

FEC Adopts Bundling Rules, But Has Yet to Issue the Necessary Interpretative Guidance

By Jan Witold Baran and D. Mark Renaud

On December 18, 2008, the Federal Election Commission (FEC) adopted final rules regarding disclosure of contributions bundled by lobbyists, lobbyist employers and their PACs.

(The delay in these rules, required by the Honest Leadership and Open Government Act [HLOGA] to be implemented in 2008, resulted from the period in the first half of 2008 when the Commission did not have sufficient Commissioners to operate.) The rules have yet to be published in the *Federal Register* and are not yet effective.

Moreover, the regulated community awaits the Explanation and Justification for the rules, which is expected to assist in the interpretation of the new rules.

As dictated in HLOGA, the proposed rules do not require any additional disclosure by lobbyists, their employers

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Federal Court Upholds Connecticut's Pay-to-Play Law

By Carol A. Laham and D. Mark Renaud

On December 19, 2008, the U.S. District Court for the District of Connecticut upheld Connecticut's broad pay-to-play contribution ban and granted summary judgment to the state. The court applied less exacting scrutiny than in political expenditure cases because the activity involved pertained to contributions, not expenditures, and thus was closer to the edge than the core of the First Amendment. The court found the pay-to-play and accompanying lobbying contribution and solicitation bans to be narrowly tailored to prevent corruption or the appearance of corruption,

which, the court said, was significant given Connecticut's recent history with corruption at the highest levels of state government. *Green Party of Connecticut v. Garfield*, No. 3:06cv1030 (D. Conn. Dec. 19, 2008). ■

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Adding Federal Lobbyists: A Two-Step Method

By D. Mark Renaud and Stephan Shriver¹

In the old days—the years preceding HLOGA, it was pretty straightforward when a registrant under the Lobbying Disclosure Act (LDA), such as a corporation or trade association, needed to add a new federal lobbyist. With the advent of mandatory electronic filing and of Form LD-203, however, the complete process has become a bit more complicated—in the technical sense. Below is some technical assistance to ensure 100% compliance.

“new” and list the covered positions held by the employee during the previous 20 years. (This process is the same as it always has been except that the covered positions must be reported for 20 years instead of for two.)

about new lobbyists, a registrant should take the following steps in the Form LD-203 system, which can be accessed at <http://lobbyingdisclosure.house.gov/> by selecting LD-203 Contributions in the blue menu bar.

With the advent of mandatory electronic filing and of Form LD-203, however, the complete process has become a bit more complicated . . .

Form LD-2—Pretty Much the Same as Always

To add a new lobbyist, a registrant simply must list on the quarterly LDA report, Form LD-2, the employee on Line 18 of all of the issue pages on which the employee engaged in lobbying activities during the previous calendar quarter. On that line, the registrant must check the box for

Form LD-203—New System, New Technical Issues

Unfortunately, the system for quarterly LDA reports and the system for the semiannual LDA contribution and gift reports, Form LD-203, do not necessarily share all information. As a result and in order to ensure that both systems have complete information

To identify a new lobbyist the registrant is responsible for activating an account for the lobbyist. The following steps are necessary for a new account activation:

- (1) Access the Lobby Disclosure web page for the Office of the Clerk of the House.

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Louisiana Changes Lobbying Law and Requires Monthly Reporting

By Carol A. Laham and Andrew G. Woodson

As part of Governor Bobby Jindal’s ethics push in 2009, several changes to Louisiana’s lobbying law became effective on January 1, 2009. Highlights are discussed below.

(1) Lobbyist reports are now due monthly instead of semiannually. The reports are due the 25th of each month, except the report for January 2009 is due on February 15. That is also which the due date for the semiannual report covering the second half of 2008.

(2) Registration and reports must now be filed electronically. The online system of the Louisiana Board of Ethics is available at <http://204.196.0.54/Lobbyist/>.

(3) Lobbyists must itemize all expenditures for legislative and executive branch officials and must list expenses made for spouses and minor children of such officials, organized by official.

(4) If an individual lobbies the legislature and the executive branch,

the lobbyist may file consolidated registration statements and reports.

