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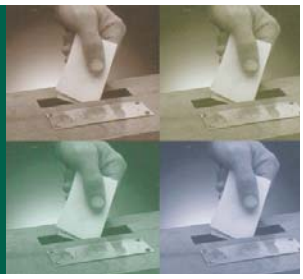

Firms Pay Penalties for LDA Violations, Fines Total $47,000

Contrary to the assumption of many in the industry, the federal government is enforcing the provisions of the Lobbying Disclosure Act (LDA) through its prosecutorial powers. During the summer, the U.S. Attorney for the District of Columbia released the text of three civil settlements related to LDA violations, with total fines of $47,000.

Natsource LLC, a Washington lobbying firm, settled for $25,000. According to the terms of the settlement, Natsource failed to file mid-year LDA reports in 2003. CHG & Associates, another lobbying firm, agreed to pay $12,000 to settle civil claims that it failed to file semi-annual LDA reports in 2000. Finally, an unnamed lobbyist agreed to pay $10,000 to the U.S. Attorney in order to close his or her civil case. The lobbyist also agreed that neither he nor she, nor his or her employer, will engage in federal lobbying activities for three years. The settlement agreement stated that this lobbyist failed to file semi-annual LDA reports on multiple occasions.

Reminder

LDA reports are due on February 14 and August 14 of each year, covering the reporting periods of January 1 to June 30 and July 1 to December 31, respectively.

All of the settlement agreements contain provisions that do not release the private parties from, among other things, any criminal claims.

Guidance about the LDA can be found on the Secretary of the Senate's website, www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm. ■

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FEC Revisits Electioneering Communication Rules

Pursuant to court decisions from the U.S. Court of Appeals for the D.C. Circuit and the U.S. District Court for the District of Columbia, the Federal Election Commission (FEC) has issued a notice of proposed rulemaking (NPRM) that will affect the contours of the definition of "electioneering communication" and the scope of the blackout periods for unions and corporations. Specifically, the NPRM targets for deletion the exceptions in the current rules for public service announcements (PSAs) and communications made by 501(c)(3) charities, and proposes to add an exception related to advertisements, including movies and books. Comments are due on the rulemaking by September 30, 2005, and the Commission has scheduled a hearing on October 19, 2005.

Under the Bipartisan Campaign Reform Act of 2002, corporations and labor unions (and organizations funded by corporations and unions) are prohibited from making "electioneering communications," while others are required to file reports of such activity. Electioneering communications are broadcast, cable and satellite radio and

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FEC Appeals D.C. Circuit Decision on BCRA Regulations

On August 29, 2005, the Federal Election Commission (FEC) announced that it was appealing a recent decision regarding FEC regulations to the full U.S. Court of Appeals for the District of Columbia Circuit. A panel of the D.C. Circuit had ruled on July 15, 2005, that the FEC must rewrite or better explain five regulations implementing the Bipartisan Campaign Reform Act of 2002 (BCRA). *Shays v. Fed. Election Comm'n*, 414 F.3d 76 (D.C. Cir. 2005). The panel's ruling stemmed from an appeal of a district court decision that had similarly required revision or further justification of these and other rules the FEC had promulgated. The FEC decided to appeal the decision of the district court as it applied to five of the rules while beginning rulemaking proceedings to address the rest. While the FEC appeals the three-judge panel's decision to the *en banc* D.C. Circuit, it is also proceeding with rulemakings in some of these areas. See related article on page 1.

The appellate panel ruled against the FEC on all five regulations that were subject to the appeal. A summary of the court's ruling with regard to each of the five regulations follows:

Standards for "Coordinated Communication"

FEC regulations explain that an expenditure can be considered "coordinated" with a candidate or political party if, among other things, it refers to a clearly identified candidate or party within 120 days of an election and is directed to the relevant electorate. An expenditure that is "coordinated" is treated as an in-kind contribution subject to federal limitations and prohibitions. However, the court of appeals determined that the FEC had not sufficiently justified the 120-day time period and invalidated the regulation as arbitrary and capricious.

Definitions of "Solicit" and "Direct"

The BCRA disallows various individuals, including officials of national political parties, federal candidates and federal officeholders, to "solicit" or "direct" funds not compliant with federal amount and source limitations, *i.e.*, "soft money." The FEC's regulations took a strict view of the meaning of these terms requiring that they be interpreted to apply only to explicit and direct requests for money. The court of appeals ruled that this contravened the BCRA, which the court understood to require a broader interpretation that reaches indirect requests for funds.

Interpretation of "Electioneering Communication"

FEC regulations had carved out an exception from the definition of "electioneering communications" (communications by television and radio within 30 days of a primary or 60 days of a general election that are directed to the relevant electorate) for those that are not disseminated for a fee. The court of appeals ruled that such an exemption was not contemplated by the language of the BCRA and did not meet the BCRA's specific criteria for establishing exemptions to the definition of "electioneering communication."

