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11/30/2007 03:17 PM

Please respond to "Sharon Paganelli" <SPaganelli@oconnorhannan.com>

To <bundling07@fec.gov>

cc

bcc

Subject Comments by the Coalition for Tax Equity on Bundling Provisions

Please find attached the Coalition for Tax Equity Comments on the Proposed Rulemaking issued by the Commission on Tuesday, November 6, 2007 on the bundling provisions of the Honest Leadership and Open Government Act of 2007.

Thank you.

Timothy W. Jenkins

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The Coalition for Tax Equity Comments on the FEC NPRM on Bundling Provisions.pdf

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November 30, 2007

VIA EMAIL: bundling07@fec.gov

Ms. Amy L. Rothstein
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Dear Ms. Rothstein:

These comments are submitted in response to the notice of proposed rulemaking issued by the Commission on Tuesday, November 6, 2007 on the "bundling" provisions of the "Honest Leadership and Open Government Act of 2007." (HLOGA). (Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Lobbyists and Registrants, 72 Fed. Reg. 62,600 (Nov. 6, 2007) (to be codified at 11 C.F.R. pts. 100 and 104). The undersigned is counsel to the Coalition for Tax Equity (the "Coalition"), a not-for-profit business association organized under Section 501(c)(6) of the Internal Revenue Code. The Coalition was founded in 1992, and is comprised of corporations and trade associations which are active in the federal public policy arena. **The Coalition requests to testify at the Commission hearing on this subject.**

The Coalition was originally formed to respond to the proposal to disallow the income tax deduction for "influencing legislation" (I.R.C. § 162(e)(2006)). Over the years, the Coalition has also impacted changes to Congressional gift rules adopted in 1995 and to the lobbying reforms enacted by Congress in 1995 and 1998. (Lobbying Disclosure Act of 1995, Pub. L. No. 104-65 and the Lobbying Disclosure Technical Amendments Act of 1998, Pub. L. No. 105-166, collectively the "LDA"). The Coalition most recently was actively involved with the authors of the HLOGA on the gift and LDA provisions.

Although the Coalition engages in limited lobbying, the focus of the Coalition's work is on providing compliance counsel.[1] Throughout its existence, the Coalition has strongly advocated for rules and laws in the lobbying/ethics arena that are unambiguous and in harmony with related provisions.[2] Although the Coalition members may disagree with the underlying policies for some of these changes, ultimately the guiding principle is to assure that these provisions are clear and concise and thus easily subject to full compliance.

Technically, the new bundling reporting obligations are imposed directly on candidate committees, leadership PACs, and party committees. However, the rules will heavily impact the lobbyists and registrant PACs who may be the subject of the reports. All of the Coalition members either have PACs and/or employ lobbyists who are active in fundraising in their personal capacities. How and when these entities will be disclosed as bundlers is potentially legally material and very consequential from a public relations/optics perspective, especially when considered in the context of the six reports these entities will have to file under the new LDA. In keeping with the long-standing mission of the Coalition, the Coalition's comments are focused on assuring that "bright lines" are established so the Coalition members know precisely what will constitute "credit" and how and when the $15,000 threshold will be tripped.

The following areas are addressed in order of Coalition priority:

(1) How the Commission will define the scope of "designations or other means of recognizing" for purposes of establishing bundling status (including how to treat the "agency" question) (72 Fed. Reg. 62,602-62,603 (Nov. 6, 2007)); (2) How "credit" will be assigned to multiple lobbyist/registrants or lobbyist/registrant PACs when they are involved in a single fundraiser (including the "credited" v. "raised" inquiry) (72 Fed. Reg. 62,603 (Nov. 6, 2007)); and, (3) How to establish the appropriate definition of "covered period" (72 Fed. Reg. 62,601 (Nov. 6, 2007)). We also offer comment on a miscellaneous item relating to the new "leadership PAC" definition.

