

# Perfect Storm: The Fast-Changing Regulation of Political Activity

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In a normal year, January is a hectic month for the Washington lobbying community. Congress is back in session. Campaign fundraising begins anew. Lobbying disclosure reports must be filed with the Hill, and year-end reports on PAC activity have to be filed with the Federal Election Commission.

This is not a normal year. Politically active organizations should prepare for a virtual tsunami of new regulatory activity over the next several months. Some of these changes will be entirely new and others will amend the already complex web of laws and regulations. The government relations community will need to adapt quickly to these changes while operating at full pitch. Here is a summary of some of the changes that are already taking place that we foresee in the near future.

## Lobbying Disclosure Act: More Last-Minute Guidance

In 2008, lobbyist-employers and individual lobbyists filed the first semiannual disclosure report, or LD-203, one of a number of changes in federal lobbying law brought about by the Honest Leadership and Open Government Act of 2007 (HLOGA).

Charged with issuing guidance, the Secretary of the Senate and the Clerk of the House (the Secretary and Clerk) first offered a very expansive reading of the new disclosure requirements, and then after a storm of criticism, reversed their decision

in guidance published just two weeks before the first report was due. Adding to the confusion, the new computer-based LD-203 Contribution Report system was unveiled for the lobbying community in June, just one month before the first filing date at the end of July.

The good news was that when the wheel stopped spinning, the task of determining reportable contributions and expenses was much more manageable. For example, while the initial guidance suggested that registrants had to report payments for events where a member of Congress was merely listed as a “speaker,” “attendee,” or “honorary co-host,” the later guidance requires disclosure only where the event specifically honors a member and is sponsored or substantially funded by the registrant. Similarly, lobbyists do not need to report the purchase of a limited number of tickets to an event where a member is honored.

The bad news was that in the haste of issuing last-minute guidance, many questions were left unanswered, and associations that were in the process of surveying office heads and others as part of their due diligence for completing the new report had to adjust quickly to new instructions. Filers held their breath, hoping that they would not be among the first group subject to the new random audit authority given to the Government Accountability Office.

The Secretary and the Clerk announced last November that they would issue additional lobbying disclosure guidance early in the new year. New guidance was released on January 16, once again shortly before reports are due—just two weeks before the January 30 LD-203 filing date, and only five days before the quarterly LD-2 filing date for lobbying expenses and issues. As Yogi Berra said, “This is like *deja vu* all over again.”

While many of the changes clarify previous advice, there are a few new requirements worth noting. For the first time, the Secretary and the Clerk have stated that a registrant has an affirmative obligation to contact any associations to which it is a member to determine what portion of annual dues support association lobbying efforts. Those amounts must be included

in the registrant's LD-2 report of lobbying expenses. Making such an inquiry has always been the recommended course of action for registrants, and most associations provide this information without prompting. But now registrants have a duty to inquire.

With respect to the LD-203 contribution reports, the new guidance clarifies when disbursements must be disclosed for events "honoring" a member of Congress or senior executive official. Reporting is required only when the registrant pays for the "costs of an event" in whole or in part. And purchasing tickets or tables for an event will generally not be reportable, unless the registrant purchases a significant number or percentage of the tickets or tables. But the new guidance says that a case-by-case analysis is required to ascertain if the registrant has purchased "enough" tickets to trigger reporting obligations.

Finally, while the Lobbying Disclosure Act does not contain any documentation requirement, the new guidance sees this as, at least, a best practice. It states that LD-203 signatories and any third-party preparers should retain appropriate documentation to verify report contents.

## New Bundling Rules for Lobbyists and Contribution Recipients

A key part of HLOGA requires the disclosure of campaign contributions bundled by lobbyists. Congress directed the Federal Election Commission to write rules implementing the law, with the bundling provisions to take effect three months after final FEC action. No one expected, however, a long standoff over appointments to the Commission that left the rulemaking in limbo.

In one of its final actions of 2008, the FEC approved new bundling regulations, promising to complete the required written explanation in the near future. Even if the rules are finalized in the next few weeks, they will not go into effect until May of this year.

