Wiley Rein LLP

ELECTION LAW *NEWS*

Developments in All Aspects of Political Law | September 2017

One Year After Implementation, Confusion Lingers Over New IRS 501(c)(4) Notice Requirement

By Robert D. Benton and Eric Wang

It has now been a little more than a year since the Internal Revenue Service (IRS) implemented a requirement for newly formed 501(c)(4) social welfare organizations to notify the agency of their operation (*See* ***Election Law News*, July 2016**). To commemorate the one-year anniversary of the IRS Form 8976, we take this opportunity to clarify some of the confusion that may continue to exist in the non-profit community over this new requirement, particularly as it relates to the separate preexisting process for applying for formal IRS recognition of tax-exempt status.

As we first wrote about last year, the new IRS requirement is a result of an enigmatic provision that was slipped into the monstrous 888-page Protecting Americans From Tax Hikes (PATH) Act – a budget bill enacted at the end of 2015. The new provision requires a new 501(c)(4) entity to notify the IRS of the organization's operation within 60 days of its formation.

Last July, the IRS implemented this new requirement by promulgating Form 8976, which must be completed and submitted on the agency's website, along with a $50 fee. The notification

continued on page 4

ALSO IN THIS ISSUE

2 Random State & Local Audits: A Reminder to Retain Records of Lobbying Activity

2 FINRA Proposes Pay-to-Play Rule for CABs

5 President Trump Begins Reshaping the FEC

7 Breakfast Briefing: Navigating Legal Challenges for Trade Associations

8 Events & Speeches

Joint Fundraising 101: Transparency & Compliance

By Michael E. Toner and Brandis L. Zehr

Pro-regulatory groups and the media frequently bemoan joint fundraising as a "loophole" that allows federal candidates and parties to "circumvent" contribution limits by accepting "huge checks" from donors. But nothing could be further from the truth. The Federal Election Campaign Act (FECA) and Federal Election Commission (FEC) regulations not only specifically permit joint fundraising, but also highly regulate the activity to ensure that each participant pays for its share of the joint fundraising costs and the funds raised comply with contribution limits and are fully disclosed.

continued on page 6

Random State & Local Audits: A Reminder to Retain Records of Lobbying Activity

By Carol A. Laham and Louisa Brooks

Recent months have seen an uptick in the number of stories about high-profile organizations penalized either for failing to register as lobbyists in a state or locality, or for inaccurately reporting lobbying expenditures. While inaccurate reporting is sometimes discovered because someone files a complaint, a number of jurisdictions also conduct random audits of lobbying registrations and reports. Here are just a few examples of states and localities that may audit your organization's lobby filings:

New York State

The New York State Joint Commission on Public Ethics (JCOPE) conducts statutory random audits of filings. The agency contracts with an outside consulting firm to randomly select lobbyists and clients for auditing; last year it conducted 400 audits.

If an organization is selected for an audit, JCOPE will require the registered lobbyist or client to produce records and materials to substantiate the information in the filings being audited. Under New York law, lobbyists and lobbyist employers must keep records for three years, including copies of checks and receipts. A lobbyist must be able to document any expense exceeding $50 with a receipt or cancelled check.

New York City

The Lobbying Bureau of the New York City Clerk's office conducts audits pursuant to its

continued on page 3

FINRA Proposes Pay-to-Play Rule for CABs

By Jan Witold Baran and D. Mark Renaud

In an effort to ensure that all corners of the financial advisory industry is under the thumb of the strict U.S. Securities and Exchange Commission (SEC) pay-to-play rule, the Financial Services Regulatory Authority (FINRA) announced on August 18, 2017, that it would subject Capital Acquisition Brokers (CABs) to pay-to-play restrictions. According to FINRA, CABs are members of FINRA that engage in a limited range of activities, "essentially advising companies and private equity firms on capital raising and corporate restructuring" and act as placement agents for sales of certain securities to institutional investors under certain conditions.

FINRA proposes to make CABs subject to FINRA's new pay-to-play rules for its registered reps, FINRA Rules 2030 and 4580. These rules just became effective on August 20, 2017 (*See* ***Election Law News*, November 2016**). The SEC has indicated that FINRA's rules are as strict as the SEC's own pay-to-play rules for investment advisers so that investment advisers may compensate those FINRA members who solicit state and local government business on their behalf.

