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CANDIDATE GUIDE SUPPLEMENT

Using this Supplement

The purpose of this supplement is to offer a summary of the most recent developments in the Commission's administration of federal campaign finance law relating to candidate committees. The following is a compilation of articles from the FEC's monthly newsletter covering relevant changes. It should be used in conjunction with the FEC's April 2008 *Campaign Guide for Congressional Candidates and Committees*, which provides more comprehensive information on compliance for candidate committees.

Note: Portions of this publication may be affected by the Supreme Court's decision in *Citizens United v. FEC*. Essentially, the Court's ruling permits corporations and labor organizations to use treasury funds to make independent expenditures in connection with federal elections and to fund electioneering communications. The ruling did not affect the ban on corporate or union contributions or the reporting requirements for independent expenditures and electioneering communications. For more information, see page 5.

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Federal Election Commission
999 E Street, NW
Washington, DC 20463

800/424-9530
202/694-1100
202/501-3413 (FEC Faxline)
202/219-3336 (TDD for the hearing impaired)

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Court Cases

Shays v. FEC (III)

On June 13, 2008, a three-judge panel of the U.S. Court of Appeals for the District of Columbia affirmed in part and reversed in part the district court's judgment in the *Shays III* case. Specifically, the appeals court agreed with the district court in finding deficient regulations regarding the content standard for coordination, the 120-day coordination window for common vendors and former campaign employees and the definitions of "GOTV activity" and "voter registration activity." The appeals court reversed the district court's decision to uphold the provision allowing federal candidates to solicit funds without restriction at state and local party events. These regulations were remanded to the FEC to issue "regulations consistent with the Act's text and purpose." The court did not vacate the regulations, so they remain in effect, pending further action. The appeals court upheld the FEC's regulations regarding the firewall safe harbor for coordination by former employees and vendors, which the district court had found deficient.

Background

In response to the court decisions and judgment in *Shays I*, the FEC held rulemaking proceedings during 2005 and 2006 to revise a number of its Bipartisan Campaign Reform Act (BCRA) regulations. On July 11, 2006, U.S. Representative Christopher Shays and then-Representative Martin Meehan (the plaintiffs) filed another complaint in district court. The complaint challenged the FEC's recent revisions to, or expanded explanations for, regulations governing coordinated communications, federal election activity (FEA) and solicitations by federal candidates and officeholders at state party fundraising events. The plaintiffs claimed that the rules

did not comply with the court's judgment in *Shays I* or with the BCRA. The complaint also alleged the FEC did not adequately explain and justify its actions.

On September 12, 2007, the district court granted in part and denied in part the parties' motions for summary judgment in this case. The court remanded to the FEC a number of regulations implementing the BCRA, including:

- The revised coordinated communications content standard at 11 CFR 109.21(c)(4);
- The 120-day window for coordination through common vendors and former employees under the conduct standard at 11 CFR 109.21(d)(4) and (d)(5);
- The safe harbor from the definition of "coordinated communication" for a common vendor, former employee, or political committee that establishes a "firewall'' (11 CFR 109.21(h)(1) and (h)(2)); and
- The definitions of "voter registration activity" and "get-out-the-vote activity" (GOTV) at 11 CFR 100.24(a)(2)-(a)(3).

On October 16, 2007, the Commission filed a Notice of Appeal seeking appellate review of all of the adverse rulings issued by the district court. On October 23, 2007, Representative Shays cross-appealed the district court's judgment insofar as it denied the plaintiff's "claims or requested relief."

Appeals Court Decision

The appellate court upheld the majority of the district court's decision, including the remand of the content standard for coordination, the 120-day common vendor coordination time period and the definitions of GOTV activity and voter registration activity. While the district court had held the firewall safe harbor for coordination by former employees and vendors invalid, the court of appeals reversed the district court and upheld the safe harbor provision. The court of appeals reversed the district court's decision to uphold the provision permitting federal candidates to solicit funds without restriction at state or local party events.

Coordination Content Standard. The court of appeals held that, while the Commission's decision to regulate ads more strictly within the 90- and 120-day periods was "perfectly reasonable," the decision to regulate ads outside of the time period only if they republish campaign material or contain express advocacy was unacceptable. Although the vast majority of communications are run within the time periods and are thus subject to regulation as coordinated communications, the court held that the current regulation allows "soft money" to be used to make election-influencing communications outside of the time periods, thus frustrating the purpose of the BCRA. The appellate court remanded the regulations to the Commission to draft new regulations concerning the content standard.

Coordination by Common Vendors and Former Employees. The appellate court affirmed the district court's decision concerning the 120-day prohibition on the use of material information about "campaign plans, projects, activities and needs" by vendors or former employees of a campaign. The court held that some material could retain its usefulness for more than 120 days and also that the Commission did not sufficiently support its decision to use 120 days as the acceptable time period after which coordination would not occur.

Firewall Safe Harbor. Contrary to the decision of the district court, the court of appeals approved the firewall safe harbor regulation to stand as written. The safe harbor is designed to protect vendors and organizations in which some employees are working on a candidate's campaign and others are working for outside organizations making independent expenditures. The appellate court held that, although the firewall provision states generally as to what the firewall should actually look like, the court deferred to the Commission's decision to allow organizations to create functional firewalls that are best adapted to the particular organizations' unique structures.

Definitions of GOTV and Voter Registration Activity. The court of appeals upheld the district court's decision to remand the definitions of "GOTV" and "voter registration activity." The court held that the definitions impermissibly required "individualized" assistance directed towards voters and thus continued to allow the use of soft money to influence federal elections, contrary to Congress' intent.

Solicitations by federal candidates at state party fundraisers. While the district court had upheld the regulation permitting federal candidates and officeholders to speak without restriction at state party fundraisers, the court of appeals disagreed. The court stated that Congress did not explicitly state that federal candidates could raise soft money at state party fundraisers; rather, Congress permitted the federal candidates to "appear, speak, or be a featured guest." Congress set forth several exceptions to the ban on federal candidates raising soft money, and state party events were not included in the exceptions. Thus, the court found the regulation impermissible.

U.S. District Court of Appeals for the District of Columbia Circuit, 07-5360.

—Meredith Metzler

Davis v. FEC

On June 26, 2008, the Supreme Court ruled that provisions of the Bipartisan Campaign Reform Act (BCRA) known as the "Millionaires' Amendment" (2 U.S.C. §319(a) and (b)) unconstitutionally burden the First Amendment rights of self-financed candidates. The decision overturned an earlier ruling by the U.S. District Court for the District of Columbia that the Millionaires' Amendment posed no threat to self-financed candidates' First Amendment or Equal Protection rights.