HOW WILL THE COMMISSION DEFINE THE SCOPE OF DESIGNATIONS OR OTHER MEANS OF RECOGNIZING

The new reporting obligation is established when a lobbyist registrant or lobbyist registrant PAC is credited with bundling $15,000 in a prescribed period. Pub. L. No. 110-81, Sec. 204. The key elements of the provisions are how to establish that a covered entity is credited with contributions from other sources and how to calculate amounts received. For the first element – defining when a covered entity is credited for third-party contributions -- the statute establishes two circumstances: first, a contribution that a covered entity forwards to the committee from the contributor; and, second, contributions received from the contributor(s) but

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[1] O'Connor & Hannan, LLP is registered pursuant to the Lobbying Disclosure Act of 1995 as a representative of the Coalition.

[2] The differing and complex definitions of lobbying in the LDA and IRC is an example of an area where harmonization is sought.

credited to the covered entities "through records, designations, or other means of recognizing that a certain amount of money has been raised" by the entity. (Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81 Sec. 204.) The proposed rule requests comments on both aspects.

The first element -- contributions forwarded by a lobbyist registrant or lobbyist registrant PAC -- is essentially a restatement of the intermediary/conduit concept defined in existing Commission regulations. (11 C.F.R. § 110.6 (2007)). For purposes of simplicity, the Commission should apply the existing standard exclusive of the exception contained in Section (b)(2)(i)(E).[3] This would mean that a steering committee member or host of a fundraiser who was a registered lobbyist and who acted as an intermediary could qualify as a potential "bundler" under the new regulations even though that individual would not be required to register and report as an intermediary under the § 110.6 regulation.[4]

The second element is far more complicated and potentially the source of enormous confusion and unintentional legal entanglement. At this level, it is imperative that the Commission be as prescriptive as possible in defining the manner in which the lobbyist/registrants and lobbyist/registrant PACs are bundlers (subject to meeting the monetary threshold). In addition to the items included in the proposed regulation, the list should include those who are listed as a "host, co-host or sponsor" of a fundraising event and if the office or residence of the covered entity is the venue for any such event. In addition, any formal designation such as assigning numbers to individuals or PACs and having those numbers included on checks or any maintenance of a master list by the campaign committee should be expressly referenced in the regulations,[5] again assuming the monetary threshold is met. The Commission regulations should attempt to provide a list of triggers that is so exhaustive that falling outside of the enumerated scope would establish a de-facto bundling safe-harbor.

A related element involves the treatment of individuals who are not registered lobbyists but work for organizations that are registrants or for firms with individual lobbyists. (Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81 Sec. 204.) On this point, the Commission's regulations appear to offer a workable analogue. In 11 C.F.R. § 114.2(f)(2)(A), otherwise permissible voluntary fundraising by union or corporate employees is treated as prohibited corporate facilitation where subordinates or support staff are ordered or directed to undertake the activity. This concept should be applied to the bundling area. The statute is

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[3] The exception provides that a person is not a conduit or intermediary if he is: "An individual who is expressly authorized by the candidate or the candidate's authorized committee to engage in fundraising, and who occupies a significant position within the candidate's campaign organization, provided that the individual is not acting in his or her capacity as a representative of an entity prohibited from making contributions."

[4] The Commission also asks whether adding a definition of "forwarded" would be a helpful clarification. 72 Fed. Reg. 62,602. Although this addition is not essential, the Coalition supports the clarification.

[5] Notably, the drafters of the final provision departed from more ambiguous terms that were applied in the Senate-passed bill. [For example that measure referenced the amorphous terms, "formal or informal agreement, understanding or arrangement" in defining how to attribute credit.] The determination to adopt more objective terms reflected a recognition of the unenforceability of the earlier alternatives.

unambiguous in establishing that the "persons described" universe consists of registered lobbyists and PACs of lobbying firms or organizations which are "registrants." Clearly intended to be excluded from the provision are individuals employed by lobbying firms or registrant organizations who are not listed as lobbyists. Pub. L. No. 110-81, Sec. 204.

