Wiley Rein LLP

Election Law News

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Are You Ready?!?

Gift Laws Already Effective; New Lobbying Disclosure Rules Begin January 1

By Jan Witold Baran and Carol A. Laham

Are you ready for the compliance challenges that present themselves with the passage of the Honest Leadership and Open Government Act of 2007 (HLOGA)? Many provisions of HLOGA, such as the criminalization of Congressional gift violations, became effective in September with the President's signature. Others, including the new Lobbying Disclosure Act (LDA) special reporting and certification rules, become effective January 1, 2008.

With all of the new rules, compliance becomes even more complicated than before and necessitates an organized approach that begins now. Understanding the new rules is the first step towards implementation, which needs to involve training of all pertinent personnel, a review and update of processes, collection and preparation of necessary data, and institutional accountability. In short, it means change—and a lot of it.

Many corporations and trade associations have formed internal committees and task forces to tackle the compliance challenge, bringing together leaders from legal, compliance, management, government

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The Media Highlights Wiley Rein's Advisory Role in Stephen Colbert's Spoof Bid for the White House

The Politico, *The New York Sun* and *The Blog of Legal Times* recently explored the legal implications of Stephen Colbert's satirical run for the presidency and the role played by Wiley Rein's Election Law experts, who counseled Mr. Colbert's network, Comedy Central, on the legal issues surrounding his candidacy.

Mr. Colbert, the host of Comedy Central's program, "The Colbert Report," allegedly sought to get on the South Carolina ballot in both parties' primaries. Whether or not his presidential candidacy was a joke, executives at Comedy Central took the legal implications of it very seriously, reports an October 26 *Politico* story.

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Sea Change for Congressional Use of Private Aircraft: We Are All in Coach Now!!

By Jan Witold Baran and D. Mark Renaud

With the passage of the Honest Leadership and Open Government Act of 2007 (HLOGA) in September, Congress instituted many lobbying and ethics changes. Not least among them were changes to whether and how Members of Congress and Congressional staff and campaigns may use private aircraft for various types of trips.

In short, Congress enacted outright prohibitions on private aircraft use in certain circumstances, additional limitations in other circumstances, and higher (meaning charter) reimbursement rates in still other situations, depending on the identity of the traveler and the nature of the trip. The various rules are summarized below.

House: No Plane for You!

HLOGA first and foremost prohibits House candidates and leadership PACs from using private aircraft for campaign travel. There is one exception, which is for an aircraft owned or leased by a candidate or his or her immediate family. This rule became effective on September 14, 2007. The FEC is currently undertaking a rulemaking to establish the scope and details of this particular statutory requirement. The rulemaking can be found at http://www.fec.gov/pdf/nprm/cand_travel_hloga/notice_2007-20.pdf. Comments in this rulemaking are due November 13, 2007.

Through rule changes adopted earlier this year, the House also bans the use by Members and staffers of private aircraft for personal and official purposes. Furthermore, the House Committee on Standards of Official Conduct has interpreted the new rules to prohibit Members and staffers from using private aircraft for officially connected travel such as fact-finding trips (which themselves have been severely curtailed). The Committee has indicated that it may allow the use of private aircraft in exceptional circumstances. See http://www.house.gov/ethics/Travel_Guidelines.pdf.

THE SENATE ETHICS COMMITTEE HAS YET TO ISSUE ITS TRAVEL GUIDANCE, WHICH, WHEN ISSUED, SHOULD INCLUDE A DISCUSSION OF THE USE OF PRIVATE AIRCRAFT FOR OFFICIALLY-CONNECTED TRAVEL.

Senate and Presidential Candidates: Not First Class All the Way!

Congress did not ban travel on private aircraft by Senatorial and Presidential campaigns. Instead, HLOGA disposes of the previous first-class/charter rate calculation and mandates that the campaigns pay the owner of the aircraft the normal and usual charter rate for a comparable plane of comparable size. If more than one candidate is using the aircraft at the same time, then each campaign pays the cost divided by the number of candidates. The payments must be made to the aircraft's owner or lessee within a commercially reasonable time. This rule became effective on September 14, 2007. It, too, is the subject of the current FEC rulemaking mentioned above.

