"Elias, Marc (Perkins Coie)"
<MElias@perkinscoie.com>
11/30/2007 05:35 PM

To <bundling07@fec.gov>
cc <arothstein@fec.gov>
bcc
Subject Bundling Rulemaking Comments

Attached are my comments in connection with the pending bundling rulemaking. I request an opportunity to testify.

<<Reportin.pdf>>

.

Reportin.pdf

Perkins Coie

607 Fourteenth Street N.W.
Washington, D.C. 20005-2011
PHONE: 202.628.6600
FAX: 202.434.1690
www.perkinscoie.com

Marc Erik Elias
PHONE: (202) 434-1609
FAX: (202) 654-9126
EMAIL: MElias@perkinscoie.com

November 26, 2007

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

RE: *Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Registrants*

Dear Ms. Rothstein:

I am writing in response to the Commission's notice of proposed rulemaking regarding *Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Registrants.* These comments reflect solely my own views and are not on behalf of any of my clients. In addition to these written comments, I request an opportunity to testify at the hearing on this important topic.

I commend the Commission for its efforts to fashion a clear and workable rule. While I would encourage the Commission to read its authority broadly to allow sensible reporting rules that avoid duplicative filings and confusing reporting, I will focus the bulk of my comments on the definition and scope of "bundled contributions."

As a general matter, the Commission should give significant weight to the formal legislative history offered by the primary sponsors and authors. S.1 was introduced as a Leader's bill by Senate Majority Leader Harry Reid. It eventually had 17 additional co-sponsors. In an effort to provide definitive guidance as to legislative intent, Leader Reid, Rules Committee Chairman Feinstein and Homeland Security and Government Affairs Committee Chairman Lieberman, placed in the Congressional Record a section-by-section analysis. When introducing this section-by-section analysis Senator Feinstein described it, without objection from any other Member of the Senate, as "legislative history endorsed by the three principal Senate authors of the legislation." I strongly urge the Commission to adhere to that analysis. While statements by other Senators are undoubtedly helpful to the Commission in understanding what *that particular* Senator may have understood, the section-by section analysis reflects the legislative intent of the authors and sponsors of the legislation.

For example, the Commission asks if a definition of "forwarded" would be welcome. It would. However, that definition should be limited to the *physical* delivery of contributions, while the proposed rule incorrectly adds "or electronic." According to the sponsors' section-by-section analysis, "[t]he definition of 'bundled contributions'" in this section contains two prongs. Subparagraph 204(a)(8)(A)(i) covers the situation where a lobbyist *physically* forwards contributions to the campaign." (emphasis added). In the absence of any statutory language to the contrary, the Commission should adopt the approach set forth by the legislation's sponsors.

Likewise, the Commission's draft is correct in requiring *both* (1) the receipt of a contribution and (2) its being "credited" to a lobbyist or registrant. Similarly, the term "candidate involved" should be amended, consistent with the section-by-section analysis to include the chairman of a political party committee for contributions bundled to that party committee.

The Commission seeks comment on a range of questions regarding how contributions should be allocated or attributed under the new law. Once again, I strongly urge the Commission to follow the clear guidance offered by the sponsors' section-by-section analysis. I will address each of the Commissions questions in turn:

Does the new law cover non-lobbyist employees of a registrant?

No. The sponsors' intent is clear: "This provision covers only contributions credited to registered lobbyists, as defined in 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."

The sponsors' section-by-section analysis is consistent with the plain language of the law, which covers lobbyists and registrants. Where, as in BCRA, the Congress has intended to cover the actions of "agents" it has stated so directly. The new law notably does not include "agents" or the concept of agency in its text.

Does the new law allow corporations or labor unions to be "credited" with having raised contributions?

There is nothing in the new law or its legislative history to suggest that it intended to alter the Commission's longstanding ban on corporate "facilitation." While a prohibited source can be a registrant, so can a permissible source – such as a partnership or LLC (taxed as a partnership). Consistent with its past practice, the Commission should assume that only registrants that are permissible sources may raise contributions.

How should contributions raised at jointly hosted events be allocated for "credit" purposes among several lobbyists?

The Commission offers two alternatives – each host receive 100% "credit" or each host receives a pro-rata share – that both miss the mark. The initial version of S.1 was passed from the Senate with a provision that required disclosure of events hosted by lobbyists. That provision was ultimately dropped from the final bill and replaced with the current text. The new law does not treat "hosts" any differently than non-hosts. The sole question under the plain text of the law is one of "credit." Regardless of who hosted the event, the Commission's rules must focus on who the committee/candidate involved "credits" with the raised contributions. If the committee/candidate credits all lobbyist-hosts equally, then that is how the bundled contributions should be reported. If, however, the committee/candidate credits one lobbyist-host (or other participant) differently than others, then the bundling reports should reflect that as well. Finally, if the committee/candidate does not credit any of the lobbyist-hosts, then none of the contributions should be reported as bundled.

The Commission also seeks comment on its definition of "designations or other means of recognizing." While the definition it proffers is reasonable, I suggest that the Commission expand its efforts to define "credit" and "records" as well. The new bundling rules (for checks not physically delivered) has two parts: (1) the contribution must be "credited" to a lobbyist; (2) the credit needs to accomplished "through records, designations, or other means of recognizing." The Commission's proposed rule would define "designation or other form of recognizing.". However, it would not also define the type of "record" that would suffice to trigger the regulatory obligation to disclose. What level of specificity and/or certainty is required before a "record" alone will trigger the obligation to report?

Even more importantly, the new rules fail to define "credit." For example, the term "credit" suggests that mere tracking of contributions is not sufficient. Rather the new rules should make clear that a lobbyist must receive "credit" of some form in order for the bundling rules to apply. I urge the Commission to promulgate concrete definitions that establish clear rules as to what a reportable "credited" contribution is and is not.

Finally, the Commission seeks comment on its "urging" committees to keep records of contributions forwarded by or "credited" to lobbyists. I object to this expression of preference for several reasons:

As noted above, under the plain text of the law, contributions are only reportable as bundled (when not physically forwarded) if they are credited through records, etc." To the extent a committee does not currently record who bundles for them, they would not likely have bundling

reporting obligations (absent other designation or form of recognition). The Commission should not impose a requirement to create records that does not exist in law.

Principles of retroactivity and due process should constrain the application of the reporting provisions to contributions raised after the effective date of the new regulations. Efforts to retroactively capture contributions made prior to the effective date of the new rules would be a serious mistake.

I look forward to testifying before the Commission on this important subject.

Very truly yours,

/s/ Marc Erik Elias

Marc Erik Elias