Understandably, the Commission is concerned about circumvention of the reporting obligation through use of non-registered lobbyist employees as the ostensible "bundlers." In lieu of an "agency" analysis, the volunteer standard could instead be applied as follows. If an administrative assistant is directed by a Vice President for Government Relations [a registered lobbyist] to serve on a steering committee, that would be treated as a potential bundling event because of the subordinate/directive aspect. On the other hand, in the case of a senior executive (not a registered lobbyist) who determines voluntarily to host a fundraiser in her individual capacity, it would be counter to the statute to require reporting merely because the organization is a registrant. In this instance, the activity by the non-lobbyist is truly voluntary and thus would not be covered by the new law.[6]

MULTIPLE COVERED FUNDRAISERS IN A SINGLE FUNDRAISING EVENT

An equally important area for the regulated community is the calculation of amounts raised where there are multiple bundlers. At this level, the issue is not whether "credit" is given, but whether the $15,000 threshold is met. Many of the Coalition members regularly participate in fundraisers where there are multiple hosts (either individuals or PACs). Consequently, the manner in which this issue is resolved is critically important.

Where multiple sponsors are involved, the only viable approach is to pro-rate the total raised among the multiple sponsors of an event. Pro-rating the total assures that a Committee is able correctly to determine whether the bundling threshold is met and further assures that the total of the funds actually raised at multiple-host events are accurately reported.

The NPRM uses an example of three lobbyists/registrants who jointly co-host a fundraiser that raises a total of $20,000 for an individual candidate committee. (Presumably with no formal designation or recordkeeping mechanism). 72 Fed. Reg. 62,603 (Nov. 6, 2007). The Commission then asks whether a disclosure from the campaign committee showing that each raised $20,000 would be misleading or inaccurate from a disclosure standpoint.

The answer to the Commission's query is obvious: the so-called "alternate approach" of having the campaign committee report that each lobbyist/registrant co-host raised $20,000 at an event where the total raised was $20,000 is both inaccurate and misleading. The Commission is a quasi-accounting agency and is empowered with audit authority to enforce accurate

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[6] The NPRM also asks whether a corporation or labor organization, that is a "registrant," and also prohibited from making contributions, could be a bundler. This issue is somewhat of a "red-herring" because in practice, corporations are almost never listed as a host or co-host. Instead, the sponsors invariably are the PACs of corporations or individual employees, most of whom are lobbyists.

recordkeeping and disclosure. Fundamental to the Commission's execution of its regulatory responsibilities are the principles of accuracy and transparency. The alternate approach, attributed to a floor statement by Senator Feingold, makes a mockery of these principles and would create a public database where reconciliation of aggregate amounts raised by candidates, leadership PACs and party committees would be virtually impossible. In addition, their approach creates a public database that is very misleading and potentially very damaging to the reporting committees and the bundlers.

A different example (which in practice is not extreme) more emphatically illustrates the fallacy of the Senator Feingold approach. Assume a scenario where 10 lobbyists each raises $15,000 for a Member of Congress. One approach (the accurate approach) would lead to each of the individuals being disclosed as a bundler of $15,000. The report would also accurately reflect the actual total raised ($150,000), by virtue of the disclosure by the Committee on the same report of the other bundlers of the event. The alternative approach would create a public record indicating the event raised a total of $1.5 million, with each host personally responsible for $150,000. This alternative approach results in a grossly inaccurate and very misleading accounting and reporting of the actual amount of funds raised and is counter to the fundamental, operational principles of the Commission.[7]

The reference to Senator Feingold's statement as potentially instructive legislative history is entirely inapposite. As noted above, the final product which passed the House and Senate and was signed into law by President Bush resulted from an informal conference between House and Senate leaders. The major sticking point for the final authors was the bundling provision.[8]

As part of the final compromise, both the original Senate and House approaches were rejected. In both of the original provisions, the bundling was to be reported by lobbyists in LDA reports and both provisions called for aggregate amounts to be disclosed.[9] After careful and extensive consideration of the provisions, the final agreement shifted the responsibility of reporting bundled contributions to the candidates and political parties on a separate schedule attached to their Commission reports. This unequivocally signaled the intent of Congress to

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[7] A variation of this example further illustrates these points. If the bundlers raised only $10,000 each, the alternative approach advocated by Senator Feingold would have each itemized as a $100,000 bundler with an aggregate of $1,000,000 raised. In addition to being inaccurate and misleading, this approach renders meaningless the $15,000 bundling threshold.

