Wiley Rein & Fielding

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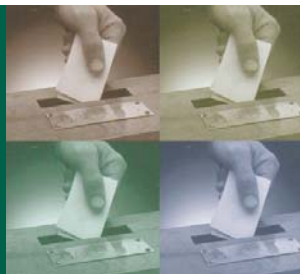
Election Law News

A Publication of the WRF Election Law Practice Group



FEC Delays Trade Association PAC Payroll Deduction Rule

At its open meeting on June 23, 2005, the Federal Election Commission (FEC) delayed until at least July 14, 2005, consideration of a proposed rule that, if passed, would allow corporations to use payroll deduction to collect contributions for trade association political action committees (PAC). The FEC's general counsel has proposed that if payroll deduction is used to collect PAC funds from a member corporation's executives, then any union representing employees in that company may obtain payroll deductions for union PAC contributions. A proposal by Chairman Scott Thomas proposes that this union might be extended to unions representing employees at any parent, affiliate or subsidiary corporation of the member company, even if the parent or subsidiary is not a member of the trade association. The delay to July 14, 2005, was given so that Commissioner Bradley Smith, who is leaving the Commission in August, might have time to thoroughly review the Thomas amendment.

[The] proposed rule . . . would allow corporations to use payroll deduction to collect contributions for trade association political action committees.

For more information about specific details of the rulemaking, see the January 2005 issue of *Election Law News*. ■

For more information, please contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com).

Washington State to Regulate Electioneering Communications

The state of Washington recently updated its election laws to regulate electioneering communications starting in 2006. The law, which was requested by the state's Public Disclosure Commission, follows in the wake of the U.S. Supreme Court's 2003 ruling in *McConnell v. Federal Election Commission*, which opened the door to state regulation of certain types of issue ads. The legislation was passed by the legislature in April 2005, and signed into law by Governor Gregoire on May 13, 2005.

Washington's new statute defines "electioneering communication" as any broadcast, mailing, billboard, newspaper or periodical that does the following:

- Clearly identifies a candidate for a state, local or judicial office either by specifically naming the candidate, or identifying the candidate without using the candidate's name;

continued on page 6

In This Issue

Public Disclosure Obligations for 501(c) Organizations

Despite the benefit of tax-exempt status, 501(c) organizations must keep in mind the IRS public inspection and copying requirements applicable to the IRS forms they file. Below is a summary of these requirements for 501(c) organizations.

Application for Tax-Exempt Status

501(c) organizations must make available for public inspection, upon request and without charge (except for reasonable copying costs if the requester consents), a copy of their application for tax-exempt status (Form 1023 or 1024). This includes all documents and statements filed with the application, any statement or other supporting document and any letter or document issued by the IRS concerning the application.

The application for exemption does not include applications from organizations that are not yet exempt, national defense material, unfavorable rulings or determination letters in response to applications for tax exemption, rulings or determination letters revoking or modifying a favorable determination letter, technical advice memoranda relating to a disapproved application, any letter or document from the IRS relating to whether a transaction is prohibited under section 503, any document relating to a private foundation or private operating foundation unless it pertains to the application for tax exemption and documents that do not pertain to an application despite their connection with the tax-exempt status of an organization described under 501(c) or (d).

Annual Information Returns

501(c) organizations must also make available for public inspection, upon request and without charge, copies of their original annual information returns (Form 990, 990-EZ, 990-BL, 990-PF or 1065) for the most recent three years. This includes any amended return after the original.

Public Inspection

These documents must be made available for public inspection, upon request in person or in writing, at the organization's principal, regional and district offices during regular business hours. The organization may allow an employee to be present during the inspection, but the inspecting individual must be allowed to take notes and photocopy freely. Should the request be made in person, the organization must provide the documents on the same business day unless there are unusual circumstances.

If the organization does not maintain a permanent office and receives a request for inspection, the organization must, within two weeks, either (1) make the documents available for inspection at a reasonable location of the organization's choice and permit inspection within a reasonable amount of time (within two weeks) or (2) mail the requestor copies of its application and annual information returns within two weeks of receiving the request. The organization may charge the requester for copying and postage costs if the requester consents.

Contributors

Other than private foundations, the names and addresses of contributors to the organization do not have to be disclosed.

