Wiley Rein LLP

Election Law News

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FEC Bundling Regulation: PACs Must Amend FEC Form 1 by March 29

As part of the new bundling regulations, the Federal Election Commission (FEC) is mandating that all federal PACs established or controlled by federal lobbyists or employers of federal lobbyists amend their Statements of Organization (FEC Form 1) by March 29, 2009. In the amendment, the PAC must indicate that it is a "lobbyist/registrant PAC." PACs also should take this opportunity to confirm that all other information contained in their statement of organization is up-to-date.

The updated Form 1 is now available from the FEC; see www.fec.gov/elecfil/updatelist.html. The updated paper form can be reviewed at www.fec.gov/pdf/forms/fecfrm1.pdf (Line 5(e) allows a corporate PAC to indicate that it is a "lobbyist/registrant PAC").

Note that the FEC has created a separate page that tracks all of the bundling requirements and filings. See www.fec.gov/info/guidance/hlogabundling.shtml.

See page 5 for the full story on the FEC's New Bundled Contribution Disclosure Rules. ■

Also In This Issue

New Jersey Annual Pay-to-Play Report Due March 30

By Carol A. Laham and D. Mark Renaud

Entities that received $50,000 or more in the aggregate in 2008 through contracts with state and local government agencies in New Jersey must file an annual Pay-to-Play Report with the state's Election Law Enforcement Commission (ELEC) by March 30, 2009. Reports are due even if the entity and its related companies, officers, directors, partners and PACs made no reportable contributions. If the company or its affiliates made reportable contributions (contributions aggregating to more than $300 to most state and local candidates, political committees and party committees), then the annual report must include detailed information about the entity's state and local government contracts.

The Annual Report (Form BE) and related pay-to-play information can be found on the website of ELEC at https://wwwnet1.state.nj.us/lpd/elec/ptp/p2p.html. ■

For more information, please contact:

Carol A. Laham
202.719.7301
claham@wileyrein.com

D. Mark Renaud
202.719.7405
mrenaud@wileyrein.com

Lobbyist Gifts to Obama Political Appointees: They Can't Take It Anymore

By Jan Witold Baran and Robert L. Walker

An Executive Order issued by President Obama on January 21, 2009, imposed a "lobbyist gift ban" on political appointees in the executive branch. Exceptions to this ban are strictly limited. The Office of Government Ethics (OGE) issued important guidance on the scope of the ban in a February 11, 2009, advisory memorandum. The memo can be found at www.usoge.gov/ethics_guidance/daeograms/dgr_files/2009/do09007.html.

The ban covers all full-time, non-career appointees appointed after January 20, 2009, whether appointed by the president, vice president, an agency head or otherwise. Unless one of the limited exceptions applies, appointees covered by the ban may not accept any gift from a registered lobbyist or lobbyist employer.

> A number of often used exceptions to the general executive branch gift regulations are *not* applicable to gifts to an appointee covered by the lobbyist gift ban.

"Gift" as used in the Executive Order has the same broad meaning as under Executive Branch gift regulations generally. The rule of thumb: if it has any monetary value and the recipient does not pay market value for it, it's a gift.

The limited number of exceptions to the lobbyist gift ban for political appointees include the following:

- Modest items of food and refreshment, such as soft drinks, coffee and donuts, offered other than at a meal.
- Greeting cards and items of little intrinsic value, such as plaques, certificates and trophies intended solely for presentation.
- Opportunities, benefits, favorable rates and discounts available to the public, to a class consisting of all government employees or all uniformed military personnel, or to a class unrelated to government employment.

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GW's Graduate School of Political Management and NABPAC Announce Jan Baran PAC Management Scholarship Recipient

The George Washington University's Graduate School of Political Management (GSPM) and the National Association of Business Political Action Committees (NABPAC) are pleased to announce that the 2008–2009 Jan Baran PAC Management Scholarship has been awarded to Ms. Tiffany Waddell. The $3,000 scholarship is funded by NABPAC and is named for Jan Witold Baran, a leading campaign finance attorney and chair of Wiley Rein's Election Law & Government Ethics Practice.

Ms. Waddell, a student in the school's Political Action Committee Graduate Certificate Program, is the manager of political advocacy at the Printing Industries of America and the director of PrintPAC, PRI's political action committee.