Senate Personal Travel: Fun in the Sun, Charter-Rate Style!

The Senate, through HLOGA, amended its rules to establish a charter-rate-based reimbursement scheme for the use of private aircraft for personal travel by Senators and staff. The new rule became effective immediately and replaced the old valuation system that often used the first-class airfare as the reimbursement rate.

The reimbursement rate now for private travel by Senators and Senate staff is determined by dividing the normal and usual charter fare for a comparable aircraft of comparable size by the number of Members, officers, or Congressional employees on the flight. The new reimbursement rate does not apply to aircraft owned by Members of Congress or their immediate families.

The Senate Ethics Committee should issue its travel guidance this month.

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Pay-to-Play Spotlight

Increasingly, states and localities are implementing "pay-to-play" laws that limit the ability of government contractors to make campaign contributions to state and local candidates and officeholders. Depending on the jurisdiction, these prohibitions can extend years before and years after the actual contracting period. Further, the application of such laws can extend beyond the contractor itself to its officers, employees, parent and subsidiaries.

As a result of such pay-to-play laws, contracting or attempting to contract with states and localities involves ensuring that political contributions do not render a contractor unable to bid on a contract or cause the contractor to lose a contract that it already has won. The following discussion of local pay-to-play ordinances in New Jersey commences a new feature in Election Law News*: the "Pay-to-Play Spotlight." Each issue, we will focus on a different pay-to-play situation from around the country.*

New Jersey Localities: A Diverse Patchwork of Pay-to-Play Laws

By Carol A. Laham and Kevin J. Plummer

In New Jersey, it is imperative that businesses holding or seeking contracts at the local level consult not only applicable state pay-to-play laws, but also the locality's own pay-to-play ordinances. These laws are often stricter and vary in their scope and application from jurisdiction to jurisdiction.

Within the past two years, New Jersey has instituted pay-to-play prohibitions for business entities having or seeking contracts in excess of $17,500 with the state, a New Jersey county, or a New Jersey municipality.

On the county level, New Jersey state law prohibits contractors with county contracts in excess of $17,500 from making contributions to an elected county official or to his or her county party. Similarly, on the municipal level, New Jersey state law prohibits contributions from contractors with municipal contracts in excess of $17,500 to elected municipal officials and their municipal party committees. Under state law, the county and municipal prohibitions only extend to those contracts that were not procured under a "fair and open" process.

New Jersey counties and municipalities, though, are permitted to have their own, often more stringent, pay-to-play provisions. The New Jersey Secretary of State's office has collected links to various county and municipality provisions, available at http://www.state.nj.us/state/secretary/ordinance.html.

In Monmouth County, New Jersey, for example, the County Board of Chosen Freeholders recently implemented much broader and more far-reaching pay-to-play prohibitions that those the state imposes. First, unlike state law, the prohibitions extend to all contracts, even those that were procured under a "fair and open" process. Second, the Monmouth County prohibitions cover not only those contributions prohibited under state law, but also contributions made to municipal party committees in the county, as well as to any committee, PAC or 527 organization that has supported a Monmouth County municipal or county candidate in the past year. Third, certain individuals who work for the contractor are limited to contributing $300 per calendar year to each covered candidate, committee, PAC or 527 organization. Finally, all covered individuals are prohibited from contributing more than $2,500 in the aggregate to all covered candidates, committees, PACs or 527 organization.

These strict local rules, therefore, are traps for the unwary. As with state law, violations can result in the loss of government contracts and bans on future government business. These local laws also have the unfortunate tendency to be loosely drafted and to use vague terminology. Nonetheless, they are becoming part of the government contract landscape in New Jersey and around the country. ■

FEC Proposes Bundling Rules

By Carol A. Laham and D. Mark Renaud

Per a command in the Honest Leadership and Open Government Act of 2007 (HLOGA), the Federal Election Commission (FEC) has opened a rulemaking into the bundling reporting provisions of HLOGA. Comments in this rulemaking are due on November 30, 2007.

HLOGA requires that candidate committees, leadership PACs, and party committees report certain contributions bundled by lobbyists, lobbyist employers and the PACs controlled by them. In the rulemaking, the FEC is considering several proposed rules to flesh out the substance of these reporting requirements.