Copies

A 501(c) organization must provide copies of its application for exemption and three most recent annual information returns to anyone who requests a copy in person or in writing at its principal, regional or district office during regular business hours. If the request is made in person, copies must be provided on the same business day unless there are unusual circumstances.

The organization does not have to comply with requests for copies if they are widely available on the Internet and the organization provides the requester with the website address where the returns are available. (*See* **www.guidestar.org** to see if your organization's Form 990 is available on the Internet). Otherwise, the organization must provide the requester with a copy and can charge nominal copying fees and postage.

Penalties

Failure to allow public inspection of annual returns can result in $20-per-day fines up to $10,000. The penalty for a similar offense involving an exemption application is $20 per day with no maximum. A willful failure to allow public inspection or provide copies is $5,000 for each return or application. ■

Web Resource: IRS Publication 557, Tax-Exempt Status for Your Organization (Rev. March 2005), at www.irs.gov/pub/irs-pdf/p557.pdf.

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

Junk Fax Prevention Act Becomes Law

On July 9, 2005, President Bush signed into law S. 714, the Junk Fax Prevention Act of 2005 (Act). The Act immediately came into force, substantially amending the Telephone Consumer Protection Act ("TCPA"; 47 U.S.C. § 227). Since 1992, the TCPA has largely prohibited junk faxes. Now, organizations lawfully may fax advertisements to consumers and businesses with which the organization has a qualifying "established business relationship" (EBR). Organizations must meet each condition of a qualifying EBR before sending any ad fax pursuant to the EBR exception.

For a complete summary of the Junk Fax Protection Act of 2005, please visit www.wrf.com/junkfax

In June 2005, the Federal Communications Commission (FCC) announced it would stop recognizing an EBR exception to its do-not-fax rules after January 9, 2006. Passage of the Act appears to supercede this FCC decision. Accordingly, for the foreseeable future, the EBR exception will provide a legal basis for sending advertising faxes.

The TCPA generally restricts individuals, businesses and organizations from faxing "unsolicited advertisements," a broad category encompassing "any material advertising the commercial availability or quality of any property, goods or services." As amended, the TCPA allows two exceptions to this prohibition: (1) where the fax recipient previously gave express consent to receive a fax and (2) as newly established by the Act, where the EBR exception applies to the fax.

The precise requirements of the EBR exception will not be known until the FCC issues implementing rules. But in broad strokes, the new EBR exception requires meeting the following three conditions:

1. A valid EBR must exist between the fax sender and the fax recipient. An EBR is formed by a "voluntary two-way communication" between the sender and the recipient in the context of an inquiry, application, purchase or transaction. The Act does not limit the duration of an EBR, but gives the FCC authority to set an expiration date. Also, recipients may terminate an EBR at any time by asking the sender to stop transmitting fax ads.
2. The recipient must voluntarily disclose the fax number to use. Such disclosures could be made directly to the sender or to the public generally. However, no separate voluntary disclosure is necessary if, as of July 9, 2005, the sender already had a valid EBR with the recipient as well as the recipient's fax number.
3. Senders must provide notice in ad faxes that recipients can "opt-out" from such faxes at any time. Such notice must conspicuously appear on the first page of the fax and clearly provide instructions and contact information for making a cost-free opt-out request. Senders must honor such opt-outs, even if the recipient continues to do business with the sender. ■

For more information, please contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com).

WRF Update

Speeches

Jan Witold Baran, Co-Chair
Corporate Political Activities 2005: Complying with Campaign Finance, Lobbying & Ethics Laws
Practising Law Institute Conference
Washington, DC
www.pli.edu/emktg/aprimo/ARD5_1.htm

Correction

In our May 2005 issue of *Election Law News*, we incorrectly referred to a now-codified Executive Order of Acting Governor Richard Codey as Executive Order 123. The correct citation should have been to Executive Order 134. We apologize for any confusion that this may have caused.

FEC Increases Civil Penalties for Violations of Federal Election Laws

In final rules issued on June 15, 2005, the Federal Election Commission (FEC) made inflation adjustments increasing civil penalties for violations of the Federal Election Campaign Act (FECA), the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act. The penalty increases apply to violations occurring after June 15, 2005.

