Client Advisory

KELLEY DRYE

CAMPAIGN FINANCE & POLITICAL LAW PRACTICE GROUP FEBRUARY 19, 2009

FEC Issues New Bundling Disclosure Rules

On Tuesday, February 17, 2009, the Federal Election Commission ("FEC" or "the Commission") issued its new final rule, 74 Fed. Reg. 7285 (Feb. 17, 2009), establishing the reporting regime for bundled contributions raised or forwarded by federal Lobbying Disclosure Act ("LDA") registered lobbyists and LDA registrants (whether a lobbying firm or an entity employing in-house lobbyists), as well as by political committees established or controlled by registered lobbyists and LDA registrants.

In short, the new rule requires that the recipient "reporting committees" (federal candidate, political party, and leadership committees) file bundling disclosure reports with the FEC if they receive two or more bundled contributions exceeding the "reporting threshold," from a "lobbyist/registrant" or "lobbyist/registrant political action committee" ("PAC") during a specified period.

The new rule is required by section 204 of the *Honest Leadership and Open Government Act of 2007* ("HLOGA"). HLOGA amended the Federal Election Campaign Act ("FECA") to require the above-mentioned, federally-registered political committees to disclose information about each registered lobbyist and LDA registrant, and each political committee established or controlled by a lobbyist or LDA registrant, that forwards, or is credited with raising, two or more bundled contributions aggregating in excess of the $16,000 reporting threshold over the course of a specified period of time.[1] The reporting threshold applies to each recipient political committee separately, as the reporting obligation applies to the recipient political committee and not the registered lobbyist or LDA registrant.

The new rule introduces the following new terms to the federal campaign finance regulatory lexicon:

Bundled Contribution

Under the new rule, a bundled contribution is a contribution that is: 1) forwarded to a reporting committee by a lobbyist/registrant or lobbyist/registrant PAC; or 2) received by the reporting committee directly from a contributor (*i.e.*, not the so-called "bundler"), but that is credited to a lobbyist/registrant or lobbyist/registrant PAC through such mechanisms as record keeping, special designations, or other means "of recognizing that a certain amount of money has been raised."

Contributions made from the personal funds of a registered lobbyist or his or her spouse are not counted in determining whether the lobbyist forwarded or raised contributions in excess of the $16,000 reporting threshold. Similarly, contributions made from committee funds of a lobbyist/registrant PAC that forwards or is credited with raising those contributions are not bundled contributions.

[1] Pursuant to Commission regulations at 11 C.F.R. § 104.22(g), the Commission will index the reporting threshold annually for inflation. The reporting threshold for 2009 has been set at $16,000.

Lobbyist/Registrant

The new rule applies to both current registrants and individuals listed on a current registration or report filed under the LDA. [2]

Lobbyist/Registrant PAC

The new rule defines "lobbyist/registrant PAC" as "any political committee that a 'lobbyist/registrant' established or controls.'" As discussed below, PACs that meet this definition must amend their *Statement of Organization* (Form 1) by March 29, 2009, to reflect this status.

Reporting Committee

The new rule requires disclosure of bundled contributions by "reporting committees." "Reporting committees" are authorized committees of federal candidates, party committees, and leadership PACs.

Covered Period

The new rule requires semi-annual filing of bundling reports and also tracks existing campaign finance reporting periods. In addition to the semi-annual reporting, bundling reports will be due quarterly or monthly, if the reporting committee files quarterly or monthly. In non-election years, quarterly reporting committees other than those authorized by a candidate may file lobbyist bundling disclosure reports only for the semi-annual covered periods (January 1 through June 30, and July 1 through December 31). Under the new rule, monthly filers may elect to file their lobbyist bundling disclosure reports on a quarterly, rather than monthly, basis.

WHAT IS REQUIRED OF YOUR PAC?