FINRA is asking for comments on this proposed rule. Comments were due by September 14, 2017. For more information, please see the notice **here**. ■

For more information, please contact:

Jan Witold Baran
| 202.719.7330
| jbaran@wileyrein.com

D. Mark Renaud
| 202.719.7405
| mrenaud@wileyrein.com

Random Audit Program and, based on its findings, may make referrals to the Office of Administrative Trials and Hearings (OATH) for possible assessment of civil penalties. When conducting an audit, the Bureau requires lobbyists to produce witnesses and records relevant to the preparation of the statements being audited. According to the Bureau's annual report for 2016, it audited the 2015 filings of 43 lobbyists last year. The City's lobbying law requires lobbyists and clients to keep "detailed and exact" records of compensation and expenditures for at least five years.

Separately, note that New York City's lobbying law overlaps with New York state law, and both jurisdictions require registration and reporting for persons lobbying New York City officials. The City's Lobbying Bureau actively reviews registrations filed with the state commission (JCOPE) to scout out entities that have listed City lobbying targets on their state registrations but have failed to separately register with the City.

Pennsylvania

Each year the Pennsylvania Department of State randomly selects three percent of all registrants for auditing. The Department contracts with an independent auditing firm, which contacts registrants directly to request any records necessary to conduct the audit. Registrants are required to keep records for four years from the date of each report.

California

California's Franchise Tax Board conducts mandatory audits of lobbying reports for each biennial period. 25 percent of registered lobbying firms and lobbyist employers are selected for audit via public drawing in February of each odd-numbered year. When a lobbying firm or lobbyist employer is selected for audit, the individual lobbyists employed by that organization are also subject to the audit. California registrants are required to retain records and substantiating documents for five years from the date of the final report filed for the calendar year.

We often assist clients selected for audit with preparing and reviewing their audit materials. Of course, organizations can prevent any anxiety about an audit by ensuring their lobby filings are accurate at the outset. We regularly prepare and file lobbying reports in states and localities across the country and are available to consult about any questions your organization may have. ■

For more information, please contact:

Carol A. Laham
| 202.719.7301
| claham@wileyrein.com

Louisa Brooks
| 202.719.4187
| lbrooks@wileyrein.com

form requires the following basic information:

- The organization's name, address, and taxpayer identification number;
- The organization's date of formation and state in which it was formed;
- A statement of the organization's purpose.

A penalty of $20 per day, up to a maximum of $5,000, may accrue for late filings.

Importantly, as the IRS has interpreted this new requirement:

- The Form 8976 is not a substitute for the optional Form 1024 application for formal agency determination of a 501(c)(4) organization's tax-exempt status;
- Conversely, filing a Form 1024, even within 60 days of an organization's formation, does not satisfy the requirement to separately file the Form 8976.

There appears to be two sources of confusion over these separate filings: (1) the lack of understanding over their purposes; and (2) the PATH Act's legislative history. To help clarify things, it is useful to first review the purpose of the Form 1024 application, which had long preexisted the 2015 PATH Act.

501(c)(4) social welfare organizations have never been strictly required to apply with the IRS for recognition of their tax-exempt status. Rather, prior to the PATH Act, they were permitted to simply "self-declare" and operate as tax-exempt organizations by filing annual Form 990 tax returns with the IRS. However, 501(c)(4) entities could receive additional assurance that they were structured and operating properly by filing an optional Form 1024 application with the IRS for a formal agency determination of their status.

The Form 1024, which typically involves at least eight pages of information plus schedules, requires an organization to provide fairly extensive details about its planned activities and anticipated budget for three tax years. A "user fee" of $850 also is required for organizations with even a modest amount of revenues. The upshot is that obtaining a formal IRS determination:

- Provides extra reassurance to donors–especially to organizational donors, which often avoid making grants to organizations that lack a formal IRS determination;
- Exempts organizations from certain state taxes;
- Facilitates nonprofit mailing privileges.

For a while, the IRS also had been targeting self-declared 501(c)(4) organizations with a 36-item questionnaire (Form 14449), asking for much of the same information that is required on the Form 1024.

In 2013, news broke that the IRS was apparently targeting groups' Form 1024 submissions for extra scrutiny and delays based on their political leanings. Later that year, the IRS issued a proposed rulemaking, which was widely panned, to expansively define what activities would qualify as restricted political campaign intervention by 501(c)(4) entities.

