



# POLITICAL LAW AND GOVERNMENT ETHICS NEWS

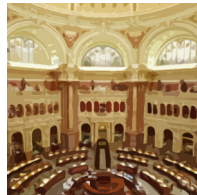
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## CONGRESS PASSES LOBBYING AND ETHICS LEGISLATION

The House and Senate passed the much debated lobbying and ethics reform bill before they adjourned for the August recess. The bill is currently awaiting the president’s signature.

The bill contains provisions that increase the disclosure of lobbying activities, set limits on gifts and travel provided by lobbyists, and increase penalties. For a more in-depth analysis of the new legislation, please refer to our policy alert issued on August 10, 2007, available at the following link:

<http://www.akingump.com/docs/publication/1011.pdf>

## LESSONS FOR LOBBYISTS: TRAVEL

The ethics reform legislation recently passed by Congress contains several provisions restricting travel. This legislation is in addition to changes made by the House of Representatives to its rules in January 2007 and incorporates provisions of competing bills passed by the House and Senate this spring. Certain provisions amend House and Senate rules only, while others add or change requirements in other statutes such as the Lobbying Disclosure Act (LDA) and the Federal Election Campaign Act (FECA).

It is important to remember that provisions dealing with the ability of a lobbyist to plan, organize or participate in a trip, as well as whether a lobbyist may accompany a member or staffer, are entirely dependent on situations where an entity that employs or retains lobbyists is paying for travel expenses. If an entity that employs or retains lobbyists is not paying for the travel expenses of a member or staffer, i.e., the member is conducting a site visit in his home state or district and a lobbyist employer is not paying, the restrictions are not in effect and a lobbyist may accompany the member or staffer or be present at the site.

### Lobbyist Participation in Travel

The newly adopted legislation contains major differences in who may pay for trips for members and staffers as well as the structure of trips. The House rules have been in effect since March. The Senate rules will change once the bill is signed into law.

**House** • Entities that do not employ or retain a lobbyist generally may continue to provide officially connected travel to members and staff and may still sponsor trips lasting up to four days for domestic travel or seven days for international travel. Entities that do employ or retain lobbyists may not pay for officially connected travel unless the trip is paid for directly by an institute of higher education or the travel is for a one-day event.

**Senate** • The Senate rules are written differently and have slightly different applications. The new Senate rules generally prohibit privately funded travel paid for by entities that employ or retain lobbyists or foreign agents, with two exceptions: travel to a one-day event and trips paid for by 501(c)(3) organizations. Unlike the House rules, which allow lobbyist participation in the planning and organization of a trip sponsored by an institute of higher education, the Senate rules prohibit senators, officers or staff from participating in trips planned, organized, or arranged by or at the request of a lobbyist in other than a *de minimis* way, regardless of the trip sponsor. The Senate rules also prohibit a lobbyist from accompanying the member, officer or employee “at any point throughout the trip” other than in a *de minimis* way.

Guidance offered in the Congressional Record by Sen. Feinstein, chair of the Senate Rules Committee, states that *de minimis* means “negligible or inconsequential,” such as a lobbyist responding to a trip sponsor’s request for names of members or staff who may be interested in issues relevant to a trip. *De minimis* does not, however, mean that a lobbyist may solicit or initiate an exchange of information with a trip sponsor, exercise control over which members or staff are invited on the trip, determine the itinerary, or exchange or forward an invitation for the trip. In addition, the Senate guidance requires that a lobbyist’s presence at an event or location being visited be a “widely attended event” to be considered *de minimis*. The provision describing “any segment” is meant to be read more broadly than the House provision, which only prohibits a lobbyist from accompanying the member or staffer on “any segment” of the trip, but permits a lobbyist to be in attendance at the event or location being visited.

## **Certification and Prior Approval of Travel**

Before accepting travel payments from a private source, the member or staffer must provide the House Committee on Standards of Official Conduct or the Senate Ethics Committee a signed and written certification that the funding for the trip is permissible and obtain prior approval for the trip from the respective committee. In addition, the clerk of the House and the secretary of the Senate will disclose all information on privately funded travel in a searchable online database.