(5) Lobbyists must take one hour of ethics training per calendar year. ■

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Federal Lobbying and Ethics New Year Checklist

January 2009

By Jan Witold Baran, Carol A. Laham, D. Mark Renaud, Caleb P. Burns and Robert L. Walker

The end of a calendar year and the beginning of the next is an opportunity to assess lobbying and ethics compliance programs in order to determine what needs to be addressed before undertaking lobbying activity in the new year. This includes assessments about education and training as well as preparations for the filing obligations in the new year. Below are some issues related to new year activities.

2008 Filings Due in January

- ✓ The following 2008 Lobbying Disclosure Act (LDA) filings are due in January 2009:
 - January 21: Fourth Quarter 2008 LDA Report (Form LD-2)
 - January 30: Second Semiannual 2008 LDA Report (Form LD-203)
- ✓ The company/association and its registered federal lobbyists must file Form LD-203. Only the company/association is required to file Form LD-2.
- ✓ Any federal lobbyists added as new lobbyists in the second half of 2008 must file Form LD-203, as must any terminated federal lobbyists with a termination date after June 30, 2008. The report for such an employee, however, need only cover the time period the individual was registered as a federal lobbyist.

Review of Lobbying and Ethics Processes

- ✓ The beginning of a new calendar year is an opportunity to institute a comprehensive review of the company's/association's lobbying and ethics policies, processes, internal rules and codes of conduct.
- ✓ The company/association should assess whether its processes comport with the LDA, with federal tax rules, and with state and local lobbying laws. Among other things, the entity should examine:
 - How it tracks and records time spent by employees engaged in lobbying activities for purposes of federal lobbying reports, tax returns and state/local lobbying reports;

- How it tracks out-of-pocket expenses incurred in connection with federal, state, grassroots and local lobbying;
- How it calculates overhead, tracks administrative expenses and tracks issues lobbied;
- How it determines whether the entity may certify to Congress on Form LD-203 compliance with the Congressional gift ban;
- How it tracks and reports expenses related to covered officials that must be reported semiannually to Congress on Form LD-203;
- How it determines whether an employee needs to register as a lobbyist; and
- How it informs registered lobbyists and others of the ethical and campaign finance restrictions placed upon them by applicable law.

If a company or its subsidiaries have contracts with state or local governments, then the company also may need to review compliance with the various pay-to-play campaign finance laws that may limit or prohibit contributions by the company, its PAC, and, in some cases, its officers and other employees.

The company should educate its directors about the potential pitfalls of making state and local contributions in states where the company does business.

Choosing the Method for Filing 2009 LDA Reports

- ✓ Each company or association may, at the beginning of each year, choose which method to use to file its 2009 LDA quarterly reports. The options are to use the definitions of lobbying found in the LDA (Method A) or the definitions of lobbying found in the Internal Revenue Code and the rules of the IRS (Method C).
- ✓ There are upsides and downsides to each method.
- ✓ Once the company or association picks a method for its first quarter 2009 LDA report, the company or association must use that method for the remainder of 2009.

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Pay-to-Play Spotlight

Pay-to-Play Laws Instituted or Expanded around the Country

By Carol A. Laham and D. Mark Renaud

In the past few months, two states and one locality have either instituted broad pay-to-play campaign finance laws or expanded existing rules. This follows the expansion of New Jersey's pay-to-play rules by Governor Jon Corzine reported in the November 2008 issue of *Election Law News* and continues a multi-year trend.

Illinois

Two Sets of New Pay-to-Play Rules

On January 1, 2009, two pay-to-play regimes became effective in Illinois. One was Governor Rod Blagojevich's Executive Order 2008-3, and the second was Public Act No. 095-0971.

These rules differ somewhat in their scope and in the contributions covered, but, together, they implement a broad ban on political contributions and solicitations by state contractors, bidders for state agency contracts, and their affiliated companies and PACs. Both also ban contributions from executive employees (and their spouses and minor children), although the statute limits the ban to the individual executive employees at the contractor or bidding company. The Executive Order goes further than the statute in that it bans all executive branch political contributions and solicitations by contractors and bidders and also bans contributions to members of the state legislature and to legislative

candidates. Companies holding or seeking covered contracts are subject to a registration requirement under the statute (with registrations due by February 2, 2009, from current contractors).

Violation of the statute or the Executive Order can result in the loss of a government contract, and three violations of either in a 36-month period can lead to a three-year debarment from state contracts.

