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POLITICAL LAW UPDATE

Covington & Burling LLP

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In this Political Law Update, we highlight a number of significant developments. At the federal level, the Federal Election Commission has issued new and controversial rules governing travel by candidates, which seem likely to revive the once commonplace requests by Members of Congress to use corporate aircraft. And the comment period has ended regarding the Securities and Exchange Commission's proposed "pay-to-play" rule for investment advisers, including hedge funds and private equity funds. At the state level, the trend toward tighter limits on gifts to state officials continues, and we see signs of an uptick in enforcement. We also address below the emergence of new, publicly available databases aggregating data on corporate political contributions, and evidence that more and more federal lobbyists are "de-registering" to avoid the consequences of the Obama Administration's restrictions on lobbyists.

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BULLETS

- **NC Expands Ban on Gifts to Executive Branch Employees.** Earlier this fall, the Governor of North Carolina issued an executive order that expanded the ban on gifts to cover all employees of the Governor's office and cabinet agencies. Previously the ban applied only to gifts from recent, current, and aspiring government contractors to executive branch employees with responsibility for planning or awarding contracts, or for supervising their completion. Limited exceptions apply. Not to be outdone, the state Treasurer has issued two new policies (here and here) that prohibit that agency's employees (including those who help manage the state's pension fund) from accepting gifts from most state contractors

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or accepting paid travel from state contractors or investment managers. It also imposes a two-year revolving door ban and requires disclosure when an investment firm uses a placement agent. Companies that do business or seek to do business with the State of North Carolina should insure that their compliance policies are up-to-date.

- **The FEC Considers Preempting State Restrictions on Political Robo-Calls.** The FEC will soon decide whether federal campaign finance law preempts state restrictions on "robo-calls" when those calls are made in connection with a federal election. About twenty states regulate these automated calls, including by requiring prior consent through live operators or requiring the use of additional disclaimers during the calls. The Attorneys General of Indiana, Minnesota, North Carolina, North Dakota and Wyoming, as well as the regulatory agencies in California and Mississippi, have all filed separate public comments in defense of their state laws. The Indiana Attorney General's office noted that it has twice filed suit against political groups that allegedly failed to comply with Indiana's restrictions on robo-calls.
- **Lavish Gifts from Lobbyists and Government Contractors Remain a Part of High Profile Scandals.** From New York City to Atlanta, political scandals are focusing on gifts to top officials. In New York, the unraveling of former Comptroller Alan Hevisi's world continued with the guilty plea of an investor who managed $250 million of state pension funds. The plea detailed $75,000 in gifts that included a visit to the King David Hotel in Jerusalem, first-class airfare, and stays in luxury hotels. In Georgia, the House Speaker resigned in the wake of a sex scandal involving a corporate lobbyist. The press has highlighted the $50,000 of gifts the Speaker received, including sports tickets, travel and hunting trips, from lobbyists and companies with business before the legislature. While there are no accusations yet that any particular gift in Georgia exceeded state limits, these press reports highlight the need to consider how a company's entertainment of particular legislators will be considered if a politician becomes ensnared in controversy.

Articles

MSRB Proposes Expanding G-37 Reporting to Include Contributions to Bond Ballot Measure Campaigns

The Municipal Securities Rulemaking Board ("MSRB") has asked the Securities and Exchange Commission ("SEC") to approve an amendment to Rules G-37 and G-8 to require recordkeeping and disclosure of contributions to a municipal bond ballot campaign by: (1) a broker, dealer, or municipal securities dealer; (2) municipal finance professionals or PACs associated with them; or (3) a non-municipal finance professional executive officer. Bond ballot measure campaigns are commonly a prerequisite to approving specific municipal financing, such as financing for school districts, transportation or other municipal projects. The new rules, if adopted, would require *disclosure* under G-37, but violations would *not* bring with them the *two-year bar* on engaging in municipal securities business with an issuer. Like the restrictions on contributions to candidates and political parties, the new rules contain an exception for contributions of $250 or less by covered individuals who are eligible to vote on the matter.

The rule would go into effect on the first business Monday at least five days after the SEC approves the amendments. The MSRB submitted its request to the SEC on December 4, 2009.

Watchdog Groups Combine Efforts to Produce Federal/State Contribution Database

On November 23, two government watchdog groups unveiled a publicly available database that allows reporters and the public to search for the combined federal and state campaign contributions of 10,000 donors. The data is currently limited to contributions made during the 2008 election cycle. The Center for Responsive Politics, which hosts the search vehicle for the database on its website, profiles the top 200 national donors, and allows users to search and retrieve a detailed page on each of 10,000 included organizations. The detailed pages break down each entity's contributions by party affiliation and winner/loser status. Contributions to party committees, candidates, and ballot initiatives at the state and federal level are detailed, and for groups that are branded "heavy hitters," visitors can search the entity's contributions to members of Congress sorted by the congressional committees on which the member serves and the details on pending legislative issues that are important to the organization.

Media outlets have already used this data to explore local companies' state and federal contribution patterns, as well as to look for partisan bias in the political giving of national companies. At a minimum, organizations should review the data that is applicable to them for accuracy and to understand the types of information that are increasingly available.