## **Airfare Rates**

The new law also amends FECA to restrict the use of campaign funds for non-commercial flights by members of Congress and candidates for Congress. Effective upon enactment, members and candidates for the House and Senate may use campaign funds on flights or aircraft if the aircraft is operated by an air carrier or commercial operator certified by the FAA and the flight is required to be conducted under air carrier safety rules. In addition, senators and candidates for Senate may use campaign funds for non-commercial flights if they pay the full fair-market charter or rental rate for the flight. On the other hand, House members and candidates for the House may not use non-commercial flights at all unless the aircraft is operated according to the terms outlined above, or operated by an entity of state or federal government. House members and candidates may avail themselves of an exception permitting use of an aircraft owned or leased by the candidate or the candidate’s family.

## **Conclusion**

The new legislation establishes changes to how and when lobbyists and the entities that employ or retain them may pay for officially connected travel. In addition, the rules change the way that members and candidates may fund their campaign travel. In light of these changes, we would be happy to help you navigate any trips or events that you may be considering. Please do not hesitate to contact us with any questions.

## FEDERAL ELECTION COMMISSION (FEC) UPDATES

### FEC Issues Notice of Proposed Rulemaking on Electioneering Communications

To implement the Supreme Court's ruling in *Federal Election Comm'n v. Wisconsin Right to Life (WRTL)*, the FEC issued a Notice of Proposed Rulemaking (NPRM) seeking comment on proposals to amend the electioneering communication (EC) provisions that prohibit corporations and unions from using general treasury funds to pay for communications which refer to a clearly identified candidate for federal office and that are broadcast in a candidate's home state or district 30 days before a primary or 60 days before a general election. The Supreme Court held that the EC provisions of the 2002 Bipartisan Campaign Reform Act were unconstitutional as applied to the proposed issue ads because the ads were not the "functional equivalent of express advocacy," and the ads did not expressly advocate the election or defeat of a clearly identified candidate for federal office.

The FEC proposes two alternatives in the NPRM and seeks comment on both. Alternative 1 would create an exemption from the prohibition on the use of corporate and labor general treasury funds being used to finance ECs. The exemption would permit corporations and labor unions to use general treasury funds to pay for ECs but would require any corporation or labor union that spends more than \$10,000 on ECs in a calendar year to file disclosure reports with the FEC.

Alternative 2 changes the regulatory definition of ECs by exempting grassroots lobbying communications and commercial and business advertisements that satisfy the Supreme Court's test. This approach would eliminate the EC reporting requirements where an ad falls outside of the EC definition. The exemption from reporting requirements would apply to all "persons" paying for such ads, not just corporations and labor organizations.

Both alternatives would establish a safe harbor for grassroots lobbying communications based on the Supreme Court's analysis in *WRTL*. The Supreme Court held that the ads at issue were not the functional equivalent of express advocacy because they focused on a legislative issue, took a position on the issue, exhorted the public to adopt the position, and urged the public to contact public officials. The ads did not mention any election, candidacy, political party or challenger and did not comment on a candidate's character, qualifications or fitness for office.

The deadline for public comment is October 1, 2007, which will be followed by a public hearing scheduled for October 17, 2007. The FEC plans to vote on a final rule by the end of November 2007. For a more detailed discussion of the Court's ruling in *WRTL*, please refer to the August 2007 newsletter available at: <http://www.akingump.com/docs/publication/1012.pdf>.

### **Shays v. FEC**

The U.S. District Court for the District of Columbia ruled in favor of the FEC's motion for summary judgment in *Shays v. Federal Election Comm'n (Shays II)*. After the FEC chose not to issue regulations concerning the applicability of FECA to 527 groups, Rep. Shays filed suit seeking to compel the FEC to issue regulations defining when a 527 group must register as a political committee. On remand to the FEC, the FEC decided again not to implement regulations for 527 groups and issued a revised explanation of its decision to proceed on a case-by-case basis. Rep. Shays sought relief. On review, the court held that the FEC's justification was sufficient to explain why it had chosen to proceed on a case-by-case basis and declined to direct the FEC to promulgate regulations.

