corporation or business association that regularly publishes a magazine or newsletter.

On August 12, the FEC voted in MUR 5315 to dismiss a complaint filed against Wal-Mart Stores, Inc. The complaint had alleged that Sam's Club's *Source* magazine promoted North Carolina Senate candidate Elizabeth Dole in its September 2002 issue. *Source* was mailed nationally to Sam's Club members, including nearly 200,000 in North Carolina. The magazine also was distributed to Sam's Club stores in North Carolina.

The Federal Election Campaign Act's contribution and expenditure limitations do not apply to "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." (2 U.S.C. § 431(9)(B)(i)) Historically the FEC applied this "media exemption" to conventional media and press organizations. However, on one prior occasion the FEC interpreted the media exemption to include political commentary by a business corporation that published a *bona fide* magazine. In that case Northwest Airlines published the *World Traveler* and featured profiles of congressional candidates in the in-flight magazine. (FEC MUR 3607)

Although the complaint was dismissed on the basis of the FEC's enforcement priority system, Commissioners Michael Toner, Bradley Smith and David Mason issued a statement of reasons expressing the opinion that Sam's Club's *Source* magazine qualifies for the "media exemption." They reasoned that there is "no justification for a narrower application of the exemption grounded in a notion that some publishers are *bona fide* while others are not." They concluded that the "Commission should declare that a story—no matter how complimentary, critical, or 'political' and without reference to motive, intent, or publisher's viability—published in a periodical, is protected by the press exemption."

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Large FEC Fines for Corporate Contributions in the Name of Another

During the past year, the FEC has assessed civil penalties of over $1.3 million in two separate compliance cases for reimbursement of contributions to federal candidates and committees. Such reimbursements, either by a corporation or by another individual, violate the federal statutory prohibition contained in 2 U.S.C. § 441f. Corporate contributions are also prohibited. 2 U.S.C. § 441b. These two cases serve to remind corporations and other organizations of the potential liability associated with employees (renegade or not) using corporate and personal funds to reimburse others or themselves for political contributions.

In MUR 4931, the Commission entered into conciliation agreements with Audiovox Corporation, one of its executive vice presidents, other executives and several of its distributors, for aggregate civil penalties of $849,000. In the case, individual contributions to federal candidates were reimbursed by Audiovox, its subsidiaries, the executive vice president, and others (including reimbursements out of petty cash). Among the various settlements, the Audiovox executive vice president agreed to a personal civil penalty of $130,000.

In MUR 5187, the Commission assessed civil penalties of $477,000 in the aggregate against Mattel, Inc., one of its former senior vice presidents and a former consultant. The two individuals agreed in conciliation agreements to personal civil penalties of $188,000 and $195,000, respectively. In this case, the reimbursements were concealed by the employee from Mattel. Nevertheless, the source of the funds was the corporation itself, and Mattel ended up paying substantial civil penalties. According to the FEC, the corporation and individuals also faced substantial fines from California's Fair Political Practice Commission and the Los Angeles Ethics Commission arising from the same or similar facts. ✦

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Practical Tip

Public Inspection of IRS Documents

Even with the pared back IRS reporting requirements that PACs face today,[1] political organizations must keep in mind the IRS inspection and copying requirements applicable to those IRS forms they actually file. Below, from IRS Revenue Ruling 2003-49 (May 19, 2003) and related IRS documents, is a summary of the public disclosure requirements, which apply even though IRS Forms 8871, 8872 and 990 filed by political organizations are available on the IRS website. There are $20 per-day fines for failure to comply with these rules.

1. Political organizations must make a copy of their IRS Forms 8871 and 8872, if applicable, available for public inspection at their principal office (and other offices with at least three paid full-time employees) during regular business hours.

2. Political organizations must make copies of their entire IRS Forms 990 publicly available in the same way for three years from the date of the return.

3. Political organizations are ***not*** required to make IRS Forms 1120-POL publicly available.

For Forms 8871, 8872 and 990, if an organization does not maintain a permanent office and it receives a request for inspection, the political organization may, within 2 weeks, either (1) make the documents available for inspection at a reasonable location of the organization's choice or (2) mail the requestor a copy.

