

POLITICAL LAW AND GOVERNMENT ETHICS NEWS

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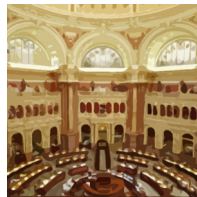
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POLITICAL ACTION COMMITTEE (PAC) ACTIVITY CONTINUES TO INCREASE

The Federal Election Commission (FEC) recently released statistics revealing that PACs increased their receipts by 18 percent and spent 25 percent more between January 1, 2005, and December 31, 2006, than over the previous two-year period. In total, PACs raised \$1.086 billion during 2005 – 2006 and spent \$1.055 billion, \$372.1 million of which was contributed to federal candidates. Corporate PACs account for 36 percent of all PACs and 26 percent of total PAC receipts are accumulated from corporate PACs. The United Parcel Service PAC is the leader among corporate PACs with total receipts over the two-year period exceeding \$4.75 million.

Top 40 Corporate PACs by Receipts¹ January 1, 2005 – December 31, 2006

RANK	NAME	RECEIPTS
1	United Parcel Service PAC	\$4,778,387
2	Pfizer PAC	\$3,666,564
3	Fed Ex PAC	\$3,248,346
4	Wal-Mart PAC	\$3,002,453
5	AT&T PAC	\$2,663,714
6	Valero Energy PAC	\$2,500,113
7	Koch Industries PAC (KOCH PAC)	\$2,387,844
8	HSBC North America PAC (H-PAC)	\$2,321,219
9	Anheuser-Busch PAC	\$2,292,104
10	Union Pacific PAC	\$2,266,940
11	Bank of America PAC	\$2,197,765
12	Burlington Northern Santa Fe Rail PAC (BNSF RAILPAC)	\$2,133,562
13	Smithkline Beecham PAC (GLAXOSMITHKLINE PAC)	\$2,127,982
14	General Electric PAC	\$2,110,636
15	Lockheed Martin PAC	\$2,050,561

¹ Data provided by the Federal Election Commission.

RANK	NAME	RECEIPTS
16	JP Morgan Chase PAC	\$2,036,631
17	OSI Restaurant Partners PAC	\$1,975,538
18	Enterprise Rent-a-Car PAC	\$1,946,691
19	Aflac PAC	\$1,932,496
20	Exelon PAC	\$1,900,272
21	Eli Lilly PAC	\$1,873,328
22	Honeywell International PAC	\$1,838,907
23	Altria Group PAC	\$1,778,475
24	Compass Bancshares PAC (COMPASS BANCPC)	\$1,768,755
25	Raytheon PAC	\$1,666,273
26	Verizon PAC	\$1,598,033
27	Home Depot PAC	\$1,579,507
28	Northrop Grumman PAC	\$1,519,527
29	Comcast PAC	\$1,494,127
30	General Dynamics PAC (GDVPCP)	\$1,413,198
31	Microsoft PAC	\$1,398,736
32	Black America's PAC	\$1,322,750
33	BellSouth PAC	\$1,319,196
34	Boeing PAC	\$1,314,848
35	Washington Group International PAC	\$1,293,413
36	Duke Energy PAC	\$1,256,243
37	DLA Piper PAC	\$1,254,859
38	New York Mercantile Exchange PAC	\$1,245,622
39	UBS PAC	\$1,239,889
40	America's Political Action Committee	\$1,231,367

POINTERS FOR PACS: COORDINATED COMMUNICATIONS²

When a political committee or an individual pays for a communication that is coordinated with a candidate or party committee, the communication is an in-kind contribution subject to the limits and prohibitions of the Federal Election Campaign Act (FECA). In order to determine if a communication is “coordinated,” FEC regulations apply a three-part test: payment, content and conduct. All three parts of the test must be met for a communication to be deemed a “coordinated communication.”

Payment Standard

The payment standard is satisfied when someone other than the candidate or party committee, such as a PAC or individual, pays for the communication in whole or in part.

² The following is a broad overview of the regulations pertaining to coordinated communications. If you are planning on conducting activities in consultation or cooperation with a candidate or party committee the activities may constitute coordinated communications.

