"Laurence Gold"
<lgold@ltsrlaw.com>
12/01/2007 12:12 AM
Please respond to
<lgold@ltsrlaw.com>

To <bundling07@fec.gov>
cc
bcc
Subject AFL-CIO comments

Please see the attached comments of the AFL-CIO.

Laurence E. Gold
Associate General Counsel
AFL-CIO
815 16th Street, NW
Washington, DC 20006
(202) 637-5130

AFL-CIO FEC NPRM bundling comments.doc

American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000
www.aflcio.org

November 30, 2007

Amy L. Rothstein
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Notice of Proposed Rulemaking, "Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Lobbyists and Registrants," 72 Fed. Reg. 62600 (Nov. 6, 2007)

Dear Ms. Rothstein:

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully submits these comments concerning the Commission's proposed regulations to carry out the so-called "bundling" amendments to the Federal Election Campaign Act (FECA) enacted by § 204 of the Honest Leadership and Open Government Act (HLOGA), Pub. L. 110-81, 121 Stat. 735. The AFL-CIO is a national federation of 55 national and international labor organizations representing over 10 million working and retired men and women.

Although Section 204 imposes allegations only on federal candidates, leadership PACs and political parties to file reports concerning the "bundled contributions" that they receive, and imposes no obligations directly on lobbyists or their employers, there are several likely, and possibly inevitable, consequences of these new requirements that will directly implicate the interests of the latter and should be considered by the Commission. Namely, due to the popular opprobrium that has been generated about "bundling," however the term is defined, § 204, if not implemented as written and intended, will deter unions that are registrants and their officers and other representatives from engaging in entirely lawful efforts to assist federal candidates and political parties that they support to raise lawful campaign funds, and the provision will cause some to engage in no fundraising activities at all.

While such an *in terrorem* impact might please some proponents of § 204, it is not

an actual legislative purpose underlying that provision. As Rep. Van Hollen, a principal House sponsor of HLOGA stated, the bundling disclosure provision "is not designed to prohibit any action by a lobbyist," but instead "will bring much needed sunlight to the intersection of bundling and public policy and hopefully, will serve as a 'disinfectant' to clean up any undue influence brought to bear by the use of third party contributions by lobbyists." 153 Cong. Rec. H9209 (daily ed. July 31, 2007). That is, disclosure of lawful activity would provide information against which to evaluate the official conduct of officeholders whose political committees received the contributions.

Because the law reposes responsibility to identify a "bundler" and the amounts he or she "bundled" solely in the recipient committee, as a practical matter those who are potentially so identified are highly dependent upon the recipient getting the identification right, lest they be incorrectly attributed with unpopular conduct that will be reflected in a sworn and well-publicized public record. Although a misattributed individual or entity could contact the reporting recipient committee and request an amendment of a report, that sequence of events creates burdens all around: on the lobbyist, the recipient committee, and the Commission itself, which must receive and process reports that are filed, and which routinely scrutinizes reports in order to ascertain and act upon errors, discrepancies and possible violations of the Act. Accordingly, it is particularly important that the regulations provide as clear guidance as possible as to what circumstances satisfy the key statutory concept of a "bundled contribution."

In turn, the aspect of the definition of that term that is in most need of clarity is the concept of contributions being "credited by the [recipient] committee or candidate involved…to the person through records, designations, or other means of recognizing that a certain amount of money has been raised by the person." The proposed regulations, at § 104.22(a)(6), provide that "[a] designation or other means of recognizing bundled contributions includes titles based on levels of fundraising, access to reporting committee events reserved exclusively for those who generate a certain level of contributions, and events provided by a reporting committee as a reward for successful fundraising." This language is taken almost *verbatim* from the section-by-section analysis of HLOGA that was authored by the three principal Senate sponsors of HLOGA, Sens. Feinstein, Lieberman and Reid, and it was the Senate version of § 204, of course, that was enacted after the House acceded to it. See 153 Cong. Rec. S10709 (daily ed. August 2, 2007). (The proposed regulation here may contain a typographical error: the second word "events" is the only change from the section-by-section analysis, which used the apparently more apt phrase "similar benefits".) But the proposed regulations omit the further explanation that these Senators provided:

> The disclosure requirement is not triggered by general solicitations of contributions, or where a registered lobbyist attends an event or an event is held on the premises of a registrant. An event hosted by a registered lobbyist may trigger the disclosure requirement if the committee credits the lobbyist with the proceeds of the fundraiser through a record, designation or other form of recognition, as described in the preceding paragraph.