If a political organization receives a request for copies of any of these forms (as opposed to requests for inspection), the political organization may simply provide the requestor with the website address (such as the IRS website) where the returns are available. (Please note that the IRS may not have three years' worth of IRS Forms 990 on its website for a given political organization.) Otherwise, the political organization must provide the requestor with a copy and can charge nominal copying fees and postage. ✦

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(Footnote)

[1] All federal PACs and those state or nonfederal PACs expecting gross receipts of less than $25,000 per year are not required to file Forms 8871, 8872, or 990 with the IRS. State PACs that file reports with a state that makes the reports publicly available, thereby achieving "qualified state and local political organization" (QSLPO) status, need only file IRS Form 8871, *Political Organization Notice of Section 527 Status*. QSLPOs need not file IRS Forms 8872, *Political Organization Report of Contributions and Expenditures*, but they must amend Form 8871 within 30 days of any material change of information on Form 8871. QSLPOs only file IRS Form 990, Return of Organizations Exempt from Income Tax, if they have gross receipts of $100,000 or more. All political organizations, including federal PACs and QSLPOs, must file IRS Form 1120-POL, *U.S. Income Tax Return for Certain Political Organizations*, if they have earned income in excess of $100 in a tax year.

Recent FEC Opinions

Without any guidance as of yet from the Supreme Court, the Federal Election Commission (FEC or Commission) continues to work its way through advisory opinion requests in order to clarify the meaning of the Bipartisan Campaign Reform Act of 2002 (BCRA). Two of the FEC's recent Advisory Opinions are discussed below.

Senator in State Candidate's Ad

In FEC Advisory Opinion 2003-25, the FEC, after reviewing the advertisement in question, allowed Senator Evan Bayh to appear in a television ad and to endorse a candidate for mayor of Evansville, Indiana. The Commission found that the advertisement did not "promote, support, attack, or oppose" any federal candidate and, therefore, could be made with nonfederal funds. The Commission also found that the ad was not an in-kind contribution to Senator Bayh because the ad did not amount to a coordinated communication under the Commission's post-BCRA regulations.

Trade Association PAC Fundraising

In Advisory Opinion 2003-22 issued to the American Banker's Association, the FEC stated that executives of member corporations could collect and forward contributions to the trade association's PAC as long as the procedures regarding trade association solicitations were observed. The Commission found that the collecting and forwarding of these trade association PAC checks did not amount to illegal corporate "facilitation" of contributions. ✦

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Georgia Governor Issues EO on Procurement Lobbying

On October 1, 2003, Governor Sonny Perdue of Georgia issued an Executive Order that mandates lobbyist registration and reporting of those persons who attempt to influence public employees and state agencies in the selection of a vendor to supply goods or services. The new rules are particularly important given that vendors and prospective vendors now must certify in their responses to the RFPs, bids, etc. that their lobbyists and employees have filed the required lobbyist registrations and reports. State agencies will decline to approve any contract with any vendor that has failed to comply with the rules contained in the Executive Order. The Executive Order, on its face, appears to be effective immediately. The Georgia State Ethics Commission now has registration forms available (colored green), although reports are not yet available. The Ethics Commission, because of jurisdiction difficulties, will not interpret the Executive Order. A description of the new rules follows below.

The new Executive Order applies to single contracts, including anticipated renewals, that exceed $50,000 in value and to situations where a person promotes or opposes contracts in a calendar year that exceed, in aggregate value, $100,000. Under the Executive Order and for these types of contracts, those persons who, for compensation, either individually or as an employee, "undertake[] to influence a public employee or state agency in the selection of a vendor to supply goods or services to any state agency" are now considered "lobbyists." In addition, natural persons who make total expenditures of more than $250 in a calendar year (excepting the lobbyist's own food, travel, and lodging and expenses for information materials) "to promote or oppose the awarding of a contract [above one of the threshold values] to a particular vendor or vendors by any state agency" are also "lobbyists."