Colorado

Pay-to-Play Laws through a Ballot Measure

On December 31, 2008, a state and local pay-to-play ban passed by the popular vote in November as Amendment 54 became effective. The contribution ban applies to those persons holding sole source contracts with the state or any of its political subdivisions with a cumulative yearly value of more than \$100,000. The ban applies to the holder of the contract, its PACs, persons controlling 10% or more of the holder of the contract, and the officers, directors and trustees of the contract holder (and, under certain circumstances, their families).

New York City

Final Rollout of Pay-to-Play Rules

The third and final phase of New York City's pay-to-play laws went

into effect on December 3, 2008.

The new law extended the pay-to-play contribution limits already applicable to the CEO, CFO, COO and any owner of more than 10% of a company contracting with New York City or any of its agencies to similarly situated persons involved in certain real property transactions and land use actions with New York City or any of its agencies. ■

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2009 State Lobbying and Gifts Survey

The Election Law & Government Ethics Practice is currently updating its annual Survey of State Lobbying and Gift Laws for each of the 50 states and the District of Columbia. This year's survey will be available in February and will cover, among other things:

- The definition of lobbying;
- Grassroots lobbying;
- Procurement lobbying;
- Lobbying registration and reporting;
- General gift rules;
- Lobbyist gift rules; and
- Lobbyist campaign finance restrictions.

This survey is available for a fee. For more information, please contact:

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FEC Adopts Bundling Rules

(continued from page 1)

or their PACs. Instead, the reporting burden falls on the recipient candidate committees, political party committees and leadership PACs. Nonetheless, the reporting rules will affect lobbyists, their employers and their PACs, depending on whether or not they engage in activity that falls within the definition of "bundling" and are concerned if they are publicly disclosed as "bundlers" on a committee's reports.

According to the rules, bundling means forwarding contributions to the three types of recipient committees, as well as receiving credit from the recipient committee "through records, designations or other means of recognizing that a certain amount of money has been raised by the" lobbyist, employer or PAC.

We will provide further analysis of the new bundling rules, including the effective date, once the Commission issues its Explanation and Justification for the rules and has the rules published in the *Federal Register*. ■

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UPCOMING EVENT

The Future of Election Law: The Changing Roles of Campaign Finance and Lobbyist Contributions

Jan Witold Baran, Keynote Speaker

Catholic University Law Review's Volume 58 Symposium

January 23, 2009 | Washington, DC

FEC, IRS and Lobbying Disclosure Filing Dates for 2009



Monthly FEC Filing Dates for PACs

01/31/09	2008 Year End Report	08/20/09	August Report
02/20/09	February Report	09/20/09	September Report
03/20/09	March Report	10/20/09	October Report
04/20/09	April Report	11/20/09	November Report
05/20/09	May Report	12/20/09	December Report
06/20/09	June Report	01/31/10	2009 Year End Report
07/20/09	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 www.fec.gov/info/articles/2009reportinghandout.pdf.

Monthly IRS Filing Dates

01/31/09	2008 Year End Form 8872	06/20/09	June Form 8872
02/20/09	February Form 8872	07/20/09	July Form 8872
03/15/09	Form 1120-POL*	08/20/09	August Form 8872
03/20/09	March Form 8872	09/20/09	September Form 8872
04/20/09	April Form 8872	10/20/09	October Form 8872
05/15/09	Form 990**	11/20/09	November Form 8872
05/20/09	May Form 8872	12/20/09	December Form 8872
		01/31/10	2009 Year End Form 8872

Note: Federal PACs are not required to file Form 8872.

* For political organizations that account on a calendar-year basis.

** Need not be filed by federal PACs registered with the FEC.

Additional information on IRS reporting is available at www.irs.gov/charities/political/index.html.

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Quarterly House and Senate Candidate Committee Filing Dates for 2009

01/31/09	2008 Year End Report		
04/15/09	First Quarter Report	10/15/09	Third Quarter Report
07/15/09	Second Quarter Report	01/31/10	2009 Year End 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 www.fec.gov/info/report_dates.shtml.