Background

On March 30, 2006, Jack Davis, a candidate for the House of Representatives in New York's 26th District, filed a Statement of Candidacy with the FEC declaring his intent to spend over $350,000 of his own funds on his campaign.

On June 6, 2006, Davis asked the U.S. District Court for the District of Columbia to declare the Millionaires' Amendment provisions unconstitutional on their face, and to issue an injunction barring the FEC from enforcing those provisions. Mr. Davis argued that the Millionaires' Amendment violates the First Amendment by chilling speech by self-financed candidates, and violates the Equal Protection Clause of the Fifth Amendment by giving a competitive advantage to self-financed candidates' opponents.

Under the Millionaires' Amendment, candidates who spend more than certain threshold amounts of their own personal funds on their campaigns may render their opponents eligible to receive contributions from individuals at an increased limit. 2 U.S.C. § 441a-1. For House candidates, the threshold amount is $350,000. This level of personal campaign spending could trigger increased limits for the self-financed candidate's opponent depending upon the opponent's own campaign expenditures from personal funds and the amount of funds the candidate has raised from other sources in the year prior to the year of the election. If increased limits are triggered, then the eligible candidate may receive contributions from individuals at three times the usual limit of $2,300 per election and may benefit from party coordinated expenditures in excess of the usual limit.

District Court Decision

The district court held that Mr. Davis's First Amendment challenge failed at the outset because the Millionaires' Amendment did not "burden the exercise of political speech."

According to the district court, the Millionaires' Amendment "places no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth to communicate his message to voters, nor does it reduce the amount of money he is able to raise from contributors. Rather, the Millionaires' Amendment accomplishes its sponsors' aim to preserve core First Amendment values by protecting the candidate's ability to enhance his participation in the political marketplace." In particular, the court cited the fact that Mr. Davis himself has twice chosen to self-finance his campaign. The court found that Mr. Davis failed to show how his speech had been limited by the benefits his opponents receive under the statute.

Mr. Davis additionally alleged that the disclosure requirements for self-financed candidates under the Millionaires' Amendment imposed an unfair burden on his right to speak in support of his own candidacy. The district court found that the Millionaires' Amendment reporting requirements are no more burdensome than other BCRA reporting requirements that the Supreme Court has already upheld.

The court also rejected the second prong of Mr. Davis's facial challenge, regarding the Equal Protection provision of the Fifth Amendment. In order to argue that a statute violates the Equal Protection Clause of the Fifth Amendment, a plaintiff must show that the statute treats similarly situated entities differently. The district court found that the Millionaires' Amendment did not violate the Equal Protection Clause of the Fifth Amendment because Mr. Davis could not show that the statute treated similarly situated entities differently. The district court held that self-funded candidates, who can choose to use unlimited amounts of their personal funds for their campaigns, and candidates who raise their funds from limited contributions are not similarly situated. According to the court, "the reasonable premise of the Millionaires' Amendment is that self-financed candidates are situated differently from those who lack the resources to fund their own campaigns and that this difference creates adverse consequences dangerous to the perception of electoral fairness." Thus, the court found no violation of the Fifth Amendment. The District court granted the FEC's request for summary judgment in this case and denied Mr. Davis's request for summary judgment.

Supreme Court Decision

On June 26, 2008, the Supreme Court issued an opinion reversing the district court's decision. The Court held that the Millionaires' Amendment unconstitutionally violated self-financed candidates' First Amendment or Equal Protection rights. The Court also rejected the FEC's arguments that Davis lacked standing and that the case was moot.

Standing. The FEC argued that Davis lacked standing to challenge the unequal contribution limits of the Millionaires' Amendment, 2 U.S.C. §319(a), because Davis' opponent never received contributions at the increased limit and therefore, Davis had suffered no injury. The

Court rejected this argument, noting that a party facing prospective injury has standing whenever the threat of injury is real, immediate and direct. The Court further noted that Davis faced such a prospect of injury from increased contribution limits at the time he filed his suit.

Mootness. The FEC also argued that Davis' argument was moot because the 2006 election had passed and Davis' claim would be capable of repetition only if Davis planned to self-finance another election for the U.S. House of Representatives. The FEC also argued that Davis' claim would not evade review as he could challenge the Amendment in court should the Commission file an enforcement action regarding his failure to file personal expenditure reports. Considering that Davis had subsequently made a public statement expressing his intent to run for a House seat and trigger the Millionaires' Amendment again, the Court concluded that Davis' challenge is not moot.

First Amendment and Equal Protection. In considering Davis' claim that imposing different fundraising limits on candidates running against one another impermissibly burdens his First Amendment right to free speech, the Court noted that it has never upheld the constitutionality of such a law. The Court referred to *Buckley v. Valeo*, in which it rejected a cap on a candidate's expenditure of personal funds for campaign speech and upheld the right of a candidate to "vigorously and tirelessly" advocate his or her own election. While the Millionaires' Amendment did not impose a spending cap on candidates, it effectively penalized candidates who spent large amounts of their own funds on their campaigns by increasing their opponents' contribution limits. The Court determined that the burden thus placed on wealthy candidates is not justified by any governmental interest in preventing corruption or the appearance of corruption, and that equalizing electoral opportunities for candidates of different personal wealth was not a permissible Congressional purpose.

The Court remanded the matter for action consistent with its decision. On June 26, 2008, the Commission issued a public statement outlining the general principles the Commission will apply to conform to the Court's decision. The full statement is printed on page 3.

U.S. Supreme Court, No. 07-320.

—Gary Mullen

Citizens United v. FEC

On January 21, 2010, the Supreme Court issued a ruling in *Citizens United v. Federal Election Commission* overruling an earlier decision, *Austin v. Michigan State Chamber of Commerce* (*Austin*), that allowed prohibitions on independent expenditures by corporations. The Court also overruled the part of *McConnell v. Federal Election Commission* that held that corporations could be banned from making electioneering communications. The Court upheld the reporting and disclaimer requirements for independent expenditures and electioneering communications. The Court's ruling did not affect the ban on corporate contributions.

Background

The Federal Election Campaign Act (the Act) prohibits corporations and labor unions from using their general treasury funds to make electioneering communications or for speech that expressly advocates the election or defeat of a federal candidate. 2 U.S.C. §441b. An electioneering communication is generally defined as "any broadcast, cable or satellite communication" that is "publicly distributed" and refers to a clearly identified federal candidate and is made within 30 days of a primary or 60 days of a general election. 2 U.S.C. §434(f)(3)(A) and 11 CFR 100.29(a)(2).