FECA places limits on the amounts that individuals, political parties and political action committees (PACs) may contribute in federal elections and requires candidates, political parties and PACs to disclose contributions and expenditures. FECA also prohibits corporations, foreign nationals, labor organizations and certain other organizations from contributing to federal elections. The Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act place expenditure limits and reporting requirements on presidential candidates who receive federal campaign funding.

- The maximum penalty for contributions and expenditures made in violation of these statutes, but which are not knowing and willful violations, was previously the greater of $5,500 or the amount of the contribution or expenditure involved. The FEC has increased this penalty to the greater of $6,500 or the amount of the contribution or expenditure involved. The penalty for knowing and willful violations is the greater of $11,000 or 200% of the amount of the contribution or expenditure involved. Due to rounding rules, the FEC has not increased the penalty for knowing and willful violations.
- FECA also prohibits any person from making a contribution in another person's name. The maximum penalty for knowing and willful violations of this prohibition was previously the greater of $50,000 or 1,000% of the amount involved. The FEC has increased this penalty to the greater of $55,000 or 1,000% of the amount involved.
- Under FECA, a candidate's principal campaign committee must report within 48 hours any contribution of $1,000 or more that it receives after the 20th day but more than 48 hours before an election. The maximum penalty for campaign committees that fail to file notices within 48 hours of these last-minute contributions has increased to $110 plus 10% of the contribution.
- FECA also prohibits FEC members and employees or any other person from publicizing FEC investigations or notifications without the written permission of the person who is subject to the investigation or notification. The maximum penalty for these violations of confidentiality, when made knowingly and willfully, has increased from $5,500 to $6,500. The maximum penalty for violations of confidentiality that are not knowing and willful is $2,200 and has not increased due to rounding rules. ■

For more information, please contact Carol A. Laham (202.719.7301 or claham@wrf.com) or Caleb P. Burns (202.719.7451 or cburns@wrf.com).

House to Mandate Electronic LDA Filings

According to a June 27, 2005 letter to the Clerk of the U.S. House of Representatives from Rep. Bob Ney, chairman of the Committee on House Administration, the House will begin accepting only electronic Lobbying Disclosure Act (LDA) filings. This electronic requirement will begin with registrations (Form LD-1), reports (Form LD-2) and amendments filed after December 31, 2005.

LDA reports are required to be filed twice a year—on August 14 and on February 14, covering two six-month periods—January 1 to June 30 and July 1 to December 31, respectively. The first regular LDA report to which the electronic requirement of the House will apply is the Form LD-2 due on February 14, 2006. LDA reports are required to be filed with both the House and the Senate, but so far, the Senate has not made electronic reporting mandatory. ■

For more information, please contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or Carol A. Laham (202.719.7301 or claham@wrf.com).

Oklahoma Bans Corporate Electioneering Communications

Joining such states as Washington (*See* page 1), Florida and North Carolina, Oklahoma's Ethics Commission has approved rules regulating electioneering communications, which are issue ads featuring state candidates or ballot measures that are disseminated in close proximity to elections. Like federal law, Oklahoma's new rules prohibit corporate- and union-funded electioneering communications. The new rules were effective July 1, 2005.

The term "electioneering communications" in the new Oklahoma rules is extremely broad and extends to handbills, direct mail, radio, television, newspapers, magazines and billboards. Covered electioneering communications must refer to one or more clearly identified candidates for state office, or to a ballot measure, and must be disseminated within 60 days of a general or special election or within 30 days of a primary or runoff.

In addition, covered electioneering communications in Oklahoma must be targeted to the relevant electorate. This means that the communication has been or can be received by the following:

- 2,500 or more persons in a state house district;
- 25,000 or more persons statewide (for statewide officeholders or ballot measures); or
- 5,000 or more persons in a state senate district or in a district for a district attorney, district judge or associate district judge.