Lobbying Disclosure Act Filings

01/20/09	Fourth Quarter Activity Report covering October 1-December 31, 2008
01/30/09	Second Semiannual § 203 Contribution Report covering July 1-December 31, 2008
04/20/09	First Quarterly Activity Report covering January 1-March 31, 2009
07/20/09	Second Quarterly Activity Report covering April 1-June 30, 2009
07/30/09	First Semiannual § 203 Contribution Report covering January 1-June 30, 2009
10/20/09	Third Quarterly Activity Report covering July 1-September 30, 2009
01/20/10	Fourth Quarterly Activity Report covering October 1-December 31, 2009
01/30/10	Second Semiannual § 203 Contribution Report covering July 1-December 31, 2009

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

www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm.

Semiannual/Quarterly FEC Filing Dates for PACs

01/31/09	2008 Year End Report
07/31/09	Mid-Year Report
01/31/10	2009 Year End 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. 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.

House Amends Ethics Rules Regarding Employment Negotiations

By Robert L. Walker

On January 6, 2009, the House of Representatives amended its rule on disclosure of employment negotiations and agreements so that the rule now requires such disclosures by “lame-duck” Members.

Before the amendment, House Rule 27, clause 1—created by the Honest Leadership and Open Government Act of 2007—provided that Members could not “directly negotiate or have any agreement of future employment until after his or her successor has been elected,” *unless* the Member disclosed the negotiations/agreement to the Committee on Standards of Official Conduct within three business days of commencement of the negotiations/agreement. A Member whose successor had been elected—that is, a “lame-duck”

Member—was not required to disclose employment negotiations or agreements to the Committee.

With the recent House rules change, *all* Members—including lame-duck Members—must now disclose employment negotiations and agreements to the Committee. As before, the rule continues to require House officers and very senior staff to disclose negotiations and agreements for future employment to the Standards Committee within three business days.

Note that these disclosures are to the Committee on Standards of Official Conduct; they are not public disclosures. Public disclosure of employment negotiations or agreements by House Members occurs only where—as required by

House Rule 27—the Member has recused himself or herself from “a matter in which there is a conflict of interest or an appearance of a conflict” arising from the Member’s employment negotiations or agreement with a prospective employer. ■

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Note: New federal contribution limits to be issued by the Federal Election Commission in late January

Pay-to-Play Survey Now Available

Many states have some sort of pay-to-play restrictions on contributions related to current or prospective government contractors. Others have recently expanded their executive branch restrictions to cover contributions by corporate officers and their families. The first step toward compliance with the pay-to-play laws is knowledge of the important details of the applicable laws and rules. To this end, the Election Law & Government Ethics Practice has prepared a survey of the pay-to-play regimes from around the country. This survey is available for a fee. ■

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Federal PAC End-of-Cycle Checklist

January 2009

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

The end of an election cycle is not only the recommended time to audit your PAC's accounts, but it is also a perfect time to review the campaign finance processes, undertake education and training, and generally prepare for the new cycle. Below are some of our recommendations with respect to PAC activities.

PAC Financial Audit

- ✓ A federal PAC should consider a financial audit of the PAC's accounts every election cycle in order to ensure that the PAC is on firm financial footing and that there are no financial irregularities.
- ✓ For such an audit, the PAC may use either in-house or outside accountants.
- ✓ A federal PAC also should audit the accounts against the FEC reports. This involves the use of specialized accountants familiar with FEC rules, policies and reports, but the results of this type of audit may be more useful from a compliance standpoint.
- ✓ Amendments should be made as necessitated by the results of the audit.

PAC Legal Process Audit

- ✓ PACs should review their bylaws, communications, solicitations, processes, etc. in order to ensure compliance with the myriad of FEC regulations going into the new election cycle.
- ✓ Any formal review should be done by counsel.
- ✓ Such a review should include analysis of federal PAC activity in the states and localities.
- ✓ The review can be combined with a review of federal, state and local lobbying processes.

Education and Training

- ✓ PACs should have a training program to ensure that employees comply with applicable FEC rules about solicitations, handling contributions, reporting, etc.

- ✓ The beginning of an election cycle or the start of an annual solicitation is a great time to disseminate training materials more broadly among employees who solicit contributions for the PAC. In-person training is recommended for PAC managers and the employees directly involved in PAC affairs.