Allocation Rules for State Party Employee Salaries

The BCRA requires that salaries for state party employees who spend more than 25% of their time on federal elections be paid entirely with federally regulated funds. The FEC determined in its rulemaking that those employees who do not exceed the 25% threshold may be paid entirely with non-federal funds. The court of appeals determined that the FEC had not provided an adequate justification for this conclusion in light of the fact that pre-existing FEC rules generally require that administrative expenses be allocated between federal and non-federal funds and not paid entirely by one or the other.

De Minimis Exemption from Allocation Rules for "Levin Funds"

State parties that are permitted to operate "Levin" accounts by virtue of state law must allocate expenditures for certain federal election activity between "Levin" and federal funds. However, the FEC's regulations provided a *de minimis* exemption from this requirement for allocable activity that does not exceed $5,000. Again, the court of appeals held that the FEC had not adequately justified the basis for this exemption. ■

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FEC Approves Trade Association Payroll Deduction Rule

At its open meeting on July 14, 2005, the Federal Election Commission (FEC) approved by a vote of 5-1 (with Commissioner Weintraub dissenting) the final rulemaking with respect to payroll deduction for trade associations. Under the new rule, a corporation that is a member of a trade association and that has given the trade association prior approval for solicitations for the trade association's federal political action committee (PAC) may use, upon written request of the trade association, payroll deduction to collect trade association PAC contributions from the corporation's administrative and executive personnel and employee stockholders. This use of payroll deduction is not considered to be an impermissible "facilitation" of contributions, and the corporation may pay the expenses for the use of the payroll deduction system.

The one change to the proposed rules that was approved at this meeting mandates that, if a corporation uses payroll deduction to collect contributions for a trade association's PAC, then the corporation, and any of the corporation's "subsidiaries, branches, divisions, and affiliates," must make payroll deduction available, upon written request and at cost, to any labor union representing employees at the corporation or its subsidiaries, branches, divisions or affiliates. This labor union "equal access" to payroll deduction is somewhat broader than what was first proposed.

The new rule, which became effective on August 22, 2005, and the FEC's explanation and justification can be found at **www.fec.gov/pdf/nprm/payroll_deduction_trade_ssf/notice_2005-18.pdf**. ■

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Ohio's Taft Failed to Report Gifts, Second Governor Found Guilty

Governor Bob Taft of Ohio pled no contest to receiving 52 gifts worth more than $6,000 in the past four years. He was found guilty of four misdemeanor violations by the state court and fined $4,000. Most of the gifts were in the form of golf and expensive meals. Ohio requires executive branch officials to report all gifts of more than $75, which Taft failed to do. Two former staff members were also found to have violated the same gift reporting statute and each paid a $1,000 fine. His former chief of staff had failed to disclose vacation stays at the Florida home of a Toledo businessman.

The Ohio gift violations come less than a year after Connecticut Governor John Rowland resigned and subsequently pled guilty to accepting more than $107,000 in personal gifts from a government contractor. Rowland is currently in federal prison serving a sentence of one year and a day. Recent press reports indicate that Connecticut state authorities are separately investigating whether Rowland violated a state ethics law that prohibits former officials from lobbying for a year. Rowland is alleged to have lobbied between the time he resigned and when he started his prison term.

All states and most municipalities have laws that limit the size of gifts.

All states and most municipalities have laws that limit the size of gifts—particularly from lobbyists to government officials—and/or require public disclosure of gifts. State laws also regulate "revolving door" employment of former government officials. For a complete list of links to state websites with ethics and gift law information, visit **http://profs.lp.findlaw.com/election/election_9.html**. ■

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FEC Releases Results of Audit Highlighting Additional PAC Errors

The Federal Election Commission (FEC) recently released the results of its audit of the Democrat, Republican, Independent Voter Education Political Campaign Committee (DRIVE), the political action committee (PAC) of the Teamsters Union. The audit, which focused on DRIVE's activities from January 1, 2001, through December 31, 2002, uncovered a number of mistakes that can arise when operating a PAC.

As noted in our July newsletter article entitled "FEC Corporate PAC Audit Highlights Several Common Errors," the FEC requires a PAC to keep a copy of each employee's Payroll Deduction Authorization (PDA) on file. Based on its analysis, the FEC determined that DRIVE lacked PDAs for contributions totaling more than $1.2 million. To conform to the FEC's requirements, DRIVE began using an image database to store old and current PDAs. According to DRIVE, the database currently is updated every 30 days, and if a contribution does not match a PDA, it is returned.

During the two-year period, DRIVE also received two bank loans totaling $500,000 that were questioned by the FEC. In order for a bank loan to be treated as a loan and not as a contribution, the FEC requires that it be "made on a basis that assures repayment." 11 C.F.R. § 100.82(a)(2). On paper, DRIVE appeared to satisfy this requirement with a promissory note and a continuing security agreement with the bank. Upon closer inspection, however, the FEC found numerous problems with the actual transaction. For example, while the loans were ostensibly made using certificates of deposit as collateral, DRIVE did not actually maintain any of these financial instruments. Additionally, the FEC found no evidence that DRIVE provided any financial statements or revenue estimates as proof of a source of revenue to repay the loan, a violation of the loan agreement. When DRIVE countered by claiming that the amount of pledged funds and the value of DRIVE's accounts at the bank always exceeded the amount of the loan, the FEC produced bank statements indicating that this claim was inaccurate.