Enter the PATH Act, which sought to rein in the IRS's abuses by: (1) prohibiting the IRS from issuing its political activity rules; and (2) providing quicker judicial relief for applicants that receive an adverse determination from the IRS on their tax-exempt status (*See* ***Election Law News*, January 2016**). With respect to the new Form 8976 notification requirement, some members of Congress

continued on page 5

One Year After Implementation, Confusion Lingers Over New IRS 501(c)(4) Notice Requirement *continued from page 4*

(or at least their staff) also apparently thought they were enacting streamlined replacement for the Form 1024 application. According to a Senate Finance Committee section-by-section analysis of the PATH Act, which appears to have been released a few days before the bill was enacted: "The provision provides for a streamlined recognition process for organizations seeking tax exemption under section 501(c)(4) . . . The current, voluntary 501(c)(4) application process will be eliminated."

The actual legislative text that was enacted into law, however, fails to reflect this understanding. Instead, the law merely provides that, "[u]pon request by an organization to be treated as an organization described in section 501(c)(4), the [IRS] may issue a determination with respect to such treatment," and that such a request "shall be treated . . . as an application for exemption from taxation." The law does not specify that filing the one-page Form 8976 obviates the need to file the optional Form 1024 for a formal IRS determination of a 501(c)(4) entity's tax-exempt status, and the IRS did not interpret the law in this manner.

According to the IRS's FY 2017 work plan, the agency received approximately 1,200 Form 8976 filings in FY 2016 (after the notification requirement went into effect), and the agency estimates it will receive an additional 2,500 such filings during this fiscal year. Thus, instead of minimizing the regulatory burdens on 501(c)(4) entities, the PATH Act ended up creating a new one.

Wiley Rein's Election Law practice routinely assists clients with creating new 501(c)(4) entities and preparing their Form 8976 and 1024 filings (in addition to applicable state filings). While obscure, loosely drafted legislative provisions like the one resulting in the new Form 8976 are difficult to forestall, we also monitor legislative and regulatory developments to assist our clients in opposing bills and rulemakings that would adversely affect the non-profit community. ■

For more information, please contact:

Robert D. Benton
202.719.7142
rbenton@wileyrein.com

Eric Wang
202.719.4185
ewang@wileyrein.com

President Trump Begins Reshaping the FEC

By Caleb P. Burns and Andrew G. Woodson

President Donald Trump has made two important personnel announcements in recent days that will potentially impact the future composition of the six-member Federal Election Commission (FEC or Commission).

On September 7, the President announced the nomination of current Republican FEC Commissioner – and Wiley Rein alumnus – Matthew S. Petersen to serve as a federal district judge in Washington, D.C. Commissioner Petersen was unanimously nominated and confirmed to the FEC in June of 2008 and has spent nearly a decade helping to oversee the federal agency that administers our nation's campaign finance laws. Prior to coming to the FEC, Commissioner Petersen had served as Republican chief counsel to the U.S. Senate

continued on page 7

What is joint fundraising?
Joint fundraising is a fundraising effort jointly conducted by one or more political committees or unregistered organizations. It allows participants to jointly solicit contributions and split fundraising overhead costs. It also allows donors to contribute to joint fundraising participants via a single check, which is subsequently split and transferred to the participants.

What is a joint fundraising committee?
Joint fundraising participants often establish a separate political committee—referred to as a joint fundraising committee (JFC)—to facilitate the effort. A JFC effectively operates as an escrow agent for the participants. Instead of writing separate contribution checks to each JFC participant, donors may write a single contribution check to the JFC. The JFC, in turn, transfers to each participant its net share of the contribution after subtracting the participant's share of the fundraising overhead costs.

How much may individuals contribute to joint fundraising committees? The contribution limit to a JFC is simply the combined total of the contribution limits to the participating entities. For example, if a campaign committee and leadership PAC form a JFC, an individual could contribute up to $10,400 to the JFC in 2017. The JFC would distribute the individual's $10,400 contribution to the participants as follows: $2,700 would be transferred to the campaign committee for the 2018 primary; $2,700 would be transferred to the campaign committee for the 2018 general election; and $5,000 would be transferred to the leadership PAC for the 2017 calendar year. Importantly, a donor's contribution limit to a JFC is not separate from the donor's contribution limit to each participating entity. Using the example above, if an individual had already contributed $2,700 to the campaign committee directly for the 2018 primary, the individual would only be able to contribute $7,700 to the JFC.

If I contribute to a joint fundraising committee, who will get my money? FEC regulations require JFCs to include a "joint fundraising notice" on every solicitation listing the joint fundraising participants, explaining how the JFC will allocate contributions, and informing donors that they may override the allocation formula by designating their contributions for a particular participant. Thus, unless a donor specifies otherwise, a contribution will be split among the joint fundraising participants according to the pre-determined allocation formula. It's worth noting that a donor's JFC contribution would be allocated differently if the donor has made prior contributions to any joint fundraising participants that affect his or her contribution limit to the participants.

As explained above, joint fundraising is not a "loophole"—it is merely a mechanism that allows donors to contribute to more than one entity with a single check. ■

For more information, please contact:

Michael E. Toner
202.719.7545
mtoner@wileyrein.com

Brandis L. Zehr
202.719.7210
bzehr@wileyrein.com

in helping craft the Help America Vote Act of 2002. Commissioner Petersen is a 1999 graduate of the University of Virginia School of Law.

A few days later, the President announced his intent to nominate Texas lawyer James E. (Trey) Trainor III to fill Commissioner Petersen's seat on the FEC. According to his biography, since graduating from Texas A&M Law School in 2002, Mr. Trainor has held several positions in state government, advised clients on election and ethics in private practice, and aided a pair of presidential campaigns. If confirmed by the U.S. Senate, Mr. Trainor's term at the Commission would expire on April 20, 2023. ■

For more information, please contact:

Caleb P. Burns
| 202.719.7451
| cburns@wileyrein.com

Andrew G. Woodson
| 202.719.4638
| awoodson@wileyrein.com

JOIN US FOR A BRIEFING ON NAVIGATING LEGAL CHALLENGES FOR TRADE ASSOCIATIONS

As exempt organizations, trade associations face growing challenges with potential long-term impacts, such as increased scrutiny by the Internal Revenue Service (IRS), the evolution of technology, and regulation by state and local campaign finance, corporate, and tax agencies. At this breakfast briefing, speakers will navigate through the complex and ever-changing rules that are unique to trade associations. The agenda can be accessed **here**.

DATE Tuesday, October 3, 2017

TIME 9:00 a.m. – 11:30 a.m.
Continental breakfast and check-in begin at 8:30 a.m.

LOCATION Wiley Rein LLP
Main Conference Center
1776 K Street NW
Washington, DC 20006

INFO CLE credit may be available. The event is complimentary but advance registration is required, as space is limited. For more information, please contact Laurena Liu at lliu@wileyrein.com or 202.719.3165.

REGISTER HERE

Hosted by the Wiley Rein Corporate and Election Law & Government Ethics Groups

Events & Speeches

Corporate Lobbying, Gift and Campaign Finance Compliance

Caleb P. Burns, Speaker

George Washington University Graduate School of Political Management

September 27, 2017 | Washington, DC

Election Law Professionals

Name	Phone	Email
Jan Witold Baran	202.719.7330	jbaran@wileyrein.com
Michael E. Toner	202.719.7545	mtoner@wileyrein.com
Carol A. Laham	202.719.7301	claham@wileyrein.com
Thomas W. Kirby	202.719.7062	tkirby@wileyrein.com
D. Mark Renaud	202.719.7405	mrenaud@wileyrein.com
Caleb P. Burns	202.719.7451	cburns@wileyrein.com
Andrew G. Woodson	202.719.4683	awoodson@wileyrein.com
Robert D. Benton	202.719.7142	rbenton@wileyrein.com
Claire J. Evans	202.719.7022	cevans@wileyrein.com
Robert L. Walker	202.719.7585	rlwalker@wileyrein.com
Ralph J. Caccia	202.719.7242	rcaccia@wileyrein.com
Roderick L. Thomas	202.719.7035	rthomas@wileyrein.com
Bruce L. McDonald	202.719.7014	bmcdonald@wileyrein.com
Jason P. Cronic	202.719.7175	jcronic@wileyrein.com
Thomas W. Antonucci	202.719.7558	tantonucci@wileyrein.com
Daniel B. Pickard	202.719.7285	dpickard@wileyrein.com
Eric Wang	202.719.4185	ewang@wileyrein.com
Brandis L. Zehr	202.719.7210	bzehr@wileyrein.com
Louisa Brooks	202.719.4187	lbrooks@wileyrein.com
Karen E. Trainer, Senior Reporting Specialist	202.719.4078	ktrainer@wileyrein.com

To update your contact information or to cancel your subscription to this newsletter, visit:

www.wileyrein.com/newsroom-signup.html.

This is a publication of Wiley Rein LLP, intended to provide general news about recent legal developments and should not be construed as providing legal advice or legal opinions. You should consult an attorney for any specific legal questions.

Some of the content in this publication may be considered attorney advertising under applicable state laws. Prior results do not guarantee a similar outcome.