In reaching its decision, the court acknowledged the FEC's recent enforcement cases and settlements with several 527 groups, including Swiftboat Veterans, League of Conservation Voters, MoveOn.org Voter Fund and Progress for America Voter Fund. Fines in these cases totaled almost \$1.5 million and the FEC recently completed two enforcement matters resulting in over \$750,000 additional fines.

## **527 Groups Should Have Registered as Federal PACs and Used Federal Funds**

The FEC fined America Coming Together (ACT) \$775,000 after determining that the group used nonfederal funds (funds raised outside FECA's amount and source limitations) to make expenditures and raise contributions for the purpose of defeating President Bush and electing Sen. John Kerry during the 2004 presidential election.

In addition, the FEC fined a 527 group called Empower Illinois Media Fund (EIMF) for violations of FECA. EIMF violated federal campaign laws by raising money to defeat Sen. Barack Obama in the 2004 Senate campaign in Illinois without registering and reporting as a political committee or abiding by federal contribution limits. The EIMF is required to pay a \$3,000 fine and report previously undisclosed activity from August 20, 2004, through December 31, 2006.

On September 5, 2007, the Club for Growth, Inc. agreed to pay a civil penalty of \$350,000 for failing to register with the FEC as a political committee. The settlement concludes a suit pending before the U.S. District Court for the District of Columbia and represents the largest penalty obtained by the FEC after an enforcement case proceeded to litigation.

FECA requires organizations that accept or disburse more than \$1,000 for the purpose of influencing the election or defeat of a clearly identified candidate to register as political committees. Other factors considered when determining whether a group should register as a political committee include whether the organization's "major purpose" is the election or defeat of a federal candidate and whether communications made independently of a candidate contain express advocacy. Once the registration threshold is crossed, committees are required to register and file regular reports and follow the contribution limits set forth in FECA. Under campaign finance law it is permissible for PACs to maintain separate accounts for federal and non-federal funds. However, the federal PAC must follow all contribution limits, as well as registration and reporting requirements. In addition, federal funds must be used for activities and expenses attributable to federal candidates. PACs may allocate certain administrative expenses between the federal and nonfederal accounts so long as the appropriate allocation ratio is used.

## **Self-Reported Violations**

In Matter Under Review (MUR) 5899, the FEC dismissed the New York Bankers Association Community PAC's self-reported complaint. NYBA, after acquiring the assets of another association and its PAC, discovered that multiple provisions of FECA may have been violated. After conducting an internal audit, NYBA notified the FEC of the violations. The FEC exercised prosecutorial discretion and dismissed the case because the violations occurred before the acquisition of the PAC by NYBA, NYBA conducted a complete review of the PAC's activities in response to an inquiry from the FEC's Reports Analysis Division, NYBA initiated corrective action, and NYBA indicated its willingness to cooperate with the FEC to address the issues.

In an effort to encourage self-reporting of violations, the FEC recently issued a policy statement outlining its procedures in such circumstances. If a person or committee self-reports a violation of FECA and cooperates with any resulting investigation, the FEC may: take no action, offer a significantly lower penalty, offer conciliation prior to a finding of probable cause to believe a violation occurred, or refrain from making a formal finding that the violation was knowing and willful. The policy seeks to provide incentives for persons who demonstrate a willingness to cooperate with the FEC in an investigation. The policy does not, however, excuse violations of FECA or automatically end the enforcement process. Any person who thinks a violation may have occurred should seek legal counsel before self-reporting.

## **Facilitating the Making of a Corporate Contribution**

In MUR 5789, the FEC found no reason to believe that Bacardi, Inc. violated FECA by facilitating the making of a corporate contribution when it allegedly failed to obtain advance payment from Bacardi PAC for catering expenses for a fundraising event. Using its prosecutorial discretion, the FEC dismissed the case and sent the PAC a letter instructing it to obtain advance payment for events to avoid the potential for a prohibited corporate contribution.

## **Advisory Opinion Issued on Donations for Professional Entertainers**

On July 12, 2007, the FEC issued Advisory Opinion 2007-8, which approved former TV executive and philanthropist Michael King's proposal to make charitable donations to encourage volunteer performances by professional entertainers at campaign events. The opinion states that Mr. King may make such charitable donations, and they will not be considered contributions to the campaigns or political committees or compensation to the performers. Further, any publicity for such activities will not be considered to be a contribution or expenditure under FECA.

