"Schiff, Bob (Judiciary-Dem)" <Bob_Schiff@Judiciary-dem.senate.gov>
11/30/2007 04:57 PM

To <bundling07@fec.gov>
cc
bcc
Subject Comments on Notice 2007-23

Attached please find comments of the following Members of Congress:

Senator Russell D. Feingold
U.S. Senate
Washington, DC 20510

Senator Barack Obama
U.S. Senate
Washington, DC 20510

Representative Chris Van Hollen
United States House of Representatives
Washington, DC 20515

The email addresses of the members are used by constituents and are not a reliable way to contact them in time-sensitive situations. Questions regarding these comments should be addressed to me. Thank you.

Bob Schiff
Chief Counsel to Sen. Feingold
202-224-8059

Feingold Obama Van Hollen Comments.pdf

Congress of the United States
Washington, DC 20510

November 30, 2007

By Electronic Mail

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

Re: Notice 2007-23: Reporting Contributions Bundled by Lobbyists, Registrants, and the PACs of Lobbyists and Registrants

Dear Ms. Rothstein:

We appreciate the opportunity to comment on the Commission's Notice of Proposed Rulemaking 2007-23, published at 72 Fed. Reg. 62600 (Nov. 6, 2007) ("NPRM"), which proposes rules to implement section 204 of the Honest Leadership and Open Government Act of 2007 ("HLOGA"). Section 204 requires certain political committees to disclose bundling by lobbyists. We were leading supporters of that legislation and early sponsors of efforts to require bundling disclosure. We therefore have a particular interest in ensuring that regulations adopted by the Commission accurately construe and implement it.

I. Legislative History

Our work on the bundling disclosure issue began in the 109th Congress when Rep. Van Hollen developed a proposal to require lobbyists to report contributions they bundled for candidates. Mr. Van Hollen successfully offered that proposal as an amendment to H.R. 4975 on April 5, 2006. The Republican leadership removed the amendment from the bill that went to the House floor and passed the House on May 3, 2006. That legislation ultimately was not enacted.

After Democrats took control of Congress in the 2006 elections, Senate Majority Leader Harry Reid announced that the first order of business in the Senate would be the ethics and lobbying reform legislation that Congress had

failed to enact in the previous session. In January 2007, in anticipation of the Senate's immediate focus on the issue, Sen. Feingold and Sen. Obama introduced a comprehensive lobbying and ethics reform bill. *See* S. 230, 110th Congress. Section 212 of that bill included a provision that built on the Van Hollen amendment adopted by the House Judiciary Committee, requiring disclosure by lobbyists not only of contributions they personally collected and delivered to candidates, but of contributions for which they received credit from a candidate.

Many of the provisions of S. 230 were included in a package of amendments offered by the Majority and Minority Leaders as the Senate began work on S. 1, the bill that ultimately became HLOGA, but bundling disclosure was not one of them. See S. Amdt. 3, Cong. Rec. at S301 (Jan. 9, 2007). Therefore, Sen. Obama offered an amendment to the bill that was drawn from S. 230. That amendment added bundling to the list of items such as campaign contributions and other payments to members of Congress that would have to be disclosed by individual lobbyists and registrants. The disclosures were to be made in a separate quarterly report to be filed on the same schedule as the reports required of registrants under the Lobbying Disclosure Act. *See* S. Amdt. 41, Cong. Rec. at S473 (Jan. 11, 2007). The amendment was adopted by unanimous consent on January 18, 2007. It became section 212 of S. 1, which passed the Senate on the same day by a vote of 96-2.

Rep. Van Hollen took up the fight for bundling disclosure as the House considered lobbying reform over the next several months. On January 23, 2007, he introduced H.R. 633, modeled on section 212 of the Senate-passed bill. After negotiations on the House side, he introduced H.R. 2317. While H.R. 633, like section 212 of the Senate-passed bill, covered disclosure of a variety of contributions and payments by lobbyists, H.R. 2317 focused specifically on bundling. H.R. 2317 passed the House on May 24, 2007, by a vote of 382-37. That same day, the bundling bill was added to H.R. 2316, the House version of the lobbying and ethics reform bill, by a vote of 346-71. S. 2316 then passed the House by a vote of 396-22. Thus, both the House and the Senate bills required disclosure of bundling by individual lobbyists and registrants, but the language of the two bills differed.

A formal conference committee to reconcile the House and Senate versions of the bill was never convened. Instead, Democratic leaders of the House and Senate along with key committee chairs and leading reform advocates in the two bodies, including the three of us, hammered out a final bill over a period of several months in the summer of 2007. The final bill, HLOGA, was passed by the House on July 31, 2007, by a vote of 411-8, and by the Senate on August 2, 2007, by a vote of 83-14. The President signed the bill into law on September 14, 2007.

It was during the process of negotiating the final bill that a new bundling provision was developed. This provision, section 204 of HLOGA, places the duty to report bundling on candidates and committees rather than the lobbyists themselves. All three of us were deeply involved in the negotiations concerning this provision. We agreed to and supported the final provision because we believed it would provide the kind of transparency that the lobbying disclosure provisions we championed in the House and Senate bills were designed to afford. *See* Cong. Rec. at S10698 (Statement of Sen. Obama).

It is difficult to overstate the importance of the bundling disclosure provision to the overall lobbying and ethics reform effort. It was a key issue for us in deciding whether to support the bill because it goes to the very heart of the influence that lobbyists exert on the legislative process. Lobbyists make direct campaign contributions to candidates and officeholders, which they are now required to disclose as part of their periodic lobbying disclosure reports. But the public is keenly aware that they can magnify their influence by bundling the contributions of others. *See* Cong. Rec. H9209 (July 31, 2007) (statement of Rep. Van Hollen). Our goal in sponsoring bundling disclosure and insisting that it remain part of the overall lobbying and ethics reform bill was to give the public as much information as possible about the involvement of lobbyists in the raising of campaign funds for candidates. We believe this provision is extremely important to the increased and improved disclosure that is the main goal of the overall bill. We felt so strongly about the need to implement it properly that we provided our respective bodies with our views on specific questions of interpretation that might arise. *See* Cong. Rec. at S10698-99 (Aug. 2, 2007) (colloquy of Senators Feingold and Obama); Cong. Rec. at H9209 (July 31, 2007) (statement of Rep. Van Hollen).

For that same reason, the statute contains a specific command to the Commission to interpret section 204 to provide the "broadest possible disclosure." 2 U.S.C. § 434(i)(5)(D). Shifting the responsibility for disclosure to campaign committees and requiring the promulgation of regulations to implement the provision raised a serious concern that lobbyists and others who would prefer that their activities remain shielded from public view would attempt to use the regulatory process to dilute the disclosure requirements. We urge the Commission to take the directive in subparagraph (5)(D) very seriously and to keep it in mind as it decides the many questions raised in the NPRM.

II. Proposed Regulations Concerning Bundling Disclosure

We offer below our comments on several of the questions raised in the NPRM.

Covered Period

We support the NPRM's proposal to require committees that file reports monthly to report their bundling on a quarterly basis, as suggested by the statute. *See* 2 U.S.C. §434(i)(5)(A). In addition, we believe that the proposed definition of "covered period" is consistent with the statutory language, which the alternative definition is not. The statutory language is clear that disclosure of bundling must be made for any reporting period in which the threshold amount of contributions are bundled. This means that if the semi-annual threshold is reached in the first quarter (or the third quarter), there must be disclosure in the reports that cover those quarters. In addition, the statute specifically requires that in the report that follows the end of a semi-annual period, if the threshold was reached in the semi-annual period, or in the second (or fourth) quarter alone, there must also be reporting.

The Commission should strive to make the meaning of the reported information as unambiguous as possible by designing reporting forms that require quarterly amounts and semi-annual aggregate amounts of bundling to be separately recorded. Any reporting requirement, including annual aggregates, that is not burdensome to the reporting committees and increases the amount and clarity of information available to the public would be consistent with the statutory directive to provide for the "broadest possible disclosure."

Forwarding of Contributions

We believe that a definition of the term "forwarded," which is used in 2 U.S.C. § 434i(8)(a)(i) would be useful, as suggested by the NPRM. Such a definition would help make clear, for example, that if a lobbyist collects groups of checks for a candidate but arranges for an employee or third party to give them to a candidate, rather than delivering them personally, those checks have still been "forwarded" and the campaign must report that bundling. Forwarding in our view means transferring, delivering, or sending the contributions to a campaign or arranging for such delivery or transfer. *See* Cong. Rec. at S10698 (Aug. 2, 2007) (statement of Sen. Obama).

Credited vs. Received Contributions

The NPRM asks whether the amount credited to a lobbyist as having been bundled should control over the amount actually received. In our view, it should not. One of the concerns expressed by some of our colleagues about making lobbyists responsible for bundling disclosure, was that it might lead to discrepancies between what lobbyists claimed they had done for candidates and what the candidates knew had actually been done (or not done). That is the main reason that the final bill made campaign committees rather than lobbyists responsible for disclosure of bundling. It is hard to imagine a situation in which a candidate would credit a lobbyist for raising money that has not actually come in the door, but if such a circumstance should arise, the best reading of the statute is that a committee should report the amount received, not the amount credited.

Bundling by Employees of Lobbyists and Registrants

There is no question that an entity that is prohibited from making contributions, such as a corporation, can and must be reported if that entity, through its agents, forwards contributions to a campaign or is credited with raising money for a campaign. Congress was well aware that many entities that register under the Lobbying Disclosure Act because they employ in-house lobbyists are corporations or unions, which are prohibited from making direct contributions, but which bundle contributions from legal contributors in order to curry favor with legislators. Such entities have to act through agents, namely their employees. The question of what employees are covered is therefore a fair one, but also an easy one to answer.

The starting and ending point of this analysis is who is being credited by the campaign with the fundraising. If it is a lobbyist, or a registrant that employs lobbyists, then the bundling must be reported. This is true even if the fundraising activities are undertaken by people who are not lobbyists. Bundling reporting is designed to shine a light on fundraising by lobbyists and organizations that lobby. To allow an entity to escape being reported by having its non-lobbyist employees do the bundling would clearly be contrary to the intent of the provision.

On the other hand, just because someone works for a lobbying entity doesn't mean he or she is acting on that entity's behalf. When bundlers are acting independently of their employers, the employers presumably are not being credited for the bundling. In such cases, no reporting would be required. We see no incongruity between our intent on this question and statement in the section by section analysis that the provision "covers only contributions credited to registered lobbyists." Cong. Rec. at 10709 (Aug. 2, 2007). The touchstone is who is getting credit for the fundraising. Is it the employer or the employee? If the employee is

getting credit, and the employee is not a lobbyist, then no reporting is required. If the employer is getting credit, and the employer is a lobbyist or registrant, there is no question that reporting is required.

Co-hosted Fundraisers

Fundraising events are the bread and butter of lobbyist bundling and lobbyist influence. All candidates are aware of this, and from the very beginning we wanted to make sure that fundraisers hosted or co-hosted by lobbyists were reported under this bill. As the concept of a dollar threshold for reporting began to be discussed it was obvious to us that a potential loophole could develop. Lobbyists and campaigns could try to "game the system" by dividing the amount raised at an event among a large number of lobbyists, thereby making sure that none of them reached the reporting threshold.

The colloquy between Senators Feingold and Obama makes it very clear that such gamesmanship should not be permitted. See Cong. Rec. at S10699 (Aug. 2, 2007). Allowing campaigns to pro-rate the amount raised among co-hosts of an event to evade the threshold would be inconsistent with the overall purpose of the provision and with the statutory instruction to require the broadest possible disclosure.

"Designations Or Other Means of Recognizing"

We believe that the clear intent of the provision is that credit for fundraising need not be written or recorded. That is plain in the statute itself, which says that "other means of recognizing that a certain amount of money has been raised" are ways for a campaign to give credit for bundling. 2 U.S.C. § 434i(8)(A)(ii). It is also clear from the legislative history in statements by all three of us. *See* Cong. Rec. at H9209 (July 31, 2007) (statement of Rep. Van Hollen) ("[T]he credit that is attributed to the lobbyist does not need to be memorialized in writing or captured within a database or any other contribution tracking system to trigger the reporting requirement."); Cong. Rec. at S10698 (Aug. 2, 2007) (statement of Sen. Obama) ("[T]he credit that is attributed to the lobbyist does not need to be memorialized in writing or captured within a database or any other contribution tracking system to trigger the reporting requirement."); *id.* (statement of Sen. Feingold) ("I agree with that.").

We were deeply involved in the negotiations over and drafting of the final bundling disclosure provision. We would not have agreed to any language that required campaign committees to report only the lobbyist bundling documented by written records or written confirmation. Campaigns could easily avoid such a requirement simply by forgoing documentation, and the goal of shining a public spotlight on fundraising by lobbyists would be foiled.

We encourage the Commission to provide as many examples of "designations or other means of recognizing" as it can, as long as it is clear that formal or written recognition is not required and that, in the end, the knowledge of the campaign or the candidate that a certain amount of money in excess of the threshold has been raised by a lobbyist or registrant is all that is needed to trigger a reporting requirement under 2 U.S.C. § 434(i)(8)(A)(ii). When a campaign or candidate knows about specific fundraising by a lobbyist, it has credited the fundraiser with the amount raised.

As Sen. Feingold noted in his colloquy with Sen. Obama, however, a candidate simply knowing that a lobbyist has been raising money for his or her campaign is not enough to trigger the need for disclosure unless the campaign is also aware of a specific amount having been raised. *See* Cong. Rec. at S10699 (statement of Sen. Feingold).

"Reasonably Known To Be"

We support the proposal in the NPRM to require campaign committees to consult the Commission's own website, as well as the sites of the Clerk of the House and the Secretary of the Senate, to determine whether people who have bundled contributions are lobbyists or registrants. The statutory instruction on this issue contained in 2 U.S.C. §434(i)(5)(B) is not exclusive. Any other publicly available website or reference that the Commission believes is a reliable way to supplement the information on lobbyist registrations provided by the Clerk and the Secretary could be added to the regulation now or in the future. It is our hope, obviously, that the sites operated by the House and the Senate will prove to be up to date and accurate, but the goal is full disclosure of bundling by lobbyists.

III. Conclusion

Reporting of bundling by lobbyists was a key component of a law that the Senate Majority Leader called "the most sweeping ethics and lobbying reform in history" and Speaker of the House called "historic" and "momentous." It is crucial that the Commission implement this provision in a way that provides the "broadest disclosure possible" of fundraising by lobbyists. We urge the adoption of a final rule that reflects the principles set forth above, so that the intent of Congress in passing this important law is carried out. Thank you for your consideration of our views.

Sincerely,

Senator Russell D. Feingold
Senator Barack Obama
Representative Chris Van Hollen