NABPAC—a trade association for corporations and business associations—is the sole national organization dedicated to promoting, defending and professionalizing PACs and political action professionals. NABPAC is not a PAC, and does not contribute to candidates, but rather, since 1977, has advanced the interests of its membership and protected the rights of millions of Americans who participate in democracy though voluntary contributions to a PAC. ■

New Jersey Supreme Court Rules against Pay-to-Play Violator

By Carol A. Laham and D. Mark Renaud

On January 15, 2009, the New Jersey Supreme Court upheld a lower court's decision against Earle Asphalt Company in an important pay-to-play decision. The court found that the company did not fully comply with the state's "cure provision" when it tried to take back a contribution it had made to a political party committee in violation of the pay-to-play laws. The result of the decision is that the company remains disqualified for a $6 million paving contract, a disqualification based on the impermissible political party contribution.

Earle Asphalt Company did not challenge the constitutionality of New Jersey's pay-to-play laws, although a decision by a federal district court recently upheld the constitutionality of Connecticut's pay-to-play law. (See the January 2009 issue of *Election Law News* at www.wileyrein.com/eln_01_09 for more information.)

As reported in the November 2008 issue of *Election Law News,* www.wileyrein.com/eln_11_08, New Jersey's governor last year expanded the scope of the state's pay-to-play contribution bans to cover contributions to legislative leadership committees and municipal party committees and contributions by officers of state executive branch contractors.

A number of states, including New Mexico, Pennsylvania and Massachusetts, currently are considering pay-to-play regimes in order to fight actual or perceived corruption. ■

For more information, please contact:

Carol A. Laham
202.719.7301
claham@wileyrein.com

D. Mark Renaud
202.719.7405
mrenaud@wileyrein.com

FEC Raises Contribution Limit

By Carol A. Laham and Caleb P. Burns

By statute, the Federal Election Commission is obligated to raise certain political contribution limits at the beginning of each election cycle in order to account for inflation. The increased 2009–2010 contribution limits for individuals are as follows:

- $2,400 per election to federal candidates; and
- $30,400 per calendar year to a national political party committee (RNC, DNC, NRCC, NRSC, DCCC, DSCC).

The two-year aggregate limit for individuals is now $115,500 (with a maximum of $45,600 going to federal candidates in the aggregate in 2009–2010 and a maximum of $69,900 going to all PACs and party committees combined in the same two-year cycle). Of the $69,900 sublimit, only $45,600 may go, in the aggregate, to federal PACs and state, district and local party committees in the two-year election cycle.

The individual contribution limits did not change with respect to PACs and state, district and local political party committees. These limits are as follows:

- $5,000 per calendar year to federal PACs (unchanged); and
- $10,000 per calendar year to the federal accounts of state, district and local party committees (combined amount) (unchanged). ■

For more information, please contact:

Carol A. Laham
202.719.7301
claham@wileyrein.com

Caleb P. Burns
202.719.7451
cburns@wileyrein.com

Tax Corner: Shared Website Is Prohibited Political Intervention by 501(c)(3) Exempt Organization

By Gary I. Horowitz and D. Mark Renaud

The Internal Revenue Service (IRS) determined in a recent Technical Advice Memorandum (TAM) that a 501(c)(3) exempt organization intervened in prohibited political activity by sharing its website with a related 501(c)(4) organization.

IRS § 501(c)(3) provides that a corporation organized and operated for charitable, scientific or educational purposes is exempt from federal income tax provided that it does not participate or intervene (directly or indirectly) in any political campaign in support of, or in opposition to, any candidate for public office. Whether an organization is participating or intervening in any political campaign depends upon all of the facts and circumstances.

Previously in Rev. Rul. 2007-41, the IRS determined that an organization posting material on its website that favors or opposes a candidate for public office will be treated the same as if it distributed printed material or broadcasts that favored or opposed a candidate. Rev. Rul. 2007-41 also held that an organization posting on its website support for a member in a local election was impermissible intervention in a political campaign.

In the new TAM, a 501(c)(3) organization controlled a 501(c)(4) organization. The (c)(4)'s website material was located on a separate set of web pages within the (c)(3)'s website and the (c)(4) reimbursed the (c)(3) for its proportional share of website costs. Regardless, the IRS ruled that the (c)(3) impermissibly intervened in a political campaign by distributing campaign endorsements on its web site.

In the TAM, the (c)(3)'s banner, logo, site links, disclaimer and copyright notices were included on every web page within the website, including the (c)(4)'s web pages, which contained candidate questionnaires and endorsements of candidates for public office. According to the IRS, the banner and visual presentation of the (c)(4) web pages were "virtually indistinguishable" from the other web pages of the (c)(3)'s website. Therefore, the IRS determined that the (c)(3) had distributed the candidate questionnaires and endorsements in contravention of the rule against political intervention.

