



POLITICAL LAW AND GOVERNMENT ETHICS NEWS

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U.S. DISTRICT COURT FOR D.C. RULES IN *SHAYS V. FEDERAL ELECTION COMMISSION (SHAYS III)*

The United States District Court for the District of Columbia declined to defer to the Federal Election Commission's (FEC) regulations and determined that several regulations promulgated were in violation of the Administrative Procedure Act or were not based on a permissible construction of the statute. The case, *Shays v. Federal Election Commission*, is a continuation of a challenge brought by Congressmen Christopher Shays and Martin Meehan who argued that the FEC's regulations were contrary to the Bipartisan Campaign Reform Act (BCRA) and opened loopholes in the campaign finance laws. In an earlier decision, the court remanded nine regulations back to the FEC to either more fully explain its rationale for adopting the rule or to promulgate new rules. In the latest decision, the court remanded to the FEC for further action the regulations dealing with federal election activities (FEA) and coordinated communications. Also challenged, but left intact by the court, was the FEC's explanation of the regulations governing federal candidate solicitation at state party fundraisers.

The court did not immediately enjoin the operation of the invalidated rules and also declined to order the FEC to conduct expedited rulemakings. However, it is anticipated that the FEC will begin work on new regulations to provide guidance for the 2008 election.

POINTERS FOR PACS: CONTRIBUTING TOWARD DEBT RETIREMENT

It is not uncommon for candidates to have debts following an election. When candidates have net debts outstanding for a particular election, federal campaign finance laws permit them to raise money for that election, even after that election has occurred. If a PAC or an individual wishes to make a contribution to retire the debt for a candidate for a particular election they must: (1) review their contribution record for that candidate for that election to ensure that the maximum contribution limit has not been reached and (2) designate the contribution for the specified election. A contributor may only make a contribution for debt retirement if he or she has not already given the maximum allowable contribution for that election.

FEC BRIEFING

Corporate PACs Allowed to Invite Restricted Classes to Jointly Sponsored Event

In Advisory Opinion (AO) 2007-14, the FEC approved a request by three trade associations that allows them to invite their respective restricted classes to a jointly sponsored event that will feature a federal candidate. The trade associations must split the costs on a pro rata basis or by a reasonable method, to ensure that each association does not subsidize the costs of the candidate's appearance to a restricted class of another association.

PACs No Longer Affiliated

The FEC approved AO 2007-12 which determined that the PACs of Tyco International, Ltd. (Tyco) and two publicly traded spin-offs were not affiliated for purposes of the Federal Election Campaign Act (FECA). FECA requires that political committees that are established, financed, maintained or controlled by the same corporation, including any parent, subsidiary, branch, division or department are affiliated. Contributions made by affiliated political committees are considered to have been made by a single committee and, thus, share contribution limits. Tyco and its two spin-offs demonstrated that they were unaffiliated by showing a lack of ownership or control by Tyco over the other two companies, minimal overlap of employees, the diversity of stock ownership in the groups of people holding shares in the three companies and discontinuation of funding by Tyco to the two spin-offs.

In AO 2007-13, the FEC concluded that the PACs of a labor union and a membership organization were not affiliated. FEC regulations identify organizations that are *per se* affiliated including "a single or international union and/or its local unions or other subordinate organizations; an organization of national or international unions and/or all of its state and local central bodies; and a membership organization, including trade and professional associations, and/or related state and local entities of that organization." The AO determined that the American Nurses Association PAC and a PAC established by the United American Nurses, a labor union, were not *per se* affiliated because they did not have the relationship of being a national and subordinate state or local organization. In addition, neither organization exercises control over the other, has the ability to participate in the governance of the other, and the two organizations are not established, financed or maintained by the other. The FEC concluded that the organizations' PACs are not affiliated.

FEC Resolves Matters Involving Internet Activity

In Matter Under Review (MUR) 5928, the FEC determined that Kos Media, LLC, which operates DailyKos, is entitled to the media exemption and is therefore exempt from the definitions of contribution and expenditure under FECA. FEC regulations provide that costs incurred in carrying a news story, commentary or editorial by any Internet or electronic publication are not contributions or expenditures unless the facility is owned or controlled by any political party, political committee or candidate.

A complaint filed with the FEC alleged that the website should register and report as a political committee. The complaint argued that because the site charges for advertising space but also provides space for the posting of blog entries supporting candidates without cost, the free space constituted a contribution or expenditure for the purpose of influencing a federal election. The FEC determined that DailyKos is the online equivalent of a newspaper, magazine or other periodical publication and has, as its primary purpose, the provision of news and commentary. As such, DailyKos is entitled to the media exemption and the FEC found no reason to believe that Kos Media violated FECA.

In MUR 5853, the FEC found that blogging which advocated for the defeat of Rep. Mary Bono did not violate FECA. As part of the volunteer exemption in FECA and FEC regulations, the FEC clarified in its Internet regulations that an individual's use of equipment and personal services for blogging, creating or hosting a website for the purpose of influencing a federal election—as long as the individual is not compensated for

those activities—is exempt from the definitions of expenditure under FECA. This exemption applies whether or not the Internet activities are conducted independently or in coordination with a candidate.

The FEC reviewed allegations that an individual had made expenditures to lease space on a computer server to blog against Mary Bono, a candidate for federal office. The complaint also alleged that the individual coordinated his activity with Ms. Bono’s opponent and that the expenditures constituted in-kind contributions.

In determining that no violations of FECA occurred, the FEC relied on the specific language of the exemption for Internet activity conducted by uncompensated individuals.

PACs Fined for Reporting Violations

In MUR 5809, the FEC fined the Christian Voter Project \$38,000 for failing to properly disclose independent expenditures and operating expenditures. Campaign finance law defines an independent expenditure as a communication that expressly advocates for the election or defeat of a clearly identified candidate and is not coordinated with a party or candidate committee. In addition to reporting independent expenditures on their regularly scheduled reports, committees are required to file either a 24 or 48 hour notice when certain aggregate limits are met. The Christian Voter Project failed to file 24 and 48 hour notices disclosing nearly \$300,000 worth of independent expenditures. Additionally, over \$125,000 of independent expenditures and nearly \$60,000 of operating expenditures were not disclosed on their regularly scheduled FEC reports.

The Laffey U.S. Senate committee was fined \$25,000 (MUR 5770) for failing to properly report contributions that were earmarked for the committee by a conduit. The committee received over \$350,000 in earmarked contributions from Club for Growth, but failed to properly identify Club for Growth as a conduit on its reports.

SPECIAL ELECTIONS

- On October 16, 2007, a special general election will take place for the 5th Congressional District of Massachusetts to fill the seat of retired Rep. Marty Meehan (D-MA). Niki Tsongas (D-MA) and Jim Ogonowski (R-MA) will face off in the special general election.
- The special primary election in Ohio’s 5th Congressional District will be held on November 6, 2007, to fill the seat of the late Rep. Paul Gillmor (R-OH).

NOTES FROM THE HILL

The Air Transportation Association ruled that senators may not book seats on multiple flights because doing so would constitute a prohibited gift under the new ethics law. The Senate Rules and Administration Committee is considering ways to clarify that airlines are not making “gifts” if they allow senators to secure more than one flight home at a time.

For the third time, a campaign finance bill that would require senators to file their FEC reports electronically was blocked by an anonymous hold.

Rep. Lynn Westmoreland (R-GA) recently introduced the PAC Fairness Act of 2007 (H.R. 3492) that would increase and index for inflation the contribution limits to and from PACs. Under the bill, PACs would be able to give \$7,500 to a candidate and individuals would be able to give \$7,500 to a PAC. The bill would also eliminate the requirement that trade associations get “prior approval” from their members before soliciting members’ employees and would also permit solicitations other than through the mail.

Both Houses of Congress passed the State Children’s Health Insurance Program (SCHIP) reauthorization legislation.

LESSONS FOR LOBBYISTS: BUNDLING

The new lobbying and ethics reform law provides the first statutory definition of bundling and requires the recipient committee to disclose contributions bundled by lobbyists and registrants under the Lobbying Disclosure Act. The FEC must issue regulations implementing the new law within six months. The new regulations will become effective three months after final promulgation by the FEC.

Authorized Agent

For individuals who act as bundlers for a campaign, it is important to receive an agent letter from the campaign authorizing the bundler to accept checks on behalf of the campaign. Without such authorization, a bundler who collects checks from contributors and forwards them to a campaign, as opposed to the contributors sending their checks directly to the campaign, may run afoul of the conduit regulations and trigger reporting obligations with the FEC. This authorization from the treasurer should be obtained in writing and a copy should be kept for personal records.

Best Efforts

As authorized agents of the campaign, bundlers must use best efforts to obtain the information required for recordkeeping. The information is as follows—

- amount of contribution
- date bundler receives contribution
- donor's name and address
- donor's occupation
- donor's employer.

Campaigns should be able to provide contributor cards that contributors can complete and include with their contribution check.

Forwarding Contributions

The bundler must forward the contribution to the candidate committee within 10 days of receiving the contribution. The bundler must not deposit the contributions; all contributions should be made out to the candidate committee.

Prohibited Activity

Bundling is a permissible form of fundraising, so long as the above mentioned actions are taken and bundlers are careful not to accept checks from prohibited sources such as corporations or foreign nationals. Bundlers must also avoid using any direction or control when seeking contributions for candidates. If a bundler uses direction or control, then the contribution “double counts” against the contribution limits of both the bundler and the individual who made the contribution. Additionally, bundlers must make certain that they are not encouraging individuals to make a contribution in the name of another. Reimbursing another person for his or her contribution is illegal. For example, Joe Smith cannot give Susie Moore money for Susie to make a contribution. The activity violates FECA and is vigorously investigated by the FEC.

UPDATES FROM THE STATES

Alabama

A former county commissioner in Jefferson County, Alabama, was sentenced to five years in federal prison and ordered to pay restitution for over \$850,000 in bribes he received from contractors who were interested in the county's sewer rebuilding program.

Alaska

A federal jury convicted a former Alaska House speaker of conspiracy to solicit financial benefits, extortion and bribery. In addition to accepting nearly \$9,000 and a political poll, the former speaker was promised a job by Veco Corporation, a corporation that could have made millions of dollars if the Alaska Legislature approved certain tax provisions.

California

The California State Teachers' Retirement System (CALSTRS), the nation's second largest public pension fund, passed limits on campaign contributions to the governor and other public officials from individuals and firms trying to buy into investment deals. The regulations are currently at the state Office of Administrative Law for review and could go into effect in two months. It is possible that other states with pension systems may consider similar laws.

The California Fair Political Practices Commission fined the Building Industry Association of Central California's PAC for several missing or late campaign contribution reports.

Florida

In Tallahassee's Leon County, county commissioners approved lobbying regulations that will make lobbying activities more transparent by requiring lobbyists to disclose clients before they begin to lobby and ban gifts designed to influence votes. The new rules are in addition to the state law that prohibits gifts from lobbyists in excess of \$100.

Hollywood, Florida, city commissioners passed a new ordinance tightening lobbying and ethics rules by requiring former elected officials and city employees to wait two years after they leave their city position to do business with the city, prohibiting commissioners from lobbying on behalf of private companies before other state agencies and requiring lobbyists to identify themselves at public meetings.

Indiana

The Gary, Indiana City Council approved an ethics policy that requires city officials to file a public disclosure notice when they have a financial or personal interest in a contract under consideration by the city. In addition, all elected or appointed city government officials are prohibited from accepting gifts in exchange for preferential treatment at city hall.

Iowa

The Iowa Ethics Board ruled that the state's gift law banning gifts of \$3 or more to public employees does not apply to students in grades K through 12. In response to schools advising students against giving gifts to their teachers, the ethics board clarified that children were not intended to be included in the "restricted donor" category of the gift law.

Maine

A new lobbying law in Maine expanded the definition of lobbying to include communications with both the legislative and executive branches, or with a constitutional officer, for the purpose of influencing legislation. Previously the definition of lobbying only pertained to communications with the legislative branch.

Maryland

The Montgomery County ethics panel determined that lawmakers violated the county's ethics laws by taking trips to Israel, which were paid for by a local Jewish organization that is registered as a lobbyist. Under Montgomery County ethics rules, trips may be funded by private foundations that are not registered as lobbyists. The ruling came as a surprise because the trips had been going on for years.

New Jersey

New Jersey Gov. Jon Corzine signed four ethics bills into law in early September. The new laws prohibit legislators from holding two elected offices at the same time, make it illegal for elected officials to misuse public resources for private gain, increase penalties for public corruption convictions and require lawmakers' voting records to be posted on the Internet. Gov. Corzine cited an effort to ban "pay-to-play" at the top of his agenda for the next round of reform.

A new law in New Jersey requires businesses with contracts of \$50,000 or more with state and local governments to file an annual report with the New Jersey Election Law Enforcement Commission (ELEC) disclosing each contact and all political contributions over \$300. Although contracting firms are prohibited from donating to gubernatorial and state party committees, the reports would disclose permissible political contributions to legislative leadership PACs or individual legislators. For-profit companies were required to file their reports at the end of September, but trustees and officers of nonprofit groups were granted at least a one-month extension while the ELEC determined whether they should be required to file the reports.

FBI agents arrested 12 people, including 11 New Jersey public officials, on charges of demanding and taking cash bribes to influence the awarding of public contracts.

New York

The New York Temporary State Commission on Lobbying and the New York Ethics Commission merged on September 22, 2007, to form the Public Integrity Commission. The Executive Director of the New York State Commission on Lobbying of 13 years, David Grandeau, does not have a position on the new Public Integrity Commission. During his tenure, Mr. Grandeau had many conflicts with prominent political figures arising from his aggressive enforcement of the ethics laws.

Oklahoma

The Oklahoma Ethics Commission is considering whether to strengthen the gift rules that prohibit lobbyists from spending more than \$300 on gifts for any legislator on behalf of their clients. Opponents of the change allege that the new wording is vague. The ethics commissioner expressed concern that the gift rules are being abused and a solution is needed that allows lobbyists to do their job without creating abuse in the system.

South Carolina

The South Carolina House Ethics Committee publicly reprimanded a legislative candidate in South Carolina for a flier that was printed and mailed by a supporter. The candidate was sanctioned for having knowledge of the distribution of the flier, failing to report it as an in-kind contribution and permitting it despite the fact that the costs for printing and mailing the flier exceeded the individual contribution limits of \$1,000.

Tennessee

Shelby County, Tennessee commissioners approved a new ethics bill in June that prohibits gifts of more than \$200 to commissioners from groups that have contracts with the county.

Washington

The Washington Supreme Court ruled that a committee backed by the U.S. Chamber of Commerce was required to register and report as a political committee for ads it funded in the 2004 Washington Attorney General's race. The committee registered and reported its contributions before the decision, but argued that they should not have been required to register because the ads were issue advocacy ads. The disclosure report revealed that the U.S. Chamber of Commerce contributed \$1.5 million to the committee. In response to the 2004 ads, state legislators amended Washington's campaign finance law to require third-party groups buying ads in political campaigns, such as the U.S. Chamber of Commerce, to disclose their donors.

Wisconsin

A former Wisconsin trucking executive was charged with steering more than \$250,000 in illegal political contributions to more than 20 candidates at the local, state and federal levels. The individual faces up to two years in prison and a fine of \$200,000 for the conspiracy to make illegal contributions in a scheme that reimbursed individuals for contributions made to candidate committees.

AKIN GUMP'S POLITICAL LAW AND GOVERNMENT ETHICS PRACTICE

Akin Gump Strauss Hauer & Feld LLP has long understood the importance of complying with federal and state campaign finance, lobbying and ethics laws. Because of this, Akin Gump has established and maintained a strong practice advising clients on the often complex and confusing legal and regulatory framework surrounding political activity.

The recent, explosive growth of regulation, affecting campaign activity, lobbying, and the interaction between the public and their elected officials requires both individuals and businesses to consider and structure their political activities carefully. No one, whether an individual, corporation, nonprofit organization or trade association, can afford to ignore the myriad regulations governing interaction with federal and state political officials. Akin Gump is committed to providing its clients with a full range of related services, and its political law and government ethics practice is an integral part of that mission.

Our services include establishing political action committees, advising on permissible corporate activity, assisting in interactions with federal and state officials, representing and defending clients before the Federal Election Commission and state campaign finance regulatory authorities, providing strategic advice for maximizing an organization's political involvement, ensuring compliance with the Foreign Agent Registration Act and the Lobbying Disclosure Act, administering both federal and state PACs, filing federal and state campaign finance reports and tax documents, and analyzing PAC employee and member participation.

Our practice represents a diverse group of individuals, donors, trade associations, corporations, grassroots groups and nonprofits. With the recent scandals and legislative and regulatory changes, the stakes are higher than ever for those engaging in political activity. Our strength is providing the legal and advisory experience necessary to champion our clients' goals while working within the confines of the complex regulatory scheme governing political activity.

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If you have any questions about any of the topics in this newsletter, please contact us:

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