Content Standard³

The content standard relates to the timing and subject matter of the communication. The purpose of the content prong is to regulate certain communications that are intended to influence federal elections. A communication that meets any one of the following conditions satisfies the content standard:

1. A communication that is an electioneering communication.
2. A public communication that republishes, disseminates or distributes in whole or in part campaign material prepared by a candidate's committee.
3. A public communication that expressly advocates the election or defeat of a clearly identified candidate.
4. A public communication mentioning a House or Senate candidate 90 days before an election for such office or mentioning a presidential or vice presidential candidate 120 days before a primary election through the general election.

The 2008 presidential primary season is fast approaching. Early primary states such as Iowa and New Hampshire have already triggered the 120-day window. The 120-day window is also in effect for states with presidential primaries on February 5, 2008.

Conduct Standard⁴

The conduct standard considers the relationship between the person paying for the communication and the candidate or party committee benefiting from the communication. This standard is satisfied if any one of the five following criteria is met:

1. A communication is made at the request or suggestion of the candidate or party committee. This standard is also triggered if the payee suggests the communication and the candidate or party committee assents to the suggestion.
2. The candidate or party committee is materially involved in decisions relating to the communication.
3. The communication is created after one or more substantial discussions about the communication between the payee and the candidate or party committee.
4. The payee employs a common vendor that (a) provided services to the candidate or party committee during the previous 120 days and (b) uses information about the needs of the candidate or party committee to create the communication.
5. A person has previously been an employee or independent contractor of a candidate's committee or party committee during the previous 120 days and that person provides information about the needs of the candidate or party committee for the creation of the communication.

If a PAC disseminates a public communication that satisfies the payment, content and conduct standards, it is a "coordinated communication" subject to the \$5,000 per election contribution limit. As such it is reportable as an in-kind contribution on the PAC's report and is reported by the recipient committee on their report.

³ Temporal limits in the content standard were remanded back to the FEC in *Shays III* for further action. They remain in effect pending FEC action. The FEC has appealed the decision in *Shays III*.

⁴ Portions of the conduct standard are on appeal in *Shays III*.

FEC BRIEFING

FEC Appeals *Shays III* Decision

The FEC filed a notice of appeal on October 16, 2007, in the *Shays v. Federal Election Commission (Shays III)* case. In September 2007, a district judge remanded certain provisions of the Commission's regulations to the FEC for further action. The remanded regulations implement sections of the Bipartisan Campaign Reform Act (BCRA) and involve coordinated communications, voter registration and get-out-the-vote activity. The FEC's current regulations remain in effect until they are revised or repealed.

FEC Rulemakings

The FEC has issued proposed rulemakings to comply with the Supreme Court's ruling in *Wisconsin Right to Life v. FEC* and to implement the Honest Leadership and Open Government Act of 2007 (HLOGA). The FEC issued a Notice of Proposed Rulemaking (NPRM) on electioneering communications on August 23, 2007, and held a public hearing on October 17-18, 2007. Final rules are expected before the end of the year. As a result of HLOGA, the FEC issued an NPRM on the use of campaign funds for non-commercial travel on October 18, 2007, and the FEC approved an NPRM for bundled contributions at its October 30, 2007, open meeting.

Payment of Administrative Costs and Name for Corporate PAC

In Advisory Opinion (AO) 2007-15, the FEC was asked whether GMAC LLC could pay the administrative and solicitation costs of a corporate PAC established by a GMAC subsidiary corporation, and whether the PAC could be named GMAC LLC PAC.

The corporate structure of GMAC LLC consists of 51 percent ownership by FMI Holdings LLC, which is owned by a company named Cerberus FIM Investors, LLC (Cerberus). The tax status of both GMAC LLC and FMI Holdings LLC is that of a partnership, but the tax status of Cerberus is not available. GMAC LLC proposed establishing a PAC for its corporate subsidiary GMAC Insurance Holdings, Inc. (GMAC Insurance).