In light of this TAM, 501(c)(3) exempt organizations that are affiliated with PACs and 501(c)(4) organizations should carefully review the visual presentation of their web pages to verify that no political intervention occurs. ■

For more information, please contact:

Gary I. Horowitz
703.905.2845
ghorowitz@wileyrein.com

D. Mark Renaud
202.719.7405
mrenaud@wileyrein.com

UPCOMING EVENT

Executive Order on Lobbying and Ethics Rules: An Update

Carol A. Laham, Speaker
Bryce Harlow Foundation
March 27, 2009 | Washington, DC

Increased Regulation of Lobbying and Other Political Activities

Jan Witold Baran, Speaker
American Bar Association Section of Business Law Webcast
April 8, 2009 | Webcast

FEC Opinion Addresses Solicitations by Parent Corporation with Different Types of Subsidiaries

By Jan Witold Baran and Andrew G. Woodson

On February 12, the FEC issued an advisory opinion on corporate solicitations to the Chicago Mercantile Exchange (CME) Group and three of its wholly owned subsidiaries: the Chicago Board of Trade (CBOT), the New York Mercantile Exchange (NYMEX) and the Chicago Mercantile Exchange. The issue presented by the CME Group's request was whether that corporation could solicit contributions for its federal PAC from individuals who were members of the three exchanges—but not necessarily stockholders of the CME Group.

Both in its regulations and through the advisory opinion process, the FEC has allowed the corporate parent in a parent-subsidiary relationship to solicit voluntary contributions to its PAC from the entire "solicitable class" of a subsidiary or other affiliate. In the case of a typical corporation, this solicitable class includes the subsidiary corporation's stockholders, its executive and administrative personnel and the families of both groups. For membership organizations, however, this solicitable class is the organization's members, its executive and administrative personnel and their families.

After an exhaustive review of both the legal criteria and the organizational structure of the three exchanges, the FEC concluded that the CBOT and the NYMEX met the requirements of a membership organization. Consequently, the CME Group could solicit certain members of these exchanges for contributions to its PAC, including individual "outright owners of a seat" on an exchange (which can cost anywhere between $500,000 and $1.5 million). Although concluding that the CME, the third subsidiary, was not a membership organization, the FEC nevertheless allowed the CME Group to solicit certain members of the CME because such individuals were automatically granted shares of stock in the CME Group (and thus were already in the parent corporation's solicitable class). ■

Jan Witold Baran
202.719.7330
jbaran@wileyrein.com

Andrew G. Woodson
202.719.4638
awoodson@wileyrein.com

Bundle of Joy: The FEC's New Bundled Contribution Disclosure Rules

By Jan Witold Baran and Caleb P. Burns

On February 17, 2009, the FEC published in the *Federal Register* final rules and an accompanying Explanation and Justification (E&J) to implement a provision of the Honest Leadership and Open Government Act of 2007 (HLOGA) requiring that federal candidate committees, leadership PACs and party committees disclose contributions bundled by federal lobbyists, their employers or their PACs.

As explained in the rules and E&J, "bundled" contributions are those that beginning March 19, 2009, are:

- Physically forwarded; or
- Credited through "records, designations or other means of recognizing that a certain amount of money has been raised."

The following activities are specifically described in the new rules as receiving "credit":

- Receiving a title such as "Ranger" or "Pioneer";
- Using a tracking identifier or number;

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Bundled Contribution Disclosure Rules (*continued from page 5*)

- Receiving access to events or activities as a result of raising a certain amount of contributions;
- Receiving mementos, such as photographs with the candidate or autographed copies of books authored by the candidate, given by the committee to persons who have raised a certain amount of contributions; and
- Receiving credit in any type of committee records for raising contributions.

Disclosure will be required when, in a semi-annual period, more than $16,000 is bundled for the same committee by a lobbyist, a lobbyist employer or the PAC of either. The FEC issued a FAQ on the bundling rules, which is available here: www.fec.gov/law/lobbybundlingfaq.shtml.

Notably, these disclosure requirements (and decisions about what to report) fall on the federal candidate committees, leadership PACs and party committees that receive bundled contributions from federal lobbyists, their employers, or their PACs. Lobbyists and lobbyist employers are not required to report any bundling activity.

A PAC established or controlled by a lobbyist or an entity that employs a lobbyist must, however, amend its FEC Form 1, Statement of Organization, by March 29, 2009, to note this fact. This requirement will apply to all corporate PACs of companies that are registered with the Secretary of the Senate and Clerk of the House pursuant to the Lobbying Disclosure Act. See the article on page 1 for more details.