Non-corporate and non-union electioneering communications must contain a prescribed disclaimer, and a person may not make an electioneering communication in the name of another. If a person makes an electioneering communication with a total value of $5,000 or more, then the person must file a statement with the Ethics Commission within 24 hours. This statement must disclose information about the person making the electioneering communication, the purpose of the electioneering communication and contributor information. ■

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

FEC Leaves Candidate and Officeholder Non-Federal Fundraising Unchanged . . . for Now

At its June 23, 2005 public meeting, the Federal Election Commission (FEC) left unchanged its rule allowing federal candidates and officeholders to speak and solicit funds without limitation at state and local party fundraising events. The FEC also kept in place a series of previously issued Advisory Opinions that allow federal candidates and officeholders to speak at other types of non-federal fundraising events (*e.g.*, those benefiting state candidates or section 527 organizations), provided a disclaimer is issued stating that the federal candidates or officeholders are not raising funds in excess of federal limits or from federally impermissible sources.

Three of the six FEC Commissioners expressed doubt as to the wisdom of the Advisory Opinions . . .

The FEC was under a court order to better justify its rule allowing unlimited federal candidate and officeholder fundraising solicitations at state and local party events. The FEC, nonetheless, sought comments on whether the rule itself as well as its Advisory Opinions addressing non-party, non-federal fundraising by federal candidates and officeholders should be modified.

After Commissioners solicited comments, took testimony and engaged in a somewhat contentious debate at the June 23, 2005 meeting, the FEC ultimately left the rule and Advisory Opinions unchanged and issued a new Explanation and Justification for the rule to comply with the court order.

Nonetheless, three of the six FEC Commissioners expressed doubt as to the wisdom of the Advisory Opinions and suggested that they would challenge them in a subsequent rulemaking proceeding. Stay tuned. ■

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

FEC Corporate PAC Audit Highlights Common Errors

Last month, the FEC made public the results of its audit of the Lockheed Martin Employees' Political Action Committee (LMEPAC). Although some of the errors uncovered were a direct result of embezzlement by LMEPAC's assistant treasurer, the audit did highlight several inadvertent mistakes often made by treasurers of corporate PACs.

First, the FEC found that "Payroll Deduction Authorization" forms were not available for 42% of LMEPAC's contributors. Under the FEC's rules, a PAC must maintain copies of the "Payroll Deduction Authorization" form for each individual who makes a contribution via automatic payroll deduction. This is true even if, as was the case here, the original corporation maintains multiple independent payroll centers or if the corporation has merged with, or been acquired by, another company. Although the FEC noted that LMEPAC could keep its forms at its various payroll centers across the country, the FEC recommended that the forms be kept in one centralized location at the PAC's headquarters.

Second, the FEC found that 54% of the contributions to LMEPAC were not deposited in a timely manner. Over half of the contributions received by LMEPAC were deposited between two weeks and six months after the date noted on the check. LMEPAC's attorney stated that this was the product of 20 separate payroll systems that were set up to run on a monthly cycle rather than during each successive 10-day period. Federal law requires that contributions be returned to the contributor or deposited into a committee bank account within 10 days of their receipt. ■

For more information, please contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or Carol A. Laham (202.719.7301 or claham@wrf.com).

Washington State

continued from page 1

- Appears within 60 days before any election for that office in the jurisdiction in which the candidate is seeking election; and
- Either alone, or in combination with more than one communication, costs $5,000 or more.

To further delineate the term, the law also defines what electioneering communication is not, which, among other things, includes the following:

- Usual advertising of a business owned by a candidate;
- Advertising for candidate debates where such advertising is paid for by the sponsor;
- A news item, feature, commentary or editorial in a regularly scheduled news medium;
- Mailed internal political communication limited to the members of a political party, or to the officers, management staff or stockholders of a corporation, or to the members of a labor organization or other membership organization; and
- Expenditures by, or contributions to, the authorized committee of a candidate for state, local or judicial office.

Activity that falls within the definition of electioneering communication must be electronically reported within 24 hours (or the next working day) of when the communication is broadcast by anyone making the communication. Nevertheless, corporations are not prohibited from making electioneering communications in Washington state.

Other relevant provisions of the new law include:

- Electioneering communications done in coordination with a candidate or party will be considered a contribution to that candidate or party.
- All electioneering ads must include the following statement: "Notice to Voters (required by law): This advertisement is not authorized or approved by any candidate. It is paid for by (name, address, city and state)."
- If the ad is paid for by a non-individual other than a political party, then a listing of the top five contributors must be provided.
- The required statement must meet certain size requirements for various communication media, including pictures.