In January 2008, Citizens United, a non-profit corporation, released a film about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. Citizens United wanted to pay cable companies to make the film available for free through video-on-demand, which allows digital cable subscribers to select programming from various menus, including movies. Citizens United planned to make the film available within 30 days of the 2008 primary elections, but feared that the film would be covered by the Act's ban on corporate-funded electioneering communications that are the functional equivalent of express advocacy, thus subjecting the corporation to civil and criminal penalties. Citizens United sought declaratory and injunctive relief against the Commission in the U.S. District Court for the District of Columbia, arguing that the ban on corporate electioneering communications at 2 U.S.C. §441b was unconstitutional as applied to the film and that disclosure and disclaimer requirements were unconstitutional as applied to the film and the three ads for the movie. The District Court denied Citizens United a preliminary injunction and granted the Commission's motion for summary judgment. The Supreme Court noted probable jurisdiction in the case.

Supreme Court Decision

The Supreme Court found that resolving the question of whether the ban in §441b specifically applied to the film based on the narrow grounds put forth by Citizens United would have the overall effect of chilling political speech central to the First Amendment. Instead, the Court found that, in exercise of its judicial responsibility, it was required to consider the facial validity of the Act's ban on corporate expenditures and reconsider the continuing effect of the type of speech prohibition which the Court previously upheld in *Austin*.

The Court noted that §441b's prohibition on corporate independent expenditures and electioneering communications is a ban on speech and "political speech must prevail against laws that would suppress it, whether by design or inadvertence." Accordingly, laws that burden political speech are subject to "strict scrutiny," which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. According to the Court, prior to *Austin* there was a line of precedent forbidding speech restrictions based on a speaker's corporate identity, and after *Austin* there was a line permitting them. In reconsidering *Austin*, the Court found that the justifications that supported the restrictions on corporate expenditures are not compelling.

The Court in *Austin* identified a compelling governmental interest in limiting political speech by corporations by preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." However, in the current case the Court found that *Austin*'s "antidistortion" rationale "interferes with the 'open marketplace of ideas' protected by the First Amendment." According to the Court, "[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech." The Court held that the First Amendment "prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." The Court further held that "the rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."

The Court also rejected an anti-corruption rationale as a means of banning independent corporate political speech. In *Buckley v. Valeo*, the Court found the anti-corruption interest to be sufficiently important to allow limits on contributions, but did not extend that reasoning to overall expenditure limits because there was less of a danger that expenditures would be given as a *quid pro quo* for commitments from that candidate. The Court ultimately held in this case that the anti-corruption interest is not sufficient to displace the speech in question from Citizens United and that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."

The Court furthermore disagreed that corporate independent expenditures can be limited because of an interest in protecting dissenting shareholders from being compelled to fund corporate political speech. The Court held that such disagreements may be corrected by shareholders through the procedures of corporate democracy.

Finally, Citizens United also challenged the Act's disclaimer and disclosure provisions as applied to the film and three ads for the movie. Under the Act, televised electioneering communications must include a disclaimer stating responsibility for the content of the ad. 2 U.S.C. §441d(d)(2). Also, any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the Commission identifying the person making the expenditure, the amount of the expenditure, the election to which the communication was directed and the names of certain contributors. 2 U.S.C. §434(f)(2). The Court held that, although disclaimer and disclosure requirements may burden the ability to speak, they impose no ceiling on campaign activities and do not prevent anyone from speaking. As a result, the disclaimer and disclosure requirements are constitutional as applied to both the broadcast of the film and the ads promoting the film itself, since the ads qualify as electioneering communications.

Additional Information

The text of the Supreme Court's opinion is available on the Commission's website at http://www.fec.gov/law/litigation/cu_sc08_opinion.pdf.

U.S. Supreme Court No. 08-205.

—Myles Martin

Unity08 v. FEC

On March 2, 2010, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's decision in *Unity08 v. FEC* (Case No. 08-5526) and ruled in favor of the Plaintiff, Unity08. The appeals court found that Unity08 is not subject to regulation as a political committee unless and until it selects a "clearly identified" candidate.

Background

Unity08, a nonprofit corporation organized under the laws of the District of Columbia, described itself as a "political movement" formed for the purpose of nominating and electing a "Unity Ticket" in the 2008 Presidential election. Unity08 intended to solicit funds via the Internet in order to qualify for a position on the ballot in approximately 37 states and planned to hold an "Internet online nominating convention" to select its candidates for President and Vice President. Unity08 submitted an advisory opinion (AO) request asking whether it would be considered a "political committee" before the conclusion of its online convention in the summer of 2008. In AO 2006-20 (See November 2006 *Record*, page 4), the Commission concluded that Unity08 would be a political committee once it spent more

than $1,000 for ballot access, since spending money for ballot access is considered an expenditure under the Federal Election Campaign Act (the Act), Commission regulations and prior advisory opinions. See 11 CFR 100.111(a). Additionally, the Commission determined that Unity08's "major purpose" was the nomination or election of federal candidates, and therefore the FEC was not prevented by the First Amendment from finding that Unity08's activities qualified it as a political committee. Unity08 filed suit seeking to enjoin the FEC from enforcing AO 2006-20 against it and seeking a declaratory judgment that the advisory opinion violated its First Amendment rights. The FEC filed for summary judgment, arguing that Unity08 lacked standing to bring the action and that, even if Unity08 had standing, the FEC's decision was neither arbitrary nor capricious, nor did the decision infringe on the Plaintiff's First Amendment rights.

District Court Decision

On October 16, 2008, the district court held that, since Unity08 sought to obtain ballot access merely as a placeholder for its candidates, it was reasonable for the Commission to conclude that any monies Unity08 spent to qualify for the ballot would be considered expenditures under the Act. The court held that Unity08's ballot access was certain to benefit its candidates, who would be identified by party affiliation and office sought, and who would have declared their intentions to run for federal office when this benefit was conferred upon them. Large, unregulated disbursements made to obtain such access would therefore present the possibility of actual or apparent corruption that the Act was intended to limit. The court also concluded that the FEC's determination that Unity08 would qualify as a political committee did not violate the First Amendment because Unity08's major purpose was to nominate and support candidates for federal office. U.S. District Court for the District of Columbia, 1:07-cv-00053-RWR.

Appellate Court Decision

The appeals court reversed the district court's decision and ruled in favor of the Plaintiff.