FEC Issues Relaxed Travel Rules For Use of Corporate Jets By Members of Congress

When Congress passed the Honest Leadership and Open Government Act ("HLOGA") in 2007, it severely curtailed the ability of Members of Congress to fly on corporate aircraft without paying for the normal and usual charter rate (for the Senate) or under any circumstance (for the House). Or at least that is what many people thought. The FEC recently issued its final rules implementing the travel provisions of HLOGA. Those rules make clear that political party committees and most PACs are not bound by the new stricter rules that Congress put in place, and that Members of Congress can continue to fly on corporate aircraft in certain circumstances for the cost of a first class or coach airplane ticket.

Here are the rules in a nutshell.

- Candidates for the House of Representatives traveling on behalf of their own campaign may not accept (with very limited exceptions) travel on private aircraft.
- Candidates for the House of Representatives traveling on behalf of a candidate for President, Vice President, or Senate, may accept travel on private aircraft, provided that the entity paying for the travel pays the charter rate.
- Candidates for President, Vice President, or Senate traveling on behalf of their own campaign must pay the pro rata charter rate for travel on private aircraft -- that is, the fair market value of the normal and usual charter fare or rental charge for a comparable plane of comparable size.
- Candidates for President, Vice President, Senate or the House of Representatives who are traveling on behalf of a political party, Senate Leadership PAC, Presidential Leadership PAC, or a corporate, union or non-connected PAC can travel on private aircraft and the sponsoring entity must generally pay only the equivalent of a first-class or coach fare on a commercial aircraft.
- Political parties and non-Leadership PACs are not affected by the new FEC travel rules. These entities may continue to travel on non-commercial aircraft, provided that the party or PAC pay the first-class or coach fare equivalent.

The most significant change is that a Member of Congress (or candidate for a seat in the House or Senate) may travel on a corporate aircraft, for the benefit of a national political party, state political party, Senate Leadership PAC, or a corporate, union or nonconnected PAC, and the sponsor of that flight will only have to pay the operator of the private aircraft the equivalent of first class or coach airfare. In addition, the restrictions in the congressional travel rules that prohibit lobbyists from arranging travel or accompanying a Member of Congress on the trip would not apply in the context of flights for a campaign purpose.

SEC's Proposed Pay-to-Play Rule for Investment Advisers Pending

The comment period on the Securities and Exchange Commission's proposed new pay-to-play rule for investment advisers closed on October 6, 2009. Numerous comments were filed objecting to the scope of the proposed rule. Notably, expressions of concern came not just from the investment advisers themselves, but also from the public sector. The National League of Cities, National Council of State Legislatures, and other public sector associations filed joint comments suggesting that the proposed rule could harm state and local pension funds.

There is considerable controversy over the proposed rule's ban on using third-party "placement agents" to seek out contracts with state and local pension funds, and many comments were critical of the proposed ban. The restrictions on political contributions to state and local officials, which form the core of the proposed rule, also came in for criticism, although those restrictions appear less likely to change materially in the final rule. To a great extent, the SEC modeled the proposed pay-to-play rule for investment advisers on Rule G-37, the MSRB rule governing municipal securities dealers. Much of the debate concerns whether investment advisers should be subject to more relaxed rules than municipal securities dealers. In the current political environment, the SEC will be under considerable pressure to take a strict approach, however.

Because the proposed pay-to-play rule would apply to hedge funds and private equity funds, which have not previously been subject to targeted restrictions on their political activities, and which do not have existing Rule G-37 compliance programs, adoption of a final SEC rule will require such funds to devote considerable time to adopting pay-to-play compliance programs and systems. If, as expected, the new rule is adopted sometime during the first half of 2010, funds will need to come into compliance with the rule in the heat of the election season. We will continue to monitor pay-to-play developments at the SEC for clients.

Lobbyists—De-registrations Increase

In the second quarter of this year, 1,418 federal lobbyists terminated their Lobbying Disclosure Act ("LDA") registrations, according to a study by The Center for Responsive Politics and OMB Watch released on November 2. These de-registrations followed a series of reforms the Obama Administration has implemented that disadvantage individuals who are registered lobbyists.

There has been a shift in the conventional wisdom in Washington. While registering under the LDA was once viewed as a safe and nearly cost-free step if there were any question that an individual might qualify as a lobbyist, today most people are carefully evaluating their work activities and the requirements of the law, and only registering if they must (and de-registering if they do not need to be registered). There remain slightly over 11,000 registered federal lobbyists, down about 8% from the same time last year and down 18% from the peak figures in 2007.

Affirmative action is required to de-register. To de-register, a lobbyist must be listed as no longer providing lobbying services on Line 23 of Form LD-2's Information Update Page. In addition, depending on the date the de-registration occurs, the lobbyist may have an ongoing obligation to file an LD-203 form if he or she has served as a registered lobbyist for any portion of a semi-annual period. Individual lobbyists should consult counsel if they have any questions about how this process works.

Upcoming Events

On February 4, 2010, we will host our day long seminar on corporate political activity, including government ethics, lobbying disclosure, pay-to-play, and campaign finance law topics. This bi-annual event provides both a deep grounding in the fundamentals of the law and a refresher on the latest developments. Although space is limited, attendance at this compliance training conference is free of charge.

Who We Are

Covington's Election and Political Law practice is one of the oldest in the Nation. In addition to our high-profile election law litigation and FEC enforcement practice, we advise numerous Fortune 500 corporations, trade associations, financial institutions, political party committees, PACs, candidates, and lobbying firms concerning compliance with the increasingly complex array of laws governing the political process. These include federal and state campaign finance, lobbying disclosure, and government ethics laws. For more information on Covington's Election and Political Law practice, please click here.

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