Reporting Cycles

- ✓ Each year, a PAC has the choice of reporting cycles. For 2009, a PAC may choose to report with the FEC on a semiannual basis or on a monthly basis.
- ✓ PACs should consider filing reports on a monthly basis in order to regularize reporting processes and to avoid having to file special pre-primary and pre-special-election reports. Some PACs have reason to use the semiannual reporting process in non-election years.

Contribution Limits

- ✓ As required by law, contribution limits must be adjusted for inflation. Sometime early in 2009, the FEC will raise the amount an individual may contribute per election to a federal candidate and the aggregate election-cycle contribution limits applicable to individuals. This increase will affect the expected special elections.
- ✓ A PAC should notify its supporters and executives at the company or association of changes to the contribution limits.
- ✓ A PAC also will need to take the new contribution limits into account when planning political activities for the year, for, among other things, the amount a couple may contribute to a federal candidate per election may more closely approach the amount a PAC may contribute.
- ✓ The PAC, subject to the bundling disclosure rules discussed on page 11, may wish to consider additional partisan communications to supplement direct PAC support of candidates.

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Our Two Cents: Wiley Rein Submits Comments to FEC Suggesting Improvements to Procedures

By Caleb P. Burns

On January 5, 2009, the Election Law & Government Ethics Practice of Wiley Rein LLP submitted comments to the FEC suggesting improvements to its procedures for enforcement, advisory opinions, and other FEC practices and programs. A copy of the comments is available on our website at www.wileyrein.com/docs/docs/230.PDF.

In a December 8, 2008, notice in the *Federal Register*, the FEC solicited comments regarding all aspects of its policies and procedures. The Election

Law & Government Ethics Practice pooled its decades of collective experience observing and practicing before the Commission to determine the issues that most urgently require the Commission's attention. Along with its comments, Jan Baran, the head of the practice group, testified at an FEC hearing on this issue on January 14, 2009.

The comments did not necessarily reflect the views or concerns of any particular Wiley Rein client. Nonetheless, the Election Law &

Government Ethics Practice prepared and submitted its comments in an effort to help improve the administration of the campaign finance laws for all its clients and anyone else who might be affected by this increasingly large and complex body of law. ■

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Adding Federal Lobbyists: A Two-Step Method *(continued from page 2)*

(2) Sign in to the Lobby Contributions System with the Senate ID and password established previously.

(3) After logging in, select "Manage Lobbyists" and complete the following four steps to properly activate a lobbyist:

- Click on the "Add New Lobbyist" button.
- The "Add New Lobbyist" screen will be displayed—enter the new lobbyist name in the appropriate fields. A phone number and email address for the lobbyist will be required.
- Click in the box next to "Effective Date" to

display the calendar. Select the date the lobbyist began actively lobbying, and that date will appear in the "Effective Date" field.

- Click the "Add Lobbyist" button.

(4) You will now be returned to the "Manage Lobbyist" page. If you need to activate additional new lobbyists, follow the steps outlined above. Once you have completed updating your lobbyist account, click "Sign Out" at the upper right corner on the "Manage Lobbyist" page, and all modifications will be uploaded into the Lobby Contribution System.

Lobbyist accounts are unique to each registered lobbyist. Once the registrant has added a lobbyist to the registrant's account and this has been processed by the system, an email will be sent directly to the lobbyist with instructions on how to activate the account and create a personal password.

For step-by-step instructions on terminating lobbyists, please see the November 2008 issue of *Election Law News*. ■

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Education and Training

- ✓ Corporations and associations should have a training program in place to ensure that employees comply with applicable lobbying and ethics rules—both at the federal level and, if employing state and local lobbyists, at the state and local level.
- ✓ Employees need to be reminded of the applicable statutes, regulations and company policies at least annually.
- ✓ More extensive training should be provided to registered federal lobbyists, those who support such lobbyists and to other employees who are likely to interact with federal officials.

Bundling Disclosure Rules

- ✓ Sometime in 2009, the FEC will finalize the Explanation and Justification for the regulations related to disclosure of federal lobbyists, lobbyist employers and their PACs that bundle contributions.
- ✓ These rules will not create any reporting or other obligation for the lobbyists, lobbyist employers or corporate or association PACs. Instead, the reporting requirements will fall upon the recipient candidate committees, leadership PACs and political party committees.
- ✓ Nonetheless, the details of these rules may affect how lobbyists, their employers and their PACs participate in the federal election process. ■

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