The appeals court rejected the Commission's argument that the case was moot once Unity08 ceased activity. The court noted that Unity08 claims it will continue operations if it wins this appeal. The court also rejected the Commission's argument that the Administrative Procedure Act does not authorize review of advisory opinions because the opinion is not "final agency action." The court, quoting *Chicago & Southern Air Lines v. Waterman Steamship Corp*, 333 U.S. 103, 113 (1948), noted that administrative orders are final when "they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." In this case, the court found that the advisory opinion procedure is complete and deprives the Plaintiff of a legal right—2 U.S.C. § 437f(c)'s reliance defense, which the Plaintiff would enjoy if it had obtained a favorable resolution in the advisory process. Additionally, the court rejected the Commission's argument that the text and structure of the Act indicated Congressional intent to preclude judicial review of Commission advisory opinions. The court stated it was "improbable that Congress's imposition of some procedural rules for investigations should, with little else, be read as an intention to implicitly preclude judicial review, particularly in contexts implicating First Amendment values." Slip op. at 10.

Additionally, the court agreed with the Plaintiff's argument that Unity08 is not subject to regulation as a political committee unless and until it selects a "clearly identified" candidate. The court applied its ruling in *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), which found that draft groups were outside of the scope of the Act. In *Machinists*, the court used the "major purpose" test in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), to determine that draft groups "whose activities are not under the control of a 'candidate' or directly related to promoting or defeating a clearly identified 'candidate'" enjoyed protection from regulation under the Act. 655 F.2d at 393. Similar to *Machinists,* Unity08 did not fulfill the "major purpose" test from *Buckley*. The court also found the risk of corruption from Unity08's activities no greater than the risk presented by the draft groups in *Machinists*.

Finally, the court rejected the Commission's argument that accepting Unity08's reading of *Machinists* would exempt political parties from regulation as political committees each election cycle until they actually nominated their candidates. According to the court, Unity08's request for an AO "presented only the question of whether a group that has never supported a clearly identified candidate—and so far as appears will not support any candidate after the end of its 'draft' process—comes within the holding of *Machinists*." The court found that Unity08 stands in contrast to political parties that have previously supported "clearly identified" candidates and almost invariably intend to support their nominees.

The text of the court's opinion is available at http://www.fec.gov/law/litigation/u08_ac_opinion.pdf

U.S. Court of Appeals for the District of Columbia Circuit (No. 08-5526).

—Stephanie Caccomo

Commission

Commission Statement on Davis v. FEC

On June 26, 2008, the Supreme Court issued its decision in *Davis v. FEC*, 554 U.S. __, No. 07-320, and found Sections 319(a) and 319(b) of the Bipartisan Campaign Reform Act of 2002[1]—the so-called "Millionaires' Amendment" (the "Amendment")—unconstitutional because they violate the First Amendment to the U.S. Constitution.[2] The Court's analysis in *Davis* precludes enforcement of the House provision and effectively precludes enforcement of the Senate provision as well.

This public statement outlines the general principles the Commission will apply to conform to the Court's decision.

- The Commission will no longer enforce the Amendment and will initiate a rulemaking shortly to conform its rules to the Court's decision.
- As of June 26, 2008, any FEC disclosure requirements related solely to the Amendment need not be followed. There is no longer a need to file the Declaration of Intent portion of the Statement of Candidacy (Lines 9A and 9B of Form 2), FEC Form 10, Form 11, Form 12, or Form 3Z-1.
- All other filing obligations unrelated to the Amendment remain the same. For example, contributions a candidate makes to his or her own campaign must still be reported.
- As of June 26, 2008, opponents of self-financed candidates who triggered the Amendment may not accept increased contributions.
- As of June 26, 2008, political parties may no longer make increased coordinated expenditures on behalf of opponents of self-financed candidates whose personal expenditures would have triggered the Amendment.

Regarding pending FEC matters that have not reached a final resolution, the Commission intends to proceed as follows:

- The Commission is reviewing all pending matters involving the Amendment and will no longer pursue claims solely involving violations of the Amendment. Moreover, the Commission will no longer pursue information requests or audit issues solely concerning potential compliance with the Amendment. However, not all activity related to the Amendment was affected by the *Davis* decision. If, for example, someone accepted a contribution *above* the amount allowed under the Amendment's increased limits, or accepted increased contributions without being eligible, the Commission will consider such matters as part of its normal enforcement process.
- The Commission will not require that candidates who received increased contributions in accordance with the Amendment before June 26, 2008, return those funds so long as the funds are properly expended in connection with the election for which they were raised. Similarly, the Commission will not request that political parties, if any, that made increased coordinated expenditures before June 26 consistent with the Amendment take any remedial action. Additionally, the Commission will not pursue individual contributors who made increased contributions, that were in accordance with the Amendment, before June 26, 2008.

Campaigns or party organizations with specific questions regarding their reporting obligations may contact the Reports Analysis Division at (800) 424-9530.

Commission Statement on Citizens United v. FEC

On February 5, 2010, the Commission announced that, due to the Supreme Court's decision in *Citizens United v. FEC*, it will no longer enforce statutory and regulatory provisions prohibiting corporations and labor unions from making either independent expenditures or electioneering communications. The Commission also announced several actions it is taking to fully implement the *Citizens United* decision.

In *Citizens United v. FEC*, issued on January 21, 2010, the Supreme Court held that the prohibitions in the Federal Election Campaign Act (the Act) against corporate spending on independent expenditures or electioneering communications are unconstitutional. The Supreme Court upheld statutory provisions that require political ads to contain disclaimers and be reported to the Commission. Provisions addressed by the decision are described below:

- The Court struck down 2 U.S.C. §441b, which prohibits, in part, corporations and labor organizations from making electioneering communications and from making independent expenditures—communications to the general public that expressly advocate the election or defeat of clearly identified federal candidates;
- The Court upheld 2 U.S.C. §441d, which requires that political advertising consisting of independent expenditures or electioneering communications contain a disclaimer clearly stating who paid for such communication; and

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[1] *2 U.S.C. § 441a-1.*

[2] *Under the "Millionaires' Amendment," when a candidate's personal expenditures exceeded certain thresholds, that candidate's opponent(s) became eligible to receive contributions from individuals at an increased limit and to benefit from enhanced coordinated party expenditures.*

- The Court upheld 2 U.S.C. §434, which requires certain information about electioneering communications and independent expenditures, and the contributions received for such spending, to be disclosed to the Commission and to be made public.

The Commission is taking the following steps to conform to the Supreme Court's decision:

- The Commission will no longer enforce the statutory provisions or its regulations prohibiting corporations and labor organizations from making independent expenditures and electioneering communications;
- The Commission is reviewing all pending enforcement matters to determine which matters may be affected by the *Citizens United* decision and will no longer pursue claims involving violations of the invalidated provisions. In addition, the Commission will no longer pursue information requests or audit issues with respect to the invalidated provisions; and
- The Commission is considering the effect of the *Citizens United* decision on its ongoing litigation.