The law seems straightforward at first blush: campaigns, party committees, and leadership PACs must report to the FEC aggregate contributions "bundled" by a registered lobbyist, if the contributions exceed \$15,000 over a six month period. But at least until the FEC provides a written explanation, the new rules raise some interesting questions about how bundling disclosure will actually work. These include:

**What's a bundled contribution?** Like the law it implements, the new regulations require disclosure of contributions that lobbyists forward to a campaign, leadership PAC, or party *and* those contributions that a committee receives from a contributor which are "credited" to the lobbyist. The FEC says that for contributions that are not directly handed to the committee by the lobbyist, disclosure is required if there is some written evidence of the lobbyist's role in steering the contribution to the committee or the lobbyist receives a benefit from the campaign, such as a title, access to events, or mementos. But what if a committee does not maintain any written verification of contributions raised by the lobbyists and no "benefits" are provided to the lobbyists? Must those contributions be disclosed? On this point, the regulations are not clear.

**How should contributions be allocated among lobbyists?** Watchdog groups have argued that when lobbyists join to sponsor a fundraiser, the total of such bundled contributions should be allocated in full to each participating lobbyist. But the new regulations are silent on this point. This may mean that a reporting committee can allocate contributions to the participating lobbyists through some reasonable method, and those falling below the \$15,000 reporting threshold may not need to be disclosed. Again, the regulations are not clear.

The answer to these and other questions will have to await explanation from the FEC. In the meantime, lobbyists who bundle contributions should keep accurate records of the contributions that they raise. The campaign and other committees that receive "bundled" contributions are likely to request this information, and lobbyists will want to ensure that attributions relating to their fundraising activities are accurately reported.

## Obama Transition Team Signals More Reform on the Way

As if HLOGA didn't create enough headaches for the lobbying community, it would appear that the Obama administration is intent on further changes. The "Ethics Page" of the Presidential Transition website, which is no longer accessible, contained a 24-point "Obama-Biden Plan" for reforming government, much of which focused on regulating and publicizing the activities of the Washington lobbying community. The plan called for measures such as:

- Public disclosure of all communications between persons outside government and the White House staff

regarding regulatory policymaking;

- New Office of Government Ethics regulations for recording and making available to the public all oral and in-person lobbying contacts between registered lobbyists and political appointees; and
- New centralized, online databases of lobbying, ethics, campaign finance, and government contractor data

While it is not clear precisely how much of this plan will eventually be put into place, the president got to work quickly and issued an executive order on ethics on his first full-day in office. The new order, among other things, limits the positions that lobbyists can accept in the Administration, prohibits appointees who leave service from lobbying the executive branch during the remainder of the administration, and prohibits appointees from accepting gifts from lobbyists. It's apparent that the president intends to do as much as he can through regulations and executive orders. This improves the prospects for the Obama-Biden Plan and the likelihood that there will be new obligations for the lobbying community.

## Is “Pay-to-Play” on the Way for Federal Contractors?

Companies that are awarded contracts by state and local governments are no doubt familiar with so-called “pay-to-play” laws. These laws ban government contractors, as well as their executives and other managers, from making contributions to covered state candidates and officials. Violators face fines, as well as the loss of existing government contracts and the right to compete for future contracts.

Campaign finance reformers already have quite a head of steam at the state level. Over 20 states have enacted some form of “pay-to-play” law. And now reformers have the perfect poster boy—embattled Illinois Gov. Rod Blagojevich—whose name has become synonymous with “pay-to-play”. In addition, on December 19, 2008, a Connecticut federal judge upheld that state's stringent “pay-to-play” regime. It seems likely that other states will follow suit and enact these laws.

It isn't clear yet whether President Obama will push for federal “pay-to-play” legislation. Certainly, President Obama has decried pay-to-play politics in the past, and he refused contributions from lobbyists during the campaign. In addition, some elements of the “Obama-Biden Plan” appear to take aim at this issue, such as the proposed creation of a “Contracts and Influence” database. Given this, can federal pay-to-play legislation be far behind? We think not.