As lobbyists, these persons must register with the Georgia State Ethics Commission and file regular reports with the Commission. Currently, lobbyists must file semiannual reports by August 5 (for the period ending July 31) and January 5 (for the period ending December 31). Ga. Code Ann. § 21-5-73.

Special forms will be developed for vendor lobbyist registration and reporting. For the vendor lobbyists, the disclosure reports must include the following:

(a) The name of the vendor or vendors by which the lobbyist is employed or retained;

(b) The contract or contracts for which the lobbyist is lobbying; and

(c) A good faith estimate of the total amount of all the income to the lobbyist from the vendor other than income for matters that are unrelated to lobbying.

Please note that these new rules are in addition to the pre-existing requirement that state vendors file reports of gifts made to public employees exceeding $250 in a calendar year. Ga. Code Ann. § 45-1-6(b). ✦

For more information, contact Carol Laham (202.719.7301 or claham@wrf.com) or D. Mark Renaud (202.719.7405 or mrenaud@wrf.com).

Recent Appointment

WRF Attorney Elected to the Board of COGEL

On September 26, 2004, **Carol A. Laham** was elected to serve on the Steering Committee of the Council on Government Ethics Laws (COGEL). COGEL is a professional organization for government agencies, organizations, and individuals with responsibilities or interests in governmental ethics, elections, campaign finance, lobby laws and freedom of information. http://www.cogel.org/

Changes in State Lobbying Laws

Indiana

The Indiana legislature passed amendments to its lobbying laws earlier this year. Effective July 1, 2003, lobbyist activity reports are due from lobbyists and employer lobbyists on May 31 and November 30 of each year (replacing the previous July 31 and January 31 reports). Senate Enrolled Act No. 280. The May 31 report covers activity from the preceding November 1 through the current April 30, and the November 30 report covers activity from May 1 through October 31. For 2003 only, the Indiana Lobby Registration Commission eliminated the July 31, 2003 report. As a result, the November 30, 2003 report will include activity from January 1, 2003 to October 31, 2003.

In addition, lobbyists making a purchase from a member of or candidate for the general assembly in excess of $100 (or in excess of $1,000 from the member's partner) or making a gift of cash or gift with a value in excess of $100 must file a Report of Legislative Gift or Purchase within seven days of the transaction. This is a change from the previous 30-day time limit. Furthermore, the lobbyist must file a copy of this report with the principal clerk of the house of representatives or the secretary of the senate, recipients which are in addition to the previously required Lobbying Commission and recipient member. Gifts aggregating in excess of $250 must be reported in the same manner.

Finally, earlier this year, the Indiana Lobby Registration Commission approved Advisory Opinion 2002-1, which addressed grass roots lobbying. In short, the Commission ruled that a corporation may send postcards to individuals, urging them to contact their state legislators and support or oppose proposed or pending legislation. Such activity, in addition to similar door-to-door and phone banking contacts, are not reportable activities. However, the sending of pre-printed postcards and the connection of a phone call to a state legislator are reportable activities that trigger lobbyist registration and reporting.

Iowa

Earlier this year, Iowa Governor Vilsack signed House File 583, which amended the state's lobbying laws effective July 1, 2003. First, lobbyist employers or clients (both executive branch and legislative) now need only file one report per year on July 1, covering the previous 12 months. Second, public officials and employees may now accept gifts of entertainment, food, and beverages at receptions to which all members of the legislature are invited and which occur during a regular session of the legislature. Within five days of the reception, however, the sponsor of such a reception must file a special report disclosing the expenses for the reception. This report must be filed with secretary of the senate, the chief clerk of the house, and the Iowa Ethics and Campaign Disclosure Board.

Maryland

By virtue of Chapter 283 of state legislation (former H.B. 191), the annual lobbyist registration fee in Maryland increased from $20 to $50 on October 1 of this year.

Montana

Two somewhat inconsistent statutes passed earlier this year by the Montana legislature (Ch. 572 (May 5, 2003) & Ch. 52 (Feb. 26, 2003)) have been harmonized through the state's annual codification process. Through these amendments, Montana has eliminated its definition of "lobbyist for hire" and expanded the definition of "lobbyist" to include all persons engaged in "lobbying." Mont. Code Ann. 5-7-102(12). However, Montana has also added a monetary threshold to the definition of "lobbyist." Now, if an individual receives total payments of less than $2,150 in the aggregate per year from one or more persons, he or she is not a lobbyist. Id. 5-7-102(12)(b)(iii). See also 5-7-103(5) (applying same threshold to the lobbyist license requirement). Furthermore, a lobbyist principal or employer is not required to file lobbying reports unless it makes payments of more than $2,150 to one or more lobbyists. Id. 5-7-208(1). This $2,150 lobbyist registration and principal reporting threshold will be adjusted for inflation after every general election by the the Commissioner for Political Practices. Id. 5-7-112. Importantly, "payment" does not include personal and necessary living expenses, nor does it include travel expenses if the principal is not otherwise required to file lobbying reports. Id. 5-7-102(13).

Ohio

As part of the budget signed by Governor Taft (House Bill 95), Ohio increased its lobbyist registration fee from $10 to $25. This change took effect on October 1, 2003. ✦

For more information, contact Carol Laham (202.719.7301 or claham@wrf.com) or D. Mark Renaud (202.719.7405 or mrenaud@wrf.com).

Update on BCRA

On September 8, 2003, the United States Supreme Court heard four hours of argument in the case of *McConnell v. FEC*, in which the Senator and some 70 other plaintiffs are challenging the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA). The case is on special statutory appeal from a special three-judge panel of the U.S. District Court for the District of Columbia.

The lower court split along various lines on the many constitutional issues presented by BCRA. In short, the District Court ruled that the 30/60-day ban on corporate issue ads ("electioneering communications") around elections was unconstitutional, but upheld the backup, and much broader, prohibition on corporate issue ads. The court also upheld some of the political party soft money restrictions as they related to speech supporting or opposing a federal candidate. Nevertheless, the District Court stayed its opinion pending the appeal to the Supreme Court.

In the Supreme Court, Ken Starr, Floyd Abrams, Bobby Burchfield, Larry Gold and Jay Sekulow argued for the plaintiffs while Solicitor General Ted Olsen, Deputy Solicitor General Paul Clement and Seth Waxman argued for the defendants and intervenors. Counsel encountered heated questioning from the Justices, but little insight could be gleaned as to the views of the Chief Justice or Justice O'Connor, both of whom are considered by the press to wield the pivotal votes in the case.

It is not known when the Supreme Court will issue a ruling in *McConnell v. FEC*. Corporations, political parties, PACs, labor unions and candidates hope that an opinion will issue before mid-December so that the regulated community will know the law of the land at least 30 days before the first Presidential caucus—in Iowa on January 19.

Wiley Rein & Fielding LLP represents Senator McConnell, as well as the Chamber of Commerce, the National Association of Manufacturers and the Associated Builders & Contractors in this case. ✦

For more information, contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or Caleb P. Burns (202.719.7451 or cburns@wrf.com).

Upcoming Events

November 14 – 1:00 to 5:00 p.m.

Georgetown Law Center, Gerwitz Hall
Washington, DC

Jan Baran will participate in a panel discussion "Taking a Backseat? Impact Of Enhanced Criminal Penalties on Civil Enforcement" as part of a conference on Criminal Liability and Prosecution under McCain-Feingold, sponsored by the ACLU and Perkins Coie.

January 21, 2004

Innovate to Motivate: The National Conference for Political Involvement Professionals
Captiva Island, Florida

Carol A. Laham will speak on: "Avoiding Fines, Keeping Your Name Out Of The News and Preserving Your Job: Answers to All of Your Legal Questions…Including A BCRA Update."

Upcoming Filing Dates to Remember

November 20, 2003	November Monthly FEC Report due for Federal PACs filing monthly.
November 20, 2003	November Monthly IRS Form 8872 due for nonfederal PACs filing monthly.*
December 20, 2003	December Monthly FEC Report due for Federal PACs filing monthly.
December 20, 2003	December Monthly IRS Form 8872 due for nonfederal PACs filing monthly.*
December 20, 2003	30 days before the Iowa Caucus. Electioneering Communication prohibition of BCRA comes into effect.
January 19, 2004	Iowa Caucus.
January 31, 2004	2003 Year-End FEC Report due for Federal PACs and political committees.
January 31, 2004	2003 Year-End FEC Report due for nonfederal PACs.*

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.)*

*If you have any questions or would like any additional information, please contact a member of Wiley Rein & Fielding's Election Law & Government Ethics Group at 202.719.7000 or visit the website at **www.wrf.com**. We welcome the opportunity to discuss any matter of specific concern to you or to tell you more about our practice and our capabilities.* ✦

New FCC Fax Rule Update

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organizations, including those that fax fundraising invitations and political contribution solicitations.

A fierce public outcry ensued, with businesses and non-profits contending that legitimate and well-established exchanges would be disrupted under the new rule. In addition, the Federal Election Commission submitted comments requesting that the FCC adopt a rule specifically exempting political speech from regulation.

In mid-August, the FCC essentially agreed to revert to the older rule by reinstating the EBR and the less-restrictive consent exceptions, at least until January 1, 2005. Consequently, if a sender of unsolicited fax ads uses the consent exception, it does not need to obtain the recipient's written, signed permission, including the fax number to be called. Rather, the FCC requires only that permission is express (i.e., "opt-in") and obtained prior to sending any unsolicited ad faxes.

On October 14, the FCC clarified further that recently adopted limits on the duration of an EBR will not apply in the fax context, at least until January 1, 2005. Entities using the EBR exception to fax unsolicited ads must ensure that they have a prior or existing relationship with the fax recipient based on a "voluntary two-way communication." Such a communication could be a purchase, transaction, inquiry or application. The fax recipient may terminate the EBR at any time by asking not to receive any additional faxes. But barring such a request, fax senders may continue to send unsolicited ads, even eighteen months after the fax recipient's last transaction or purchase or three months after the recipient's last inquiry or application. ✦

For more information, contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or Caleb P. Burns (202.719.7451 or cburns@wrf.com).

Three FEC Commissioners Support Broad Interpretation of "Media Exemption"

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Commissioner Scott Thomas issued an opposing statement of reasons expressing his view that "Sam's Club/Wal-Mart is not a media or press entity" but a business corporation in the retail business. He also advocated a narrow interpretation of the media exemption to cover "[o]nly magazines and periodicals which ordinarily derive their revenues from subscriptions and advertising." He likened *Source* to "a sophisticated advertising brochure." Citing the Supreme Court's decision in *Massachusetts Citizens for Life v. FEC*, Commissioner Thomas concluded that a "contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, thereby eviscerating § 441b's prohibition."

Two other commissioners did not express any position on the breadth of the "media exemption." ✦

For more information, contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or Lee E. Goodman (202.719.7378 or lgoodman@wrf.com).

WRF Election Law Practice Group

Jan Witold Baran ..... 202.719.7330 ..... jbaran@wrf.com

Carol A. Laham ..... 202.719.7301 ..... claham@wrf.com

Thomas W. Kirby ..... 202.719.7062 ..... tkirby@wrf.com

Barbara Van Gelder ..... 202.719.7032 ..... bvangeld@wrf.com

Jason P. Cronic ..... 202.719.7175 ..... jcronic@wrf.com

Lee E. Goodman ..... 202.719.7378 ..... lgoodman@wrf.com

Caleb P. Burns ..... 202.719.7451 ..... cburns@wrf.com

D. Mark Renaud ..... 202.719.7405 ..... mrenaud@wrf.com

Thomas W. Antonucci ..... 202.719.7558 ..... tantonuc@wrf.com

1776 K Street NW ✦ Washington, DC 20006 ✦ (ph) 202.719.7000 ✦ (fax) 202.719.7049

7925 Jones Branch Drive ✦ Suite 6200 ✦ McLean, VA 22102 ✦ (ph) 703.905.2800 ✦ (fax) 703.905.2820

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