The Commission intends to initiate a rulemaking to implement the *Citizens United* opinion. It is reviewing the regulations affected by the invalidated provisions, including but not necessarily limited to the following:

- 11 CFR 114.2(b)(2) and (3), which implement the Act's prohibition on corporate and labor organization independent expenditures and electioneering communications;
- 11 CFR 114.4, which restricts the types of communications corporations and labor organizations may make to those not within their restricted class;
- 11 CFR 114.10, which permits certain qualified nonprofit corporations to use their treasury funds to make independent expenditures and electioneering communications under certain conditions;
- 11 CFR 114.14, which places restrictions on the use of corporate and labor union funds for electioneering communications; and
- 11 CFR 114.15, which the Commission adopted to implement the Supreme Court's decision in *Wisconsin Right to Life, Inc. v. FEC*.

The Commission is also considering the effect of *Citizens United* on the ongoing Coordinated Communications rulemaking. 74 FR 53893 (Oct. 21, 2009). The Commission also issued a Supplemental Notice of Proposed Rulemaking (SNPRM) regarding issues presented by *Citizens United*. See page 7 for more information. The additional comment period closed on February 24, 2010. The Commission intends to hold a hearing on the Coordinated Communications rulemaking on March 2 and 3, 2010. The text of the SNPRM is available at http://www.fec.gov/pdf/nprm/coord_commun/2009/notice2010-01.pdf.

Revisions to Commission reporting requirements, forms, instructions and electronic software may be required.

Corporations and labor organizations that intend to finance independent expenditures or electioneering communications should:

- Include disclaimers on their communications, consistent with FEC regulations at 11 CFR 110.11;
- Disclose independent expenditures on FEC Form 5, consistent with FEC regulations at 11 CFR 109.10; and
- Disclose electioneering communications on FEC Form 9, consistent with FEC regulations at 11 CFR 104.20.

The Commission notes that the prohibitions on corporations or labor organizations making contributions contained in 2 U.S.C. §441b remain in effect.

The full text of the Commission's statement is available at http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml.

Regulations

Final Rules on Repeal of Millionaires' Amendment

On December 18, 2008, the Commission approved final rules that remove regulations on increased contribution limits and coordinated party expenditure limits for Senate and House of Representative candidates facing self-financed opponents. The rules implemented provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) known as the "Millionaires' Amendment." In *Davis v. Federal Election Commission (Davis)*, the Supreme Court held that the Millionaires' Amendment provisions relating to House of Representatives elections were unconstitutional. The Commission retained and revised certain other rules that were not affected by the *Davis* decision. The final rules were published in the December 30, 2008, *Federal Register* and took effect February 1, 2009.

Background

On June 26, 2008, the Supreme Court ruled in *Davis* that the Millionaires' Amendment provisions of BCRA relating to House of Representatives elections unconstitutionally burden the First Amendment rights of self-financed candidates. Under those provisions, Senate and House candidates facing opponents who spent personal funds above certain threshold amounts were eligible for increased contribution and coordinated party expenditure limits.

On July 25, 2008, the Commission issued a public statement announcing that the *Davis* decision precluded the enforcement of the House provisions and effectively precluded the enforcement of the

Senate provisions. The statement noted that, as of June 26, 2008, the increased contribution limits and reporting requirements of the Millionaires' Amendment were no longer in effect, and political party committees were no longer permitted to make increased coordinated party expenditures under these provisions. See August 2008 *Record*, page 3. The Commission published a Notice of Proposed Rulemaking (NPRM) on October 20, 2008, seeking comment from the public on proposed rules implementing the *Davis* decision.

Removal of 11 CFR Part 400 — Increased Limits for Candidates Opposing Self-Financed Candidates

Part 400 of FEC regulations implemented the statutory provisions of the Millionaires' Amendment. The Supreme Court's decision in *Davis* invalidated the entire BCRA section 319 relating to House elections, including the increased limits in 319(a) and its companion disclosure requirements in 319(b). While the *Davis* decision struck down only the BCRA sections 319(a) and (b) governing House elections, the Commission concluded that the Supreme Court's analysis in *Davis* also precludes enforcement of the parallel provisions applicable to Senate elections. Therefore, the Commission decided to delete the regulations found at 11 CFR Part 400 in their entirety.

Amendments to Other Provisions

The deletion of the rules at 11 CFR Part 400 affects several other Commission regulations, as noted below.

Definition of File, Filed or Filing. Section 100.19 specifies when a document is considered timely filed. The Commission deleted paragraph (g), which had described the candidate's notification of expenditures of personal funds under 400.21 and 400.22.

Definition of Personal Funds. The Commission revised the definition of "personal funds" in 11 CFR 100.33 by deleting the cross-reference to section 400.2, which the Commission removed. The Commission retained the remaining language of section 100.33.

Candidate Designations. The Commission deleted the sentence in paragraph (a) of 11 CFR 101.1 that required Senate and House of Representatives candidates to state, on their Statements of Candidacy on FEC Form 2 (or, if the candidates are not required to file electronically, on their letters containing the same information), the amount by which the candidates intended to exceed the threshold amount as defined in 11 CFR 400.9. The *Davis* decision invalidated the statutory foundation for this requirement.

Statement of Organization. Section 102.2(a)(1)(viii) requires principal campaign committees of House and Senate candidates to provide an e-mail address and fax number on their Statement of Organization (FEC Form 1). This regulation was promulgated to aid with the expedited notifications required by the Millionaires' Amendment under Part 400. The Commission retained the requirement that these committees provide e-mail addresses because it facilitates the exchange of information between the Commission and committees for other purposes under the Act. However, the Commission deleted the requirement that committees provide their facsimile numbers because it does not routinely communicate with committees via facsimile machine.

Calculation of "Gross Receipts Advantage." Section 104.19 had required principal campaign committees of House and Senate candidates to report information necessary to calculate their "gross receipts advantage." This calculation was then used to determine the "opposition personal funds amount" under 400.10. With the Commission's deletion of Part 400, the reporting under section 104.19 is no longer required. Therefore, the Commission removed section 104.19.

Biennial Limit. The Commission deleted paragraph (b)(2) of section 110.5 because the statutory foundation for this provision was invalidated by the Supreme Court's decision in *Davis.* Paragraph (b)(2) stated the circumstances under which the biennial limits on contributions by individuals did not apply to contributions made under 11 CFR Part 400.