The FEC has raised in its rulemaking several important questions about the reporting process. One of the most important questions raised is whether the reporting will be limited solely to contributions bundled by lobbyists and lobbyist employers and their PACs or whether reporting also should include contributions bundled by nonlobbyist employees of lobbyist employers. The Notice of Proposed Rulemaking (NPRM) also raises the issue of how PACs controlled by lobbyists and lobbyist employers will so identify themselves so that the recipient committees can prepare the proper reports.

Finally, the NPRM discusses, among other things, the level of contributions from a fund-raiser that should be attributed to each lobbyist or PAC that is listed on an invitation to that fundraiser (the "multiple host" issue). One option is allocating all of the money raised at the fund-raiser to each person listed on the invitation. Another option is an even division among fund-raiser hosts.

Another issue addressed is whether reporting should be done quarterly or even monthly by committees that already file on a more frequent basis.

The text of the NPRM can be found at http://www.fec.gov/pdf/nprm/bundling_hloga/notice_2007-23.pdf.

Wiley Rein LLP is available to draft comments to the rules. ■

FEC OKs Jointly-Sponsored Candidate Appearances

By Jan Witold Baran and Andrew G. Woodson

On behalf of three trade associations—the Associated Builders and Contractors, the National Federation of Independent Business, and the National Restaurant Association—Wiley Rein LLP successfully sought an advisory opinion from the FEC permitting these entities to jointly host a number of presidential candidate teleconferences focusing on small-business issues. Under the proposal, individual members of all three organizations would dial into a joint, password-protected conference call with a particular candidate and would be given the opportunity to hear the candidate speak, as well as to ask questions. The candidate, in turn, would be able to ask individuals participating in the call to volunteer and make contributions to the candidate's campaign.

The significance of the advisory opinion is that it permits a group of trade associations to pool their general treasury funds and jointly host a presidential candidate forum with the combined restricted classes of all three organizations.

Importantly, the FEC conditioned its approval on the ability of the associations to use a reasonable accounting method to ensure that each association only pays for the actual costs incurred in communicating with its own restricted class. By tracking the percentage of individuals from each association who dialed into the call (or by using some other reasonable accounting method), the FEC concluded that one trade association's funds would not be used to subsidize a candidate's appearance before the restricted class of another organization.

Wiley Rein LLP attorneys Jan Baran and Carol Laham represented the trade associations in this proceeding. ■

Wiley Rein Election Law Lawyers Keep Pennsylvania Issue Ad on the Air

On Friday, November 2, Wiley Rein Election Law attorneys Thomas W. Kirby and Caleb P. Burns beat back an effort by the Pennsylvania Attorney General and Commonwealth Secretary to force a client's issue ad off the air.

The ad, sponsored by the Center for Individual Freedom, said that a Pennsylvania judge had a record of being tough but fair in dealing with criminals and asked viewers to sign an on-line petition thanking her. The judge was running for election to the Pennsylvania Supreme Court, but the ad did not mention the election or identify the judge as a candidate.

Wiley Rein previously had obtained a federal court ruling that Pennsylvania's law did not restrict such ads unless they contained explicit words that expressly advocated the election or defeat of a clearly identified candidate. The Pennsylvania authorities brought suit in the Commonwealth Court, arguing that standard should not be strictly applied and that the ad's request for "thanks," made just before an election, was the functional equivalent of advocating a vote. The state judge ruled that the Pennsylvania authorities had failed to make the clear showing necessary to obtain an injunction forbidding speech.

Before the state court hearing, Wiley Rein had filed papers with the federal court seeking further relief. The Center for Individual Freedom expects to pursue the federal case to make crystal clear its right to run similar issue ads in the future.

"The state court suit was doubly flawed," said Mr. Kirby. "First, the federal action established an objective bright-line standard to guide speakers that the state sought to change into a fuzzy subjective test. Second, under the First Amendment, no court has any business issuing a preliminary injunction forbidding speech on public issues and officers."