## FEC Flexing Its Muscle, At Least When It Comes to Corporations and Associations

With a full complement of Commissioners on board, the FEC is working its way through a backlog of cases that built up during the seven months it was unable to act. Two recent actions would seem to indicate that the FEC will act vigorously in two areas in which it has previously signaled that corporations, associations and others must get their houses in order:

- The need for PACs and other political committees to have adequate internal controls.
- The need for incorporated organizations to take steps to avoid facilitating contributions to candidates. Indeed, the FEC has reserved some of its harshest penalties for organizations that do not address these concerns.

### Internal Controls

The FEC recently released its audit report regarding the American Resort Owners Coalition PAC, which exposed a host of compliance lapses: contributions from prohibited sources (corporations and foreign nationals), solicitations that lacked required disclosure statements, and misreporting on publicly filed reports. The PAC's problems reportedly included soliciting small amounts from numerous timeshare owners, who were not advised that PAC contributions are voluntary.

Where did this PAC go wrong? The FEC has recommended that political committees (including PACs) adopt certain internal financial and procedural controls as a way of preventing unintentional errors, misappropriation of funds, and the associated misreporting of committee operations. Though these controls are not mandatory, the guidance underscores the FEC's view that separation of functions is key to an effective internal control system.

At the same time, the FEC has created a “safe harbor” under which the agency will not seek civil penalties from a committee in the event of a misappropriation of funds, if specified minimum safeguards have been implemented. These relate to the opening of accounts, reconciliation of bank accounts, requiring multiple signatures for disbursements, the handling of petty cash funds, and the receipt of and accounting for PAC funds.

It is doubtful that the American Resort Owners PAC had appropriate internal controls in place. In all likelihood, the PAC's reporting errors would have been discovered by

reconciling bank statements with filed reports, screening contributions for foreign business addresses and corporate names, and through separation of managerial functions.

This matter is probably headed for the FEC's enforcement track, where the investigation may expand, and fines and other remedies will be sought.

### Facilitation

CEOs and other top executives ask their assistants and subordinates to perform a wide range of functions to further company business. So it's not surprising that some CEOs ask employees to help plan and organize campaign fundraising events. After all, strong political contacts can be a great benefit to a company. The problem is that at the federal level and in many states, this activity can land an incorporated entity—a business, trade association, or a non-for-profit—in trouble with regulators and lead to substantial fines, intrusive government investigations, and unwelcome headlines.

Under federal law, corporate officials are barred from ordering or directing support staff to plan, organize or carry out a fundraising event as part of their work responsibilities, unless the corporation receives advance payment for the costs of the employees' salary and overhead. Similarly, an organization's resources and facilities cannot be used to help raise political contributions from individuals. The value of these resources and facilities is considered an illegal corporate contribution.

The most recent example of FEC enforcement in this area came in a settlement with CarePlus Medical Centers, Inc. and CarePlus Health Plans, Inc. The two companies and their Chief Operating Officer paid over \$130,000 in fines and

admitted violations of federal law. In recent years, the FEC has pursued a string of similar cases against corporations and their executives, with fines ranging as high as \$3.8 million.

According to publicly-released documents, the CarePlus CEO hosted a fundraiser for a U.S. Senate candidate in Florida. At his request, his assistant helped prepare invitations, maintain spreadsheets to keep track of contributions pledged and received, and type letters and address labels. None of the assistant's work was reimbursed by the campaign or other permissible source, such as the company's PAC.

### How Do You Deal With This New Wave of Rules?

An effective and ongoing compliance program is *essential* in the current environment, where the potential risks to organizations and their executives include hefty fines, random government audits, and jail time. PACs and lobbying activity should be audited every two years for legal compliance. Appropriate policies and procedures should be in place. Key employees should be trained on Congressional gift rules that under the new federal lobbying law are a source of liability not just for members of Congress, but also for organizations that employ federal lobbyists.

Such attention to compliance can head off problems before they ripen into troublesome audits or investigations. Indeed, the mere fact that a company provides periodic training tends to soften the regulators' stance in assessing punitive action.

Opportunities will abound in the new year for influencing public policy and promoting your agenda. Don't let violations of lobbying, gift, and campaign finance laws undermine your efforts.



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