The new electioneering communication reporting regulations do not take effect until January 1, 2006. ■

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

Changes in the States

New York

New York Clarifies Gift Rule

On April 5, 2005, the New York Temporary Commission on Lobbying issued three opinions affecting the lobbying business in the state and clarifying the scope of the state's $75 gift rule for lobbyists and lobbyist employers. Each is described below.

Charity Exception: In Advisory Opinion No. 59 (05-04), the Commission stated that the state's exemption from the $75 lobbyist gift limit for charity events only applied to the portion of any payment that was deductible as a charitable donation. The non-deductible expenditures count against the $75 gift limit. The example in the opinion related to a pro-am golf tournament where the charity stated that only $94 of a $500 entry fee was deductible.

Travel Rules: In Advisory Opinion No. 60 (05-05), the Commission stated that reimbursement by public officials for private airplane trips must be equal to the actual cost of the transportation divided by the number of people receiving the transportation. Reimbursement of first-class airfare is insufficient and could cause a person to fall afoul of the $75 gift limit.

Political Convention Events: In Advisory Opinion No. 61 (05-06), the Commission reiterated a stance that it took in Advisory Opinion 55 (Aug. 31, 2004), which stated that social events surrounding political conventions but paid for by lobbyists and lobbyist employers must come within the state's $75 gift rule and that the exemption for political events only applies to events benefiting a candidate or political party. Moreover, the value for gift rule purposes is equal to the fair market value of the item, not the cost of the item. Finally, according to the Commission, if a public official receives multiple invitations to an event and has the freedom to distribute those invitations to others, then the value of the gift for gift rule purposes is the aggregate value of all of the invitations received.

Virginia

Virginia Changes Reporting Requirements

Because of recently passed legislation, effective July 1, 2005, every lobbyist in Virginia must send by December 15 of each year a copy of the relevant parts of the lobbyist's disclosure form to each legislative and executive official who is required to be identified as an expense beneficiary on such forms. The report must cover the previous 12 months, ending on the preceding November 30. This is a change from the previous report deadline, which was January 5 and which covered the time period up to the preceding December 31.

For 2005, the notification provided to the identified officials need only cover the previous 11 months, ending on November 30, 2005.

West Virginia

West Virginia Amends Lobbying Law

West Virginia made several changes to its lobbying law effective on July 1, 2005.

First, lobbyists are now required to attend a lobbyist training course on applicable lobbying and ethics provisions. Second, the state authorizes the West Virginia Ethics Commission to conduct random compliance audits of lobbyist registration statements and disclosure reports. Third, there is a new conflict of interest provision for lobbyists. A lobbyist and his or her immediate family may not participate in a government decision as part of certain government bodies if the lobbyist might receive direct economic benefit from the decision of that government body.

In addition to the new provisions discussed above, West Virginia also amended several of its lobbyist registration and reporting requirements. First, the state raised its lobbying registration from $60 to a base fee of $100 plus $100 for each employer represented. Second, the state streamlined the lobbyist reporting requirements. Now, lobbyist reports are due three times per year: May 15, September 15 and January 15, covering the dates of January 1 to April 30, May 1 to August 31, and September 1 to December 31, respectively. Third, the state eliminated the $25 threshold for reporting gifts to public officials and employees and clarified other itemization requirements. Finally, the new law provides that lobbyists need only retain their lobbying records for two years, a reduction from the previous five-year requirement. ■

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Upcoming Dates to Remember

July	**7/15/05**	Second quarter FEC report due for federal candidates
	7/20/05	July monthly FEC report due for federal PACs filing monthly
	7/20/05	July monthly IRS Form 8872 due for non-federal PACs filing monthly*
	7/31/05	Semiannual FEC report due from federal PACs filing semiannually
	7/31/05	Semiannual IRS Form 8872 due from non-federal PACs filing semiannually*
August	**8/15/05**	Lobbying Disclosure Act (LDA) filing due
	8/20/05	August monthly FEC report due for federal PACs filling monthly
	8/20/05	August monthly IRS Form 8872 due for non-federal PACs filing monthly*

Deadlines are not extended if they fall on a weekend.

*Qualified state and local political organizations are not required to file Form 8872 with the IRS.

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