For more information, please contact Thomas W. Kirby at 202.719.7062 or tkirby@wileyrein.com. ■

FEC Permits Disaffiliation at the Time of a Corporate Spin-off

By Jan Witold Baran and D. Mark Renaud

In Advisory Opinion 2007-12, the Federal Election Commission (FEC) permitted the disaffiliation of the U.S. subsidiaries of two spun-off corporations and their PACs from the U.S. subsidiary of the former parent entity (and its PAC). Importantly, the FEC for the first time found disaffiliation at the time of the spin-off instead of at a later time.

The advisory opinion request came from Tyco International Management Company (Tyco US) and its federal separate segregated fund. The facts involved the separation of Tyco Electronics Ltd. and Covidien Ltd from the former ultimate parent Tyco International Ltd. All three companies after the spin-off are publicly traded on the New York and Bermuda stock exchanges.

In support of its request, Tyco US submitted historical data from Goldman Sachs that detailed the increased stock-trading volume after major spin-offs had taken place. Given the anticipated vigorous trading and concomitant diversification of the companies' shareholder bases in this particular spin-off (as predicted by the historical data), the FEC found that the shareholder bases among the companies would cease to be common in a very short amount of time. Accordingly, disaffiliation was made retroactive to the date of the spin-off. The FEC also looked at many other factors of disaffiliation, such as minimal overlap among the boards of directors.

Tyco US was represented in this advisory opinion by Wiley Rein LLP attorneys Jan Baran and Mark Renaud. ■

FEC Agrees to Disagree about Whether an LLC Can Pay PAC Administrative Expenses

By Jan Witold Baran and Caleb P. Burns

On behalf of GMAC LLC, Wiley Rein LLP requested guidance from the Federal Election Commission on whether GMAC LLC may pay the administrative and solicitation costs of a PAC established by a wholly owned subsidiary corporation, and whether the PAC may be named "GMAC LLC PAC" and abbreviated as "GMAC PAC." The FEC responded by issuing Advisory Opinion 2007-15, in which the FEC explained that it was unable to reach a consensus as to the first issue, but concluded that the PAC may nonetheless include the name "GMAC LLC" in its name and may use the abbreviation "GMAC PAC."

As explained by Wiley Rein LLP in the advisory opinion request, a wholly owned subsidiary corporation of GMAC LLC intends to establish a PAC. GMAC LLC wanted to (1) use its own personnel and resources to administer the PAC, (2) name the PAC "GMAC LLC PAC," and (3) refer to the PAC by the abbreviation "GMAC PAC."

The advisory opinion request argued that the affiliated relationship of GMAC LLC to its wholly owned subsidiary corporation should permit GMAC LLC to use its resources to administer the PAC. This result appears to be justified by analogous FEC regulations and advisory opinions. Other FEC advisory opinions suggested that the PAC could also be named and abbreviated in the manner desired by GMAC LLC.

Nonetheless, the FEC Commissioners could not agree on whether the affiliation of GMAC LLC and its wholly owned corporate subsidiary was enough to permit GMAC LLC to use its resources to administer the PAC. However, all five Commissioners agreed that the PAC name could include "GMAC LLC" in its name—along with the name of the subsidiary corporation—and could be abbreviated as "GMAC PAC."

Jan Baran and Caleb Burns submitted the request on behalf of GMAC LLC ■

Maine Expands Legislative Lobbying Law to Executive Branch

By Carol A. Laham and Andrew G. Woodson

Earlier this year, Maine Governor John Baldacci signed into law two bills that make several changes to the state's lobbying and ethics laws. Most notably, Maine's lobbying laws now require the reporting of legislative lobbying contacts with constitutional officers and other officials of the executive branch.

Specifically, the state expanded the definition of "lobbying" to include not only communications with officials in the legislative branch, but also (1) communications with an official in the executive branch or with a constitutional officer, if the conversation concerns legislative action; and (2) communications with the Governor or the Governor's cabinet and staff for the purpose of influencing the approval or veto of a legislative action. Nevertheless, the new law (former H.P. 776) still requires the lobbying contacts to be about legislative action in order to be reportable; other executive branch activity is not covered.