If Your PAC is a Recipient ("Reporting") Committee

As noted above, the new rule requires a reporting committee to disclose that a registered lobbyist, an LDA registrant, or a PAC affiliated with these LDA-registered entities provided two or more bundled contributions aggregating over $16,000 to the committee during the relevant covered period. However, contributions credited to others, including others who may share a common employer with, or work for a lobbyist or LDA registrant, but who themselves are not lobbyists, are not covered by this rule so long as any credit is genuinely received by the non-lobbyist and not the lobbyist.[3]

As explained above, "reporting committees" are authorized committees of federal candidates, "leadership PACs,"[4] and party committees. A reporting committee will be required to file a new FEC form, "3L," which must disclose the name of each lobbyist/registrant or

---

[2] The term "lobbyist" is defined as any individual "who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period.'" *See* 2 U.S.C. 1602(10). Any entity employing such a lobbyist (either a lobbying firm or entity employing an in-house lobbyist) must register with the Secretary of the Senate and the Clerk of the House of Representatives ("Clerk of the House") if certain income or expense levels are exceeded. *See* 2 U.S.C. 1603(a).

[3] 153 Cong. Rec. S10709 (August 2, 2007). However, if the reporting committee knows that the person forwarding the bundled contribution is doing so on behalf of a registered lobbyist, LDA registrant, or lobbyist/registrant PAC, the bundled contribution must be reported and attributed to the lobbyist/LDA registrant or lobbyist/LDA registrant PAC

[4] Pursuant to Section 204(a) of HLOGA, a leadership PAC is a "political committee that is directly or indirectly established, financed, maintained or controlled by a candidate or an individual holding Federal Office but which is not an authorized committee of the candidate or individual."

lobbyist/registrant PAC that made bundled contributions to the reporting committee, their address, the employer of each lobbyist, and the aggregate amount of bundled contributions forwarded by, or received and credited to, each lobbyist or LDA registrant or lobbyist/registrant PAC during that covered period.

If Your PAC is a Lobbyist/Registrant Political Committee:

The Commission has defined "Lobbyist/registrant PAC" as "any political committee that a 'lobbyist or registrant' established or controls." Any political committee that meets the definition of "lobbyist/registrant PAC" under the new definition is required to amend its FEC Form 1 – *Statement of Organization* – to identify its status as a lobbyist/registrant PAC by **March 29, 2009**, that is within forty days after the date the final rule is published in the Federal Register. The FEC is revising Form 1 in order to allow all leadership PACs and lobbyist/registrant PACs to check all "appropriate boxes" required to disclose their status as those types of committees.

Determining If a PAC Is "Established Or Controlled" by a Registered Lobbyist or LDA Registrant

As noted above, HLOGA and the new regulation require reporting committees to disclose bundled contributions that exceed the reporting threshold within a covered period, if those contributions were forwarded by, or received and credited to, any political committee reasonably known by the recipient reporting committee to be "established or controlled" by a registered lobbyist or LDA registrant. Accordingly, PAC treasurers and administrators must determine who, if anyone, must be identified as having "established or controlled" their respective PACs.

Under HLOGA, the term "established and controlled" occurs in separate sections including in Section 203, which requires the filing of semi-annual LD-203 reports with the Secretary of the Senate and the Clerk of the House, as well as in Section 204, the bundling disclosure provision. In promulgating the new rule, the FEC has looked to the explanation of "established or controlled" as set out by the Secretary of the Senate and Clerk of the House for **guidance** in its own rulemaking. The LDA guidance includes the following example, which is illustrative of what constitutes "established and controlled" under HLOGA:

> Lobbyists "C" and "D" serve on the board of a non-connected PAC as member and treasurer respectively. As board members, they are in positions that control direction of the PAC's contributions. Since both are controlling to whom the PAC's contributions are given, they must disclose applicable contributions of the PAC on their semi-annual [LD-203] reports.

In that example, the PAC is a lobbyist/registrant PAC because lobbyists "C" and "D" control the direction of the PAC's contributions. The same result would be obtained for the board of a connected PAC ("separate segregated fund").

Accordingly, a lobbyist/registrant established or controls any political committee for the purposes of this bundling rule, if the lobbyist/registrant is required to disclose that political committee to the Secretary of the Senate or the Clerk of the House as being established or controlled by that lobbyist/registrant under Section 203 of HLOGA on their respective LD-203 semi-annual disclosure forms. If a political committee is unable to determine whether it is established or controlled by a lobbyist/registrant based upon the guidelines issued by the Secretary of the Senate and Clerk of the House for purposes of Section 203 of HLOGA, it must consult additional criteria established by the Commission.

The first criterion established by the new Commission regulations states that a PAC, which has an LDA-registered connected organization (including, for instance, a PAC that is the separate segregated fund of an LDA reg-

istrant) is a lobbyist/registrant PAC. If not, the political committee must look to two additional criteria. First, the new Commission regulations state that a political committee is "established" by a lobbyist/registrant if a lobbyist/registrant had a primary role in the establishment of the political committee, excluding the provision of legal or compliance services or advice.[5] Of import, the Commission has noted that several individuals may participate in the establishment of a political committee.

Second, the Commission regulations state that a political committee is "controlled" by a lobbyist/registrant if the lobbyist/registrant directs the governance or operations of the political committee, excluding the provision of legal and compliance services or advice. The Commission noted in its Explanation and Justification that a "lobbyist/registrant's authority to direct," which need not be exclusive to any one person, "may derive from the political committee's controlling documents, such as the articles of incorporation or bylaws." The Commission is careful to acknowledge, however, "that that the political committee's informal procedures or actual practices may also demonstrate that a lobbyist/registrant directs the governance or operations of the committee." The Commission stated that "even a lobbyist/registrant who is a non-voting member of a political committee's board of directors may control the political committee as long as that lobbyist/registrant in fact directs the governance or operations of the political committee."

If either of the later two criteria are met, the political committee is "established or controlled" by a lobbyist/registrant for purpose of the new bundling rule. As noted above, the committee, being a lobbyist/registrant PAC, must then identify itself as such on the revised Form 1, either upon registration with the FEC or by amendment by March 29, 2009.

CO-HOSTING FUNDRAISERS

Some have questioned how the reporting obligations will be met by reporting committees in instances where more than one lobbyist/registrant or lobbyist/registrant PAC hosts a fundraising event.

The FEC's new rule does address how reporting committees should give credit to multiple lobbyists/registrants or lobbyists/registrant PACs that co-host fundraisers or raise funds for a candidate as a result of a coordinated effort. The FEC concluded that any determination of whether the reporting threshold is met and how much must be reported, is controlled by:

1. whether a reporting committee credits a lobbyist/registrant or lobbyist/registrant PAC for having raised contributions, and
2. how much the reporting committee credits the lobbyist/registrant or lobbyist/registrant PAC with having raised.

Thus, total proceeds raised at a co-hosted fundraiser need not be prorated among all the co-hosts nor must the total proceeds raised be attributed to each of the co-hosts. Instead, committees must report the actual amount raised by and credited to lobbyist/registrants and lobbyist/registrant PACs.

[5] In its Explanation and Justification of the Final Rule, the Commission cites the Webster's Dictionary definition of "establish." It defines "establish" as "to found, institute, build, or bring into being on a firm or stable basis." *Random House Webster's Unabridged Dictionary*, 2nd Ed. 663 (Random House 2001).

CAMPAIGN FINANCE & POLITICAL LAW PRACTICE

Kelley Drye helps its clients succeed in the political arena by guiding them past the legal pitfalls that could lead to civil and even criminal penalties and adverse scrutiny. Through our comprehensive, continuing focus on evolving campaign finance and ethics rules and the tactics of enforcement authorities, we shape clients' advocacy programs, compliance approaches and defensive measures to reduce vulnerabilities and address problems. Many diverse corporations, trade associations and labor organizations turn to us for continuing assistance on government ethics, lobbying, and campaign finance and election law. We create tailored lobbying, government ethics, and political activity compliance programs for our clients designed to train employees on the relevant laws, reinforce the right behaviors, and clarify when to ask for guidance.

For more information about this Client Advisory, please contact:

DAVID E. FRULLA
(202) 342-8648
dfrulla@kelleydrye.com

DUSTIN J. PAINTER
(202) 342-8875
dpainter@kelleydrye.com