The FEC was unable to determine whether the partnership GMAC LLC could pay the administrative costs of its corporate subsidiary GMAC Insurance. Partnerships and LLCs treated as partnerships under the IRS Code are prohibited from serving as the connected organization to a corporate PAC, unless the partnership is owned entirely by a corporation. Some commissioners concluded that they did not have enough information to determine if GMAC LLC was owned entirely by corporations because Cerberus's tax status was unavailable. On the other hand, several commissioners did not believe that the exception for a partnership owned by a corporation was the appropriate analysis for this case.

The FEC concluded that the PAC could be named "GMAC LLC PAC." Additionally, the FEC concluded that "GMAC PAC" was also permissible because the FEC's regulations permit a corporate PAC to use a clearly recognized abbreviation or acronym as their name. The full name of the corporation and the acronym are required on all reports filed with the FEC and in disclaimer notices on communications to the public.

Group Qualifies as Membership Organization and Groups Affiliated

In AO 2007-16, the FEC found that the American Kennel Club (AKC), its voting clubs and accredited clubs qualified as membership organizations and were affiliated with one another so that a prospective corporate PAC may solicit all the members of the clubs.

In concluding that AKC, its voting clubs and accredited clubs qualified as a membership organization, the FEC examined six criteria: (1) the board of directors is comprised of members, (2) the membership requirements are expressly stated, (3) the charter and bylaws are available to members on the web site, (4) AKC expressly solicits membership, (5) AKC formally acknowledges members and (6) AKC is not organized for the purpose of influencing federal elections.

Additionally, the AKC, the voting clubs and accredited clubs demonstrated that they were composed of persons who qualify as members by (1) satisfying membership requirements, (2) accepting an invitation to become a member and (3) paying annual dues.

The FEC determined that although AKC and the voting and accredited clubs were not *per se* affiliated, several circumstantial factors indicated that AKC established, financed, maintained or controlled the voting and accredited clubs. The factors included (1) AKC and its clubs share in the governance of one another, (2) AKC and its clubs have the ability to make employment decisions for the other and (3) AKC is active in forming the voting and accredited clubs.

Signature Requirements for Checks Issued via Online Banking Service

The FEC found, in AO 2007-17, that personal checks issued through an online banking service, which are signed by a bank official rather than the individual, do not require follow-up from the recipient committee to obtain a signature as long as the check has the account holder's name, account number, account holder's address and identifying information that the account holder provided to the bank to issue the check. In instances where the check is drawn from a joint account, the recipient committee should follow-up with the account holder to determine how the contribution should be attributed.

Radio Station Dedicated to 2008 Presidential Election Granted Press Exception

The FEC decided in AO 2007-20 that XM Satellite Radio Inc. (XM), a satellite radio subscription service, qualifies for the press exemption and is allowed to provide free airtime to presidential candidates. XM proposed to launch a national, 24-hour, commercial-free channel dedicated to the 2008 presidential election called POTUS '08. XM also proposed to provide free airtime to presidential candidates on POTUS '08.

In order to be able to provide this service without making prohibited corporate contributions or electioneering communications, XM must qualify as a press entity. The FEC determined that XM qualified as a press entity because it is in the business of producing news stories, commentary and editorials; it is not owned or controlled by any political committee or candidate; and the provision of free airtime to presidential candidates constitutes covering or carrying a news story or commentary.

Individual and Corporation Fined \$1 Million

The FEC accepted a conciliation agreement from Mitchell Wade in which he admitted to knowingly and willfully funneling \$78,000 in corporate contributions to federal candidates. Federal law prohibits corporations and individuals from reimbursing contributions. Under the reimbursement scheme, Mr. Wade used funds from the corporation MZM to reimburse employees and their spouses for contributions they made to two campaign committees. The candidates were unaware of the prohibited activity and later reimbursed or disgorged all MZM-related contributions.

SPECIAL ELECTIONS

On November 6, 2007, a special primary took place for the 5th Congressional District of Ohio to fill the seat of the late Rep. Paul Gillmor (R-OH). Robert Latta (R-OH) and Robin Weirauch (D-OH) will face off in the special general election on December 11, 2007.

On December 11, 2007, a special general election will be held in the 1st Congressional District of Virginia to fill the seat of the late Rep. Jo Ann Davis (R-VA).