[8] "The dispute over disclosure of bundled contributions has been one of the key obstacles to achieving a final reform bill." Kenneth P. Doyle, *Changes to 'Bundling' Disclosure Eyed As Way to Get Reform Bill Back on Track,* BNA, Inc. Money & Politics Report, July 25, 2007. "One of the most controversial aspects of the bill is a requirement that lobbyists disclose their bundling of campaign contributions for candidates." National Journal's CongressDailyAM, July 30, 2007. "A Democratic lawmaker familiar with the negotiations said the main provision that must be resolved is language by Rep. Chris Van Hollen (D-Md.) that would impose new disclosure requirements on lobbyists who bundle campaign donations." John Stanton and Susan Davis, *Ethics Bill Will Return to Floor,* Roll Call, July 19, 2007.

[9] The Van Hollen Amendment required reporting by lobbyists of bundled contributions "in an aggregate amount exceeding $5,000...." H.R. 2317, Sec. 2. The original Senate version required lobbyists to disclose committees "to whom aggregate contributions equal to or exceeding $200 were made...." S.1, Sec. 212.

depart from an inexact lobbyist disclosure regime and instead to require accuracy and accountability in these disclosures.

In sum, in the absence of some designation or formal tracking system, where multiple sponsors are involved, the only viable approach is to pro-rate the total raised among the multiple sponsors of an event. This is critical in determining whether the threshold is met and in assuring that multiple-host events are accurately reported.

PROPOSED DEFINITION OF "COVERED PERIOD"

The Commission also seeks comment on how to implement the provision that requires reporting Committees which are required to file receipts and expenditures on a monthly or quarterly basis, to file bundling reports on a quarterly basis. 72 Fed. Reg. 62,601-62,602 (Nov. 6, 2007). Ideally, the Commission would not be statutorily constrained to require more frequent reporting and would instead allow for uniform reporting on a semi-annual basis. Recognizing this potential legal limitation, the Coalition proposes a fourth option.

To avoid a circumstance where there is inaccurate and/or misleading disclosure, the reporting would take place on a rolling basis once the threshold is triggered. For example, if in Quarter 1, $20,000 is raised for the reporting Committee, the first quarter report would disclose that amount. If an additional $5,000 is raised in the 2nd Quarter, that amount would also be disclosed on the second quarter report because the semi-annual threshold amount has been met. The Commission may also wish to consider reporting the $5,000 during the quarter and also including a separate semi-annual aggregate line-item amount.[10] Unlike the Commission options, this approach is neither over nor under-inclusive.

LEADERSHIP PAC ISSUE

An issue which has arisen in the course of dozens of briefings on the new law involves the treatment of Leadership PACs on the new report. The Commission has always considered Leadership PACs controlled by a candidate to be separate legal entities from that candidate's re-election committee. This concept is further confirmed by virtue of the creation of a separate definition of Leadership PAC in Commission regulations implementing the corporate aircraft provision of HLOGA. (Candidate Travel, 72 Fed. Reg. 59,953 (Oct. 23, 2007)) (To be codified at 11 C.F.R. Pts. 100, 113, 9004 and 9034).

Reinforcement of this principle in the context of the bundling rules would be helpful. A simple notation in the regulations that a $5,000 contribution to a Leadership PAC controlled by a candidate would not count against contributions to that Member's re-election campaign, would suffice.

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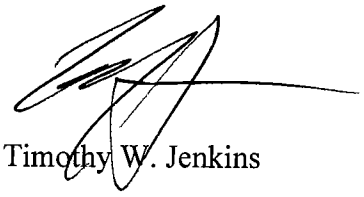
[10] In the above example, the 2nd quarter report would reflect the $5,000 collected during the reporting period and separately disclose $25,000 in the aggregate for the 6 month period.

Thank you for the opportunity to submit these comments and to testify before the Commission at the upcoming hearing.

Respectfully submitted,



Timothy W. Jenkins

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