In its audit, the FEC also uncovered a number of misstatements relating to DRIVE's reported financial activity. In 2001, for example, DRIVE had overstated its receipts by $321,264. DRIVE claimed this resulted from the difficulty in getting local unions and/or employers to send contributor information electronically in a timely manner. As a result, the contribution amount was entered into the database as an un-itemized receipt with the contributor information added at a later date. However, due to problems with data entry, this process resulted in the double-counting of some contributions that could not be fixed by the time the reports were filed. The FEC recommended that DRIVE file amended reports as necessary to correct the errors. ■

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Corporation Pays Penalty for Facilitating Corporate Contributions

Earlier this summer, the Federal Election Commission (FEC) collected more than $40,000 in civil penalties from Westar Energy, Inc., several of its former officials and one of its outside lobbyists in connection with a corporate-organized fundraising scheme.

In the conciliation agreements from Matter Under Review 5573(MUR), the FEC outlined a fundraising plan initiated and orchestrated by corporate officials and the outside lobbyist. In all, corporate officials solicited and collected more than $40,000 in contributions to federal candidates and committees, some of which were mailed to the candidates at the company's expense and all of which were collected and forwarded by corporate officials in violation of federal law. According to the conciliation agreement, impermissible "facilitation" includes "*inter alia*, directing staff to plan, organize or carry out a fundraising project as part of their work responsibilities and using corporate resources and providing materials for the purpose of transmitting or delivering contributions, such as stamps, envelopes or other similar items." More information on the MUR, including relevant documents and conciliation agreements, can be found on the FEC's website at http://eqs.nictusa.com/eqs/searcheqs. ■

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WRF Partner Co-Chairs Upcoming PLI Conference

Wiley Rein & Fielding partner Jan Witold Baran, chair of the firm's Election Law & Government Ethics Practice Group, will co-chair the Practising Law Institute's upcoming conference, Corporate Political Activities 2005: Complying with Campaign Finance, Lobbying & Ethics Laws, on September 15-16, 2005, in Washington, DC.

Heightened public scrutiny of political contributions has made activity by corporations, trade associations and unions more complex than ever. During this popular annual program, high-level officials from the Federal Election Commission, U.S. Department of Justice, Office of Government Ethics and Congressional ethics committees, as well as expert private practitioners, will explain how to comply with the laws regulating political and lobbying activities.

The conference will also cover hot FEC topics, such as soft money, issue advocacy, 527 organizations and campaigning on the Internet.

In addition, key program topics will include:

- Federal and state election and lobbying/gift laws
- Bipartisan Campaign Reform Act
- Contributions and expenditure limitations
- Political action committees
- Political use of corporate aircraft and facilities
- Current developments in lobby registration rules
- Corporate gift-giving and ethics
- Tax considerations including IRS Section 527 rules

For more information or to attend PLI's annual conference, please visit **www.pli.edu/emktg/aprimo/ARD5_1.htm**. ■

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Electioneering Communication Rules

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TV ads that mention or feature a federal candidate, are aired within 30 days of a primary or 60 days of a general election and are able to be received by 50,000 or more persons in the relevant jurisdiction.

The NPRM addresses one issue raised when the U.S. Court of Appeals for the D.C. Circuit in *Shays v. FEC* (see related article on page 2 about the appeal of this ruling) upheld a lower court ruling striking down, among other things, the FEC's rules related to electioneering communications distributed for free. In the current FEC rules, there is an exception for PSAs because the definition of electioneering communications requires that it be "distributed for a fee" in order to be regulated. The proposed rules in the NPRM, available at **www.fec.gov/pdf/nprm/exemption_doc_films/notice_2005-20.pdf**, would do away with this exception and prohibit PSAs produced or distributed with corporate or union funds.

The NPRM also addresses an issue not raised on appeal by the FEC to the D.C. Circuit. The issue relates to an exception in the FEC's current rules for electioneering communications sponsored by a 501(c)(3) organization. The FEC initially created this exception because, under the tax code and IRS rules, such charities are not permitted to participate in federal elections. In response to a district court ruling, the NPRM proposes to eliminate this exception, unless the communication "does not promote, support, attack, or oppose a federal candidate," known as "PASO" in FEC circles.

Finally, moving in another direction and not pursuant to a court decision, the proposed rules in the NPRM add an exception for a communication that "[p]romotes a movie, book, or play, provided that the communication is within the ordinary course of business of the person that pays for such communications" and the communication does not PASO a federal candidate.

The Commission, in the NPRM, asks for comments by September 30, 2005, on all of these proposed actions. ■

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Upcoming Dates to Remember

September	9/20/05	September monthly FEC report due for federal PACs filing monthly
	9/20/05	September monthly IRS Form 8872 due for nonfederal PACs filing monthly*
October	10/15/05	Third quarter FEC report due for federal candidates
	10/20/05	October monthly FEC report due for federal PACs filling monthly
	10/20/05	October monthly IRS Form 8872 due for nonfederal 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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