Niki Tsongas (D-MA) won the October 16, 2007, special general election in Massachusetts's 5th Congressional District. Ms. Tsongas will fill the seat of retiring Rep. Marty Meehan (D-MA).

LESSONS FOR LOBBYISTS: CONVENTIONS

The newly passed lobbying legislation prohibits members from participating in events held in their honor at national party conventions if the event is paid for by a registered lobbyist or a private entity that employs or retains a lobbyist.

Pending guidance from the Senate Ethics Committee and the House Committee on Standards of Official Conduct, companies and organizations interested in hosting an event should seek counsel before making plans for the event. The Republican National Convention will be held in Minneapolis-St. Paul, Minnesota, from September 1-4, 2008. The Democratic National Convention will be held on August 25-28, 2008, in Denver, Colorado.

NOTES FROM THE HILL

The Senate Ethics Committee officially ruled that senators can book multiple flights home from Washington, D.C., without violating the gift ban. This clarification was issued following the Air Transportation Association's ruling that booking seats on multiple flights was a violation of the new ethics law. However, staff members are not permitted to book multiple flights.

President Bush vetoed the State Children's Health Insurance Program (SCHIP) reauthorization legislation.

UPDATES FROM THE STATES

Florida

In Lake County, Florida, a new ordinance requires lobbyists to sign a registry in which they must identify their client, the officials with whom they meet and the purpose of their visit.

Idaho

A federal appeals court struck down an Idaho law forbidding teacher, firefighter and other local government employee unions from using payroll deduction to raise funds for political activities.

New Jersey

The New Jersey Election Law Enforcement Commission (ELEC) determined that nonprofit agencies with contracts of \$50,000 or more with state and local governments must disclose their contracts and political

contributions made by their officers and trustees by November 30, 2007. For-profit companies were already required to submit their disclosure forms at the end of September 2007.

During the three years that New Jersey has prohibited political contributors from obtaining state contracts, the Treasury Department reviewed approximately 22,000 forms submitted by prospective vendors and disqualified 24 vendors. Disqualification results in a penalty and a ban from government contracts for 18 months or the remainder of the governor's term in office, whichever is longer.

New York

As required by the state's new ethics rules, New York Lieutenant Gov. David Paterson wrote a check to the state from his campaign account for use of state aircraft on a trip where the primary purpose was public business, but also included a meeting with a political fundraiser.

North Carolina

The North Carolina, Henderson County Republic Party cancelled their annual cobbler sale at the 2007 North Carolina Apple Festival because it was unclear whether the new state ethics rules would treat the purchase of cobbler as a contribution, thus requiring everyone who purchased the cobbler to give their name and address. The party cancelled the fundraiser and lawmakers are working on a bill to address the issue.

A North Carolina state representative paid a \$16,000 state penalty for accepting money for a fraudulent loan and accepting contributions from anonymous or prohibited donors.

Oklahoma

The Oklahoma Ethics Commission issued clarification of the \$300 annual limit on gifts from lobbyists. The law was unclear as to whether or not the \$300 annual limit was aggregated for anyone associated with the lobbyist's company or group, or if each lobbyist could spend \$300 on an elected official. The ethics commission ruled that gifts given by employees, stockholders or trade association members will not count toward the \$300 annual limit on individual lobbyists, principals and other entities, unless the gift is given at the direction of a lobbyist or principal. In addition, the ethics commission found that a gift given by a contract lobbyist on behalf of one client does not count against the \$300 annual limit for other candidates.

Pennsylvania

The Pennsylvania House adopted rules changes that increase the authority of the chamber's internal oversight panel on member conduct. The new rules require the committee to recommend sanctions against members accused of ethics violations, create a handbook for members and staff, and develop a two-hour ethics training session.

Washington

A King County, Washington, councilperson agreed to pay an \$8,000 fine after admitting to violating state campaign finance laws for reimbursing herself from the surplus funds account, making prohibited contributions to candidates and political groups, and accepting excessive contributions from several individuals.

A hospital executive agreed to pay a \$120,000 fine for violating state campaign finance law by using hospital resources to conduct polling, organize focus groups and hire political consultants.

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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