## **Candidate Committees Raise \$239 Million in First Half of 2007**

Between January 1 and June 30, 2007, House and Senate candidates reported receipts of \$239 million for the 2008 election. Senate candidates raised \$80.6 million and House candidates raised \$157.8 million.

In the aggregate, both Democratic House and Senate candidates raised more money during the first half of 2007 than their Republican counterparts. Fundraising figures for Senate candidates paralleled the figures for the same period in 2005. However, for the same period in 2001 when this year's Senate seats were last up for election, candidates had raised only half of the current totals. House candidates are also raising money at a pace that exceeds the totals from the first half of 2005.

## **Party Committees Raise Over \$200 Million in First Half of 2007**

The FEC reported that the Democratic Party committees raised \$111.5 million in the first six months of 2007, with Republican Party committees raising \$108.8 million. Trends show that the Democratic Party committees have made significant increases in their fundraising since 2003 and 2005, while the Republican Party committees are raising less money than during 2003 and 2005.

At the close of the first half of the year, the Republican Party committees had \$31.8 million in cash on hand and \$6.4 million in debt, while the Democratic Party committees had \$50.9 million in cash on hand and \$11.7 million in debt.

## **POINTERS FOR PACS (AND INDIVIDUALS): CONTRIBUTING TO SENATORS**

Contribution limits to candidates are based on a per-election limit: for House candidates it is a two-year cycle, for presidential candidates a four-year cycle, and for Senate candidates a six-year cycle. PACs and individuals frequently find themselves exceeding contribution limits to Senate candidates because of the difficulty of tracking contributions over a six-year period. Below are three suggestions that will streamline the process of contributing to senators.

- Identify the senator's election year (see chart on page 7)
- Review records for the six years preceding the election year
- Designate contributions

### **Multicandidate PACs**

FEC regulations prohibit candidate committees from presumptively redesignating contributions from multicandidate PACs to the next election to prevent an excessive contribution. Since undesignated multicandidate PAC contributions are automatically designated to the candidate's next election, all undesignated contributions made by a PAC before the general election are designated to the primary. If a multicandidate PAC has already made contributions totaling \$5,000 during the election cycle, any additional undesignated contributions made before the general election will be excessive contributions. The PAC may avoid making excessive contributions by designating future contributions to the general election. This can be done as an entry on the memo line of the check or designated in a cover letter accompanying the check.

In the event that a multicandidate PAC discovers that it made a contribution that should have been designated to a different election, the PAC has 60 days to send a letter to the candidate committee to request the redesignation. If the discovery is outside of the 60-day window, FEC regulations require that the PAC ask for a refund of the contribution and then reissue a check with the appropriate designation.

## Individuals

Individuals must also be mindful of their contributions to senators over the six-year cycle. Since candidate committees may presumptively redesignate individual contributions, there is more flexibility. However, tracking your own contributions is the only way to ensure compliance with the two-year aggregate contribution limit.

The contribution limit from an individual to a candidate is adjusted for inflation every two years. The contribution limit for the election year of the senator is the contribution limit that applies to the individual. For example, Jane gave a total of \$4,200 to Sen. Jones in 2005 and Sen. Jones is up for reelection in 2008. The new contribution limit increased to \$2,300 per election for 2008, so Jane may contribute an additional \$200 to Sen. Jones for each election. If Jane makes a \$400 contribution in 2007, she should designate on the check that \$200 is designated to the primary and \$200 is designated to the general.

For purposes of the overall two-year biennial limit for individuals, contributions count against the biennial limit for the year in which the contribution is made. So Jane's contributions in 2005 count against her 2005-2006 biennial limit, and her contribution in 2007 counts against her 2007-2008 contribution limit.

## SPECIAL ELECTIONS

- In the special primary on September 4, 2007, for the 5th Congressional District in Massachusetts, Niki Tsongas won the Democratic nomination and Jim Ogonowski won the Republican nomination. They will face off in the special general election on October 16, 2007, to fill the seat of retiring Rep. Marty Meehan (D-MA).
- Laura Richardson (D-CA) won the August 21, 2007, special election in California's 37th District, which was held to fill the seat of the late Rep. Juanita Millender-McDonald (D-CA).