> This provision covers only contributions credited to registered lobbyists, as defined by subsection 204(a)(7). Contributions credited to others, including others who may share a common employer with, or work for a lobbyist, are not covered by this section so long as any credit is genuinely received by the non-lobbyist and not the lobbyist.

Id. In order to provide as clear rules as possible, the regulations should incorporate these passages as well.

The analysis by the Senate sponsors confirms that the statutory language requires that "credit[ing]" both entails an overt action by the recipient committee and certainty about the lobbyist's responsibility for raising particular sums of money; it is the recipient's "records," "designations" and other "means of recognizing" with respect to a "*certain* amount of money" that comprises "credit[ing]." Thus, the illustrative examples provided by the Senate sponsors all have in common overt actions that confer recognition upon a lobbyist: "titles," "access" and "events [sic] provided…as a reward," and they refer to "a certain level of contributions" and "successful fundraising," terms that require, of course, precision as to the amounts actually raised; and, of course, § 204 triggers reporting at a precise $2,000 threshold of bundled contributions and requires the recipient committee to report "the aggregate amount of the bundled contributions provided by each such person during the covered period." (As the NPRM observes, Sen. Feingold acknowledged that the reporting committee "must know" that a lobbyist raised "a certain amount" and "not just be generally aware" that the lobbyist "has been fundraising." See 72 Fed. Reg. at 62603.)

In contrast, actions by the lobbyist alone – "general solicitations," and "attend[ing]" or "host[ing]" an event -- do *not* suffice to trigger a reporting obligation absent a distinct act of crediting as the statute describes. This demonstrates that "credit" is an objective act that includes some manifestation by the recipient to the lobbyist, upon which both the reporting and reported-about entities ought to be able to rely. Section 204 might have, but did not, predicate reporting on a recipient's mere knowledge or speculation about who was responsible for raising funds, even absent any manifestation by the recipient that accords notice to the credited lobbyist and an opportunity fir the latter to react prior to the recipient's sworn public identification that the lobbyist is a "bundler" responsible for raising particular amounts of funds. If the Commission provides further illustrations of "crediting," then, they should bear the same characteristics described above that pertain to the three examples provided by the principal Senate sponsors.

This reading of § 204 is not only faithful to its language but also manifestly fair to all concerned, including, again, the Commission itself, which will be enforcing the reporting of conduct that does not bear the more conventional certainty of a financial transaction directly between either two reporting entities or between one reporting entity and a contributor who is on specific notice that his or her contribution will be reported by the recipient.

The NPRM asks whether "an organization that is prohibited from making contributions, such as a corporation or a labor organization, but nonetheless is a registrant, [can] be credited with having raised contributions." *Id.* The Commission's current regulations preclude labor organizations and corporations from "facilitating the making of contributions to candidates or political committees" other than their own separate segregated funds, subject to various exceptions, including those pertaining to an employee's incidental use as a volunteer of union or corporate facilities and the provision of meeting rooms under certain circumstances." See 11 C.F.R. § 114.2(f)(1), 114.9 and 114.13. Without attempting to catalogue here the specific conduct by a registrant union or corporation that would be both proscribed by these regulations and reportable under § 204, the fact that there is such overlap underscores the importance that the bundling regulations define "credited" in a manner that will deter inaccurate attributions of bundling to unions and corporations themselves, as opposed to particular individual lobbyists who actually receive "credit" and are thereby put on notice that their conduct will be reported. Of course, if a union or a corporation does engage in unlawful facilitations that comprise bundling, including being "credited" with doing so, and the recipient committee duly reports it, then adverse consequences may justifiably follow; but that is as the law provides. But regulations implementing § 204 should not invite loose and inaccurate attributions of "bundling" to unions and corporations that, themselves, did not engage in the activity, even if individual lobbyists whom they employed did. Rather, only the latter should be identified, as appropriate."

Relatedly, the regulations should provide that, where a union's or corporation's separate segregated fund pays the expenses of fundraising for a recipient committee, or where the committee itself pays for a fundraising event as to which a union or corporation itself is listed as a host or sponsor, the recipient's report must disclose the identity of the actual source of payment of the related costs.

Thank you for the Commission's consideration of these comments.

Yours truly,

/s/ *Laurence E. Gold*

Laurence E. Gold
Associate General Counsel