A separate bill (former H.P. 928) signed into law by the Governor requires independent agencies and certain quasi-governmental organizations to develop their own internal code of ethics. ■

Congressional Use

(***continued from page 2***)

Senate Officially Connected Travel: Under Construction

As noted above, the Senate Ethics Committee is set to issue its travel guidance, this month. When issued, this guidance should include a discussion of the use of private aircraft for officially-connected travel. From HLOGA, it appears that the free use of such aircraft is prohibited, although the Senate may allow the use of such aircraft if the charter rate is paid. ■

Federal Election Commission's Rules on Coordination Still in Effect

By Jan Witold Baran and D. Mark Renaud

On October 16, 2007, the Federal Election Commission (FEC) filed a notice of appeal in a federal district court case that involved, among other things, the Commission's coordination regulations. In a press release, the FEC noted that its coordination and other rules remain in effect pending the appeal, given that the district court did not enjoin their operation. For a summary of the FEC's coordination rules, see (www.wileyrein.com/coordination_regulations.) They are particularly important given that we are already within 120 days of many Presidential primaries and caucuses and almost within 90 days of Congressional primaries in at least one state. ■

Gift Rules (*continued from page 1*)

relations, and human relations, to name a few. Other companies also are trying to process and complete the 2007 Year End LDA report in 20 days (but only file it by February 14) to prepare for the usual course of business as of April of next year.

Among the other challenges faced by corporations and trade associations are the following:

- HLOGA calls for each individual lobbyist, lobbying firm, and employer of in-house lobbyists (the last two are referred to as "registrants") to certify that they have not provided a gift in contradiction to the House or Senate gift rules. Does your organization have a process established to account for any gift-giving by personnel? Do your employees know the gift rules and the necessary and now extremely important details of the exceptions thereto?
- HLOGA calls for quarterly LDA reports to be filed 20 days after the end of a calendar quarter. Does your organization have the data collection process in place to process the information in such a rapid time-frame? (It used to be 45 days twice a year.)
- HLOGA calls for special reports by lobbyists, registrants, and their PACs twice a year. Are your lobbyists aware of this special reporting requirement? Have they been instructed as to what contributions and other payments are covered or where and how to track their own contributions and payments? How about corporate expenditures?
- HLOGA changes the rules with respect to the use of corporate aircraft by Members of Congress, staff, and Congressional and Presidential campaigns. Have your legal and corporate offices been informed of these changes? Are policies in place to makes sure that no illegal corporate in-kind contributions are made through the use of corporate aircraft?
- HLOGA changes the time period over which an individual employee's activities must be analyzed to determine whether he or she is a "lobbyist" under the LDA. The time period is now three months instead of six months. Have you begun to look to see whether employees other than your registered lobbyists will qualify as "lobbyists" under the new rule? Have you changed their job functions and activities to make sure they do not become lobbyists (if that is the company's policy choice)? If not, have you made them aware of the rules that will become applicable to them come January 1? (This is doubly important for many trade association personnel who are not located in Washington, D.C., but who do undertake federal lobbying.)
- HLOGA adds many reporting requirements to the duties of registered lobbyists (including in-house lobbyists). Have you analyzed your company's list of registered lobbyists to make sure that everyone does and expects to continue to be a "lobbyist" under the LDA? Are you planning to delete those who no longer qualify from your February 14, 2008, LDA report so that the new reporting requirements will not apply to them?

Congress changed the laws and rules about gifts and lobbying. As a result, it is incumbent upon organizations in the private and nonprofit sectors to comply with the new rules; otherwise, they will risk civil, criminal, and public relations consequences. Now is the time to prepare—not January 1, 2008. ■

Colbert ***(continued from page 1)***

"The network has consulted a top Washington election law firm," says the *Politico* article in reference to Wiley Rein, "and appears keenly aware of the strict election law provisions that could be triggered by Colbert's satirical campaign."

The Politico article is one of many media stories to highlight Wiley Rein's advisory role in Mr. Colbert's faux campaign. *The New York Sun* published a similar commentary on the same day, noting that Comedy Central and parent company Viacom had hired "the real-life big-time D.C. law firm Wiley Rein" to explain the limitations on how Mr. Colbert could use his corporate money.

The Blog of the Legal Times also weighed in on the "joke" campaign, noting "the legal issues surrounding Colbert's presidential bid aren't exactly laughable" and that Comedy Central had hired Wiley Rein "to advice Colbert on how to avoid running afoul of the Federal Election Commission."

"It's an open question whether the FEC will move against Mr. Colbert," said *The Sun* article. "He's not running as a write-in candidate, as many of the other satirists have; he's taking concrete legal steps that make it difficult to declare that he's not technically a candidate."

As a result of Wiley Rein's legal advice, Mr. Colbert quickly changed the new title of "The Colbert Report" campaign segment from "The Hail to the Cheese Stephen Colbert Nacho Cheese Doritos' 2008 Presidential Campaign" to "The Hail to the Cheese Stephen Colbert Nacho Cheese Doritos' 2008 Presidential Campaign *Coverage*."

MR. COLBERT HELD UP FOR THE AUDIENCE A WILEY REIN MEMO PREPARED BY ELECTION LAW ATTORNEYS JAN WITOLD BARAN AND CALEB P. BURNS THAT NOTED THAT HE COULD NOT SPEND CORPORATE SPONSORSHIP MONEY ON HIS PRESIDENTIAL CAMPAIGN.

In the October 18 episode of "The Colbert Report," Mr. Colbert held up for the audience a Wiley Rein memo prepared by Election Law attorneys Jan Witold Baran and Caleb P. Burns that noted that he could not spend corporate sponsorship money on his presidential campaign, but that Comedy Central could assert a "media exemption" for campaign coverage.

"Ok, so it's illegal for my crunch money here to pay for the campaign," Mr. Colbert explained to viewers. "But it is legal for it to pay for my show, and the show can report on my campaign."

For more information, please contact Jan Baran at 202.719.7330 or jbaran@wileyrein.com. ■

To view the "Hail to the Cheese" segment click on the link below:

http://www.comedycentral.com/motherload/player.jhtml?ml_video=118650&ml_collection=&ml_gateway=&ml_gateway_id=&ml_comedian=&ml_runtime=&ml_context=show&ml_origin_url=/shows/the_colbert_report/videos/most_recent/index.jhtml&ml_playlist=&lnk=&is_large=true

Congratulations to Caleb P. Burns and D. Mark Renaud

Wiley Rein LLP and the Election Law Practice Group are pleased to announce that Caleb P. Burns and D. Mark Renaud have been elected to the firm's partnership effective January 1, 2008. Please join us in congratulating them both on this achievement.

Caleb and Mark both joined the firm in 2000. Since that time, they have been intimately involved in all areas of campaign finance, lobbying and ethics law. They regularly counsel multinational corporations, trade associations, lobbying firms, media companies, candidate committees, leadership PACs and nonprofits on the application of these laws. They also regularly work on state and federal court litigation, as well as on administrative proceedings.

Mark received his law degree from the University of Virginia School of Law and undergraduate degree from Yale College. Caleb holds a law degree from New York University School of Law and an undergraduate degree from Duke University.

Caleb P. Burns
202.719.7451
cburns@wileyrein.com

D. Mark Renaud
202.719.7405
mrenaud@wileyrein.com

UPCOMING DATES TO REMEMBER

Date	Event
November 20, 2007	November monthly FEC report due for federal PACs filing monthly
	November monthly IRS Form 8872 due for nonfederal PACs filing monthly*
December 20, 2007	December monthly FEC report due for federal PACs filing monthly
	December monthly IRS Form 8872 due for nonfederal PACs filing monthly*
January 1, 2008	New Lobbying Disclosure Act (LDA) requirements become effective
January 3, 2008	Iowa Caucuses

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.*

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Election Law Professionals

Name	Phone	Email
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
Jason P. Cronic	202.719.7175	jcronic@wileyrein.com
Bruce L. McDonald	202.719.7014	bmcdonal@wileyrein.com
Thomas W. Antonucci	202.719.7558	tantonucci@wileyrein.com
Caleb P. Burns	202.719.7451	cburns@wileyrein.com
D. Mark Renaud	202.719.7405	mrenaud@wileyrein.com
Andrew G. Woodson	202.719.4638	awoodson@wileyrein.com
Kevin J. Plummer	202.719.7343	kplummer@wileyrein.com
Shawn A. Bone	202.719.7243	sbone@wileyrein.com

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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