## Senate Election Schedule

Senators' Elections in 2008	Senators' Elections in 2010	Senators' Elections in 2012
Lamar Alexander (R-TN)	Evan Bayh (D-IN)	Daniel Akaka (D-HI)
Wayne Allard (R-CO)*	Robert Bennett (R-UT)	John Barrasso (R-WY)‡
John Barrasso (R-WY)‡	Christopher Bond (R-MO)	Jeff Bingaman (D-NM)
Max Baucus (D-MT)	Barbara Boxer (D-CA)	Sherrod Brown (D-OH)
Joseph Biden (D-DE)	Sam Brownback (R-KS)*	Robert Byrd (D-WV)
Saxby Chambliss (R-GA)	Jim Bunning (R-KY)	Maria Cantwell (D-WA)
Thad Cochran (R-MS)	Richard Burr (R-NC)	Benjamin Cardin (D-MD)
Norm Coleman (R-MN)	Tom Coburn (R-OK)	Thomas Carper (D-DE)
Susan Collins (R-ME)	Mike Crapo (R-ID)	Robert Casey, Jr. (D-PA)
John Cornyn (R-TX)	Jim DeMint (R-SC)	Hillary Rodham Clinton (D-NY)
Larry Craig (R-ID)†	Christopher Dodd (D-CT)	Kent Conrad (D-ND)
Elizabeth Dole (R-NC)	Byron Dorgan (D-ND)	Bob Corker (R-TN)
Pete Domenici (R-NM)	Russell Feingold (D-WI)	John Ensign (R-NV)
Richard Durbin (D-IL)	Charles Grassley (R-IA)	Dianne Feinstein (D-CA)
Michael Enzi (R-WY)	Judd Gregg (R-NH)	Orrin Hatch (R-UT)
Lindsey Graham (R-SC)	Daniel Inouye (D-HI)	Kay Bailey Hutchinson (R-TX)
Chuck Hagel (R-NE)	Johnny Isakson (R-GA)	Edward Kennedy (D-MA)
Tom Harkin (D-IA)	Patrick Leahy (D-VT)	Amy Klobuchar (D-MN)
James Inhofe (R-OK)	Blanche Lincoln (D-AR)	Herbert Kohl (D-WI)
Tim Johnson (D-SD)	Mel Martinez (R-FL)	Jon Kyl (R-AZ)
John Kerry (D-MA)	John McCain (R-AZ)	Joseph Lieberman (I-CT)
Mary Landrieu (D-LA)	Barbara Mikulski (D-MD)	Trent Lott (R-MS)
Frank Lautenberg (D-NJ)	Lisa Murkowski (R-AK)	Richard Lugar (R-IN)
Carl Levin (D-MI)	Patty Murray (D-WA)	Claire McCaskill (D-MO)
Mitch McConnell (R-KY)	Barack Obama (D-IL)	Robert Menendez (D-NJ)
Mark Pryor (D-AR)	Harry Reid (D-NV)	Bill Nelson (D-FL)
Jack Reed (D-RI)	Ken Salazar (D-CO)	E. Benjamin Nelson (D-NE)
Pat Roberts (R-KS)	Charles Schumer (D-NY)	Bernard Sanders (I-VT)
John Rockefeller IV (D-WV)	Richard Shelby (R-AL)	Olympia Snowe (R-ME)
Jeff Sessions (R-AL)	Arlen Specter (R-PA)	Debbie Stabenow (D-MI)
Gordon Smith (R-OR)	John Thune (R-SD)	Jon Tester (D-MT)
Ted Stevens (R-AK)	David Vitter (R-LA)	James Webb (D-VA)
John Sununu (R-NH)	George Voinovich (R-OH)	Sheldon Whitehouse (D-RI)
John Warner (R-VA)*	Ron Wyden (D-OR)	

\* Announced retirement

‡ John Barrasso was appointed after the death of Sen. Craig Thomas and faces a special election in 2008. The winner of that election will run in 2012.

† Should Sen. Larry Craig resign from the Senate, Idaho Governor C. L. "Butch" Otter (R) will name a replacement for the remainder of the term.

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