Upcoming Dates to Remember

March 15, 2009

IRS Form 1120-POL due for political committees earning more than $100 in interest or dividend income

March 20, 2009

March Monthly FEC Report due for federal PACs

March Monthly IRS Form 8872 due for PACs filing monthly*

April 15, 2009

First Quarter FEC Reports due for House and Senate candidates

April 20, 2009

April Monthly FEC Report due for federal PACs

April Monthly IRS Form 8872 due for PACs filing monthly*

First Quarter Lobbying Disclosure Act Report (Form LD-2) due**

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.

** **Note:** When the due date falls on a weekend or holiday, it is extended until the next business day.

For more information, please contact:

Jan Witold Baran
202.719.7330
jbaran@wileyrein.com

Caleb P. Burns
202.719.7451
cburns@wileyrein.com

Lobbyist Gifts to Political Appointees (*continued from page 2*)

- Gifts based on personal friendship or on a family relationship.
- Gifts resulting from a spouse's business or employment (if not enhanced because of the official's government position).
- Gifts customarily offered by a prospective employer.
- Gifts authorized by specific agency regulation or by specific statute.
- Gifts to the president or vice president.

It is important to remember, and OGE has underscored, that a number of often-used exceptions to the general executive branch gift regulations are *not* applicable to gifts to an appointee covered by the lobbyist gift ban. For example, covered appointees may *not* accept lobbyist gifts under the "$20 or less" exception to the general gift rule. Also—and this may be the provision of the lobbyist gift ban likely to have the greatest impact on private sector interactions with government officials—covered appointees may *not* accept free attendance at "widely attended gatherings" from registered lobbyists or lobbying organizations. As OGE puts it in its February 11, 2009, advisory memo on the ban, this means "an appointee may not accept a $15 lunch from a registered lobbyist or go to a widely attended reception sponsored by a registered lobbying organization."

OGE's February 11 memo provides useful guidance on and clarification of the gift ban. On appointee attendance at events, for instance, the OGE memo makes clear that, even under the ban, covered appointees may still accept "offers of free attendance on the day of an event when they are speaking or presenting information in an official capacity." Citing executive branch gift regulations, OGE notes that such participation "is viewed as a customary and necessary part of the [appointee's] assignment and does not involve a gift to him or to the agency."

The OGE memo also contains specific and important guidance on gifts from 501(c)(3) organizations and from media organizations. Under this OGE guidance, developed in consultation with the White House Counsel's Office, the gift ban does not apply to a gift from a 501(c)(3) organization or from a "media organization," as long as the gift otherwise may be accepted under executive branch gift regulations and provided the organization employee who extends or offers the gift is not himself or herself a registered lobbyist.

Right now, the lobbyist gift ban covers only political appointees. But the Executive Order directs OGE to adopt rules and procedures to apply the lobbyist gift ban to all executive branch employees. OGE says that "any such rules or procedures will be developed in due course." Stay tuned. ■

For more information, please contact:

Jan Witold Baran
202.719.7330
jbaran@wileyrein.com

Robert L. Walker
202.719.7585
rlwalker@wileyrein.com

Election Law Professionals

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

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

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

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

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

Robert L. Walker . . . . . 202.719.7585 . . . . . rlwalker@wileyrein.com

Roderick L. Thomas . . . . . 202.719.7035 . . . . . rthomas@wileyrein.com

Bruce L. McDonald . . . . . 202.719.7014 . . . . bmcdonal@wileyrein.com

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

Thomas W. Antonucci . . . . . 202.719.7558 . . . . tantonucci@wileyrein.com

Daniel B. Pickard . . . . . 202.719.7285 . . . . . dpickard@wileyrein.com

Andrew G. Woodson . . . . . 202.719.4638 . . . . awoodson@wileyrein.com

Robert D. Benton . . . . . 202.719.7142 . . . . . rbenton@wileyrein.com

Gary I. Horowitz . . . . . 202.719.7413 . . . . ghorowitz@wileyrein.com

James Slattery . . . . . 202.719.7422 . . . . . jcslattery@wileyrein.com

Christiane M. McKnight . . . . . 202.719.7463 . . . . cmcknight@wileyrein.com

Shawn A. Bone . . . . . 202.719.7243 . . . . . sbone@wileyrein.com

Ryan Michael Schmalzle* . . . . . 202.719.7036 . . rschmalzle@wileyrein.com

*District of Columbia Bar pending (supervised by principals of the firm)

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Wiley Rein LLP Offices:

1776 K Street NW
Washington, DC 20006
202.719.7000

7925 Jones Branch Drive
McLean, VA 22102
703.905.2800