Retention of Certain Other Regulations

Repayment of candidates' personal loans. The BCRA added a new provision limiting to $250,000 the amount of contributions collected after the date of the election that can be used to repay loans made by the candidate to the campaign. When promulgating regulations to enforce this statutory provision, the Commission added new sections 116.11 and 116.12 to the regulations rather than including them in Part 400 with the other Millionaires' Amendment provisions. Unlike other aspects of the Millionaires' Amendment, this statutory provision applies equally to all federal candidates, including Presidential candidates. The personal loan repayment provision was not challenged in *Davis*, nor did the Supreme Court's decision address the validity of this provision. Therefore, the Commission retained sections 116.11 and 116.12.

Net debts outstanding calculation. Section 110.1(b)(1)(i) states that candidates and their committees cannot accept contributions after the election unless the candidate still has net debts outstanding from that election and only up to the amount of that net debts calculation. This rule was in place before BCRA added the loan repayment restriction. However, to conform with the fundraising constraints put in place with the BCRA by section 116.11, the Commission added language to 110.1(b)(3)(ii)

to exclude the amount of personal loans that exceed $250,000 from the definition of net debts outstanding. For the same reasons stated above, the Commission retained paragraph (b)(3)(ii)(C).

Additional Information

The full text of the rules was published in the December 30, 2008, *Federal Register* and is available on the FEC web site at http://www.fec.gov/law/cfr/ej_compilation/2008/notice_2008-14.pdf.

—Isaac J. Baker

Final Rules on Reporting Contributions Bundled by Lobbyists, Registrants and Their PACs

On December 18, 2008, the Commission approved final rules regarding disclosure of contributions bundled by lobbyists/registrants and their political action committees (PACs). These rules implement Section 204 of the Honest Leadership and Open Government Act of 2007 (HLOGA) by requiring "reporting committees" (authorized committees of federal candidates, Leadership PACs and political party committees) to disclose certain information about any lobbyist/registrant or lobbyist/registrant PAC that forwards, or is credited with raising, two or more bundled contributions aggregating in excess of the reporting threshold within a "covered period" of time. These requirements apply to both in-kind and monetary contributions. The reporting threshold for 2009 is $16,000 and is indexed annually for inflation.

Lobbyist/Registrants and Their PACs

The rules define a lobbyist/registrant as a current registrant (under section 4(a) of the Lobbying Disclosure Act of 1995 (the LDA)) or an individual listed on a current registration or report filed under sections 4(b)(6) or 5(b)(2)(C) of the LDA. 11 CFR 104.22(a)(2). A lobbyist/registrant PAC is any political committee that a lobbyist/registrant "established or controls." 11 CFR 100.5(e)(7) and 104.22(a)(3). For the purposes of these rules, a lobbyist/registrant "established or controls" a political committee if he or she is required to make a disclosure to that effect to the Secretary of the Senate or Clerk of the House of Representatives. 11 CFR 104.22(a)(4)(i). If the political committee is not able to obtain definitive guidance from the Senate or House regarding its status, then it must consult additional criteria in FEC regulations. Under these criteria, a political committee is considered a lobbyist/registrant PAC if:

- It is a separate segregated fund whose connected organization is a current registrant; (11 CFR 104.22(a)(4)(ii)(A)); or
- A lobbyist/registrant had a primary role in the establishment of the committee *or* directs the governance or operations of the committee. (Note that the mere provision of legal compliance services or advice by a lobbyist/registrant would not by itself meet these criteria.) (11 CFR 104.22(a)(4)(ii)(B)(1) and (2)).

Disclosure is triggered based on the activity of persons "reasonably known" by the reporting committee to be lobbyist/registrants or lobbyist/registrant PACs. In order for reporting committees to determine whether a person is reasonably known to be a lobbyist/registrant or lobbyist/registrant PAC, the rules require reporting committees to consult the Senate, House and FEC web sites. 11 CFR 104.22(b)(2)(i). The Senate and House web sites identify registered lobbyists and registrants, while the FEC web site identifies whether a political committee is a lobbyist/registrant PAC. A computer printout or screen capture showing the absence of the person's name on the Senate, House or FEC web sites on the date in question may be used as conclusive evidence demonstrating that the reporting committee consulted the required web sites and did not find the name of the person in question. 11 CFR 104.22(b)(2)(ii). Nevertheless, the reporting committee is required to report bundled contributions if it has actual knowledge that the person in question is a lobbyist/registrant or lobbyist/registrant PAC even if the committee consulted the Senate, House and FEC web sites and did not find the name of the person in question. 11 CFR 104.22(b)(2)(iii).

Covered Periods

An authorized committee, Leadership PAC[1] or party committee (collectively "reporting committees") must file new FEC Form 3L when it receives two or more bundled contributions aggregating in excess of $16,000 from a lobbyist/registrant or lobbyist/registrant PAC during a specified time period. That time period, called a "covered period," is defined in HLOGA as January 1 through June 30, July 1 through December 31 and any reporting period applicable under the Federal Election Campaign Act (the Act). 2 U.S.C. §434(i)(2); 11 CFR 104.22(a)(5). As a result, covered periods will typically coincide with a committee's regular FEC reporting periods, except that bundling reports filed in July and January will also cover the preceding six months. One exception, noted below, permits monthly filers to file Form 3L on a quarterly basis, if they choose.

Semi-annual Covered Period. All reporting committees with bundled

[1] *A Leadership PAC is defined as a political committee that is directly or indirectly established, financed, maintained or controlled by a candidate or individual holding federal office but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual, except that Leadership PAC does not include a political committee of a political party. 11 CFR 100.5(e)(6).*

contributions to disclose must file a report covering the semi-annual periods of January 1 through June 30 and July 1 through December 31. 11 CFR 104.22(a)(5)(i). Totals for the first six months of the year will appear on quarterly filers' July 15 report and on monthly filers' July 20 report.[2] All reporting committees will disclose totals for the second half of the year on their January 31 Year-End Report.

Quarterly Covered Period. The covered period for reporting committees that file campaign finance reports on a quarterly schedule in an election year includes the semi-annual periods above and also the calendar quarters beginning on January 1, April 1, July 1 and October 1, as well as the pre- and post-election reporting periods (including runoff or special elections), if applicable. 11 CFR 104.22(a)(5)(ii) and (v). Authorized committees of House and Senate candidates have the same quarterly covered period for a non-election year as in an election year. However, Leadership PACs or party committees that file quarterly in an election year file campaign finance reports semi-annually in a non-election year. Therefore, in a non-election year, these reporting committees must file lobbyist bundling disclosure only for the semi-annual covered periods, and the pre- and post-special election reporting periods, if applicable. Some authorized committees of Presidential candidates may also file quarterly reports.

Monthly Covered Period. For reporting committees that file campaign reports on a monthly basis, the covered period includes the semi-annual periods above and each month in the calendar year, except that in election years they file for the pre- and post-general election reporting periods in lieu of the November and December reports. 11 CFR 104.22(a)(5)(iii). As noted above, reporting committees that file campaign finance reports monthly may elect to file their lobbyist bundling disclosure on a quarterly basis. 11 CFR 104.22(a)(5)(iv). Reporting committees wishing to change their lobbyist bundling disclosure from monthly to quarterly must first notify the Commission in writing. Electronic filers must file this request electronically. A reporting committee may change its filing frequency only once in a calendar year. 11 CFR 104.22(a)(5)(iv).

Bundled Contributions

The disclosure requirements apply to two distinct types of bundled contributions: those that are forwarded to the reporting committee by a lobbyist/registrant or lobbyist/registrant PAC and those that are received directly from the contributor and are credited by the reporting committee to a lobbyist/registrant or lobbyist/registrant PAC.

A forwarded contribution is one that is delivered, either physically or electronically, to the reporting committee by the lobbyist/registrant or lobbyist/registrant PAC, or by any person that the reporting committee knows to be forwarding a contribution on behalf of a lobbyist/registrant or lobbyist/registrant PAC. These contributions count toward the bundling disclosure threshold regardless of whether the committee awards any credit to the lobbyist/registrant or lobbyist/registrant PAC.[3] 11 CFR 104.22(a)(6)(i).

Bundled contributions also include those received from the original contributor when the contributions are credited by the reporting committee to a lobbyist/registrant or lobbyist/registrant PAC through records, designations or other means of recognizing that a certain amount of money has been raised by that lobbyist/registrant or lobbyist/registrant PAC. 11 CFR 104.22(a)(6)(ii). The final rules outline ways that a reporting committee may be considered to "credit" a lobbyist/registrant or lobbyist/registrant PAC for raising contributions.

For example, a reporting committee may credit lobbyist/registrants or lobbyist/registrant PACs through records (written evidence, including writings, charts, computer files, tables, spreadsheets, databases or other data or data compilations stored in any medium from which information can be obtained). 11 CFR 104.22(a)(6)(ii)(A).

Designations or other means of recognizing that a lobbyist/registrant or lobbyist/registrant PAC has raised a certain amount of money include, but are not limited to:

- Titles given to persons based on their fundraising;
- Tracking identifiers assigned by the reporting committee and included on contributions or contribution-related material that may be used to maintain information about a person's fundraising;
- Access, for example through invitations to events, given to lobbyist/registrants or lobbyist/registrant PACs as a result of their fundraising levels; or
- Mementos given to persons who have raised a certain amount of contributions. 11 CFR 104.22(a)(6)(ii)(A)(1)-(4).

Note, however, that the rules exclude from the definition of "bundled contribution" any contribution made from the personal funds of the lobbyist/registrant or his or her spouse, or from the funds of the

[2] *In a non-election year, committees that file only semi-annually will file Form 3L on July 31 and January 31.*

[3] *These rules do not affect the existing recordkeeping and reporting provisions that require each person who receives and forwards contributions to a political committee to forward certain information identifying the original contributor and, for contributions received and forwarded to an authorized committee, the reporting and recordkeeping requirements by persons known as "conduits" or "intermediaries." See 11 CFR 102.8 and 110.6.*

lobbyist/registrant PAC. 11 CFR 104.22(a)(6)(iii).

Disclosure Requirements

As noted above, the Commission has created new FEC Form 3L, Report of Contributions Bundled by Lobbyists/Registrants and Lobbyist/Registrant PACs, to accommodate the new disclosure requirements. Reporting committees must use the form to disclose:

- Name of each lobbyist/registrant or lobbyist/registrant PAC;
- Address of each lobbyist/registrant or lobbyist/registrant PAC;
- Employer of each lobbyist (if an individual); and
- The aggregate amount of bundled contributions forwarded by or received and credited to each.

Electronic filers are required to file Form 3L electronically. A new release of FECFile will be available from the FEC.

Reporting committees must maintain records of any bundled contributions that aggregate in excess of the reporting threshold and are reported on Form 3L. Reporting committees must keep sufficient documentation of the information contained in the reports to check their accuracy and completeness and must keep those records for three years after filing FEC Form 3L. 11 CFR 104.22(f).

The Commission has additionally revised FEC Form 1, Statement of Organization, to allow political committees to identify themselves as Leadership PACs or lobbyist/registrant PACs. As of March 29, 2009, political committees that meet the definition of "lobbyist/registrant PAC" or Leadership PAC must identify themselves as such when filing FEC Form 1 with the Commission. Political committees that meet the definition of "lobbyist/registrant PAC" or Leadership PAC that have already filed FEC Form 1 must amend their FEC Form 1 no later than March 29, 2009, to identify themselves as such.

Additional Information

The new rules will take effect on March 19, 2009, and recordkeeping requirements begin on this date. Reporting committees must also begin tracking their bundled contributions as of this date. Compliance with the reporting requirements for reporting committees is required after May 17, 2009. Reports filed in accordance with these rules need not include contributions bundled by lobbyist/registrants if the contributions are received before March 19. Contributions bundled by lobbyist/registrant PACs need not be reported if they are received by April 18.

The final rules and their Explanation and Justification were published in the *Federal Register* on February 17, 2009, and are available on the FEC web site at http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-03.pdf.

—Elizabeth Kurland

Final Rules on Participation by Federal Candidates and Officeholders at Nonfederal Fundraising Events

On April 29, 2010, the Commission approved final rules addressing participation by federal candidates and officeholders at nonfederal fundraising events. These rules were promulgated in response to the decision in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (*Shays III*), which invalidated the portion of the old regulations that permitted federal candidates and officeholders to speak at state, district or local party committee fundraising events "without restriction or regulation." 11 CFR 300.64(b).

Scope

The final rule covers participation by federal candidates and officeholders at nonfederal fundraising events, which are those fundraising events that are in connection with an election for federal office or any nonfederal election where funds outside the amount limitations and source prohibitions of the Federal Election Campaign Act (the Act) are solicited. The rule addresses participation at the fundraising event and in publicizing the event. It does not cover fundraising events at which only funds within the limitations and prohibitions of the Act are solicited or those in which funds outside the limitations and prohibitions of the Act are not solicited but are, nevertheless, received. 11 CFR 300.64(a).

Participation at Nonfederal Fundraising Events

A federal candidate or officeholder may attend, speak at and be a featured guest at a nonfederal fundraiser. 11 CFR 300.64(b)(1). He or she is also free to solicit funds at the fundraising event, provided that the solicitation is for funds that are within the limitations and prohibitions of the Act and are consistent with state law.

When the federal candidate or officeholder makes such a solicitation, he or she may limit the solicitation by displaying at the fundraiser a clear and conspicuous written notice, or by making a clear and conspicuous oral statement, that the solicitation is not for Levin funds (when applicable) and does not seek funds in excess of federally permissible amounts or from corporations, labor organizations, national banks, federal government contractors and foreign nationals. 11 CFR 300.62(b)(2). If the federal candidate or officeholder chooses to make an oral statement, it need only be made once.

Publicity for Nonfederal Fundraising Events

New 11 CFR 300.64(c) addresses the publicity for nonfederal fundraisers including, but not limited to, ads, announcements or pre-event invitation materials, regardless of format or medium of the communication.

If the publicity does not contain a solicitation or solicits only federally permissible funds, then the federal candidate or officeholder (or agent

of either) is free to consent to the use of his or her name or likeness in the publicity for the nonfederal fundraiser. 11 CFR 300.64(c)(1)-(2).

If the publicity contains a solicitation for funds outside the limitations or prohibitions of the Act or Levin funds, the federal candidate or officeholder (or agent of either) may consent to the use of his or her name or likeness in the publicity, only if:

- The federal candidate or officeholder is identified in any other manner not specifically related to fundraising, such as a featured guest, honored guest, special guest, featured speaker or honored speaker; and
- The publicity includes a clear and conspicuous oral or written disclaimer that the solicitation is not being made by the federal candidate or officeholder. 11 CFR 300.64(c)(3)(i). Examples of disclaimers are provided in the regulation at 11 CFR 300.64(c)(iv).

However, a federal candidate or officeholder (or agent of either) may not agree to the consent of his or her name or likeness in publicity that contains a solicitation of funds outside the limitations and prohibitions of the Act or of Levin funds if:

- The federal candidate or officeholder is identified as serving in a manner specifically related to fundraising, such as honorary chairperson or member of a host committee; or is identified in the publicity as extending the invitation to the event; or
- The federal candidate or officeholder signs the communication.

These restrictions apply even if the publicity contains a disclaimer. 11 CFR 300.64(c)(v).

In addition, the federal candidate or officeholder is prohibited from disseminating publicity for nonfederal fundraisers that contains a solicitation of funds outside the limitations or prohibitions of the Act or of Levin funds.11 CFR 300.64(c)(iv).

Additional Information

The final rules and Explanation and Justification were published in the May 5, 2010, *Federal Register* (75 FR 24375). They are available on the Commission's website at http://www.fec.gov/law/cfr/ej_compilation/2010/notice_2010-11.pdf. The rules are effective June 4, 2010.

—Katherine Wurzbach

Final Rules on Campaign Travel

On November 19, 2009, the Commission approved final rules implementing provisions of the Honest Leadership and Open Government Act of 2007 (HLOGA) relating to travel on non-commercial aircraft in connection with federal elections.

General Rule

HLOGA amended the Federal Election Campaign Act (the Act) to prohibit candidates for the U.S. House of Representatives, their authorized committees and their leadership PACs[1] from making any expenditure for non-commercial air travel, with an exception for travel on government aircraft and on aircraft owned or leased by a candidate or an immediate family member of the candidate. 2 U.S.C. §439a(c)(2) and (3). HLOGA also specified new reimbursement rates that Senate, Presidential and Vice-Presidential candidates and their authorized committees must pay when making expenditures for flights aboard non-commercial aircraft. HLOGA did not alter rules for travel on commercial flights. All candidates must still pay the "usual and normal charge" for all campaign travelers aboard such flights to avoid receiving an in-kind contribution. 11 CFR 100.52(a) and (d).

For purposes of HLOGA, the term "campaign traveler" refers to individuals traveling in connection with an election for federal office on behalf of a candidate or political committee, and candidates who travel on behalf of their own campaigns. The term campaign traveler also includes any member of the news media traveling with a candidate. Candidates are only considered campaign travelers when they are traveling in connection with an election for federal office. This term does not include Members of Congress when they engage in official travel or candidates when they engage in personal travel or any other travel that is not in connection with an election for federal office. 11 CFR 100.93(a)(3)(i).

Presidential, Vice-Presidential and Senate Candidate Travel

New 11 CFR 100.93(c)(1) requires candidates for President, Vice-President and the U.S. Senate to pay the pro rata share of the fair market value of non-commercial flights. The pro rata share is determined by dividing the fair market value of the normal and usual charter fare or rental charge for a comparable aircraft of comparable size by the number of campaign travelers flying on behalf of each candidate on the flight.[2]

The pro rata share is calculated based on the number of candidates represented on a flight, regardless of whether the individual candidate is actually present on the flight. A candidate is represented on a flight

[1] HLOGA and Commission regulations define "leadership PAC" as a political committee that is directly or indirectly established, financed, maintained or controlled by a federal candidate or federal officeholder, but which is not a candidate's authorized committee or a political party committee. 2 U.S.C. §434(i)(8)(B) and 11 CFR 100.5(e)(6).

[2] The term "comparable aircraft" means an aircraft of similar make and model as the aircraft that actually makes the trip, with similar amenities as that aircraft. The Commission's new regulations interpret HLOGA to include helicopters when determining "comparable aircraft." 11 CFR 100.93(a)(3)(vi).

if a person is traveling on behalf of that candidate or the candidate's authorized committee. Accordingly, when an individual is traveling on behalf of another political committee (such as a political party committee or a Senate leadership PAC), rather than on behalf of the candidate's own authorized committee, the reimbursement for that travel is the responsibility of the political committee on whose behalf the travel occurs. The reimbursement must be made to the service provider within seven calendar days after the date the flight began to avoid the receipt of an in-kind contribution.

Travel on behalf of Leadership PACs of Senate, Presidential and Vice-Presidential Candidates

For non-commercial travel on behalf of leadership PACs of Senate, Presidential and Vice-Presidential candidates, the new regulations apply the same reimbursement rates as in the prior regulations:

- The lowest unrestricted and non-discounted first-class airfare in the case of travel between cities served by regularly scheduled first-class commercial airline service;
- The lowest unrestricted and non-discounted coach airfare in the case of travel between a city served by regularly scheduled coach commercial airline service, but not regularly scheduled first-class commercial airline service, and a city served by regularly scheduled coach commercial airline service (with or without first-class commercial airline service); or
- The normal and usual charter fare or rental charge for a comparable commercial aircraft of sufficient size to accommodate all campaign travelers and security personnel, if applicable, in the case of travel to or from a city not regularly served by regularly scheduled commercial airline service.

To avoid the receipt of an in-kind contribution, the committee must reimburse the service provider no later than seven calendar days after the date the flight began. 11 CFR 100.93(c)(3).

Travel by or on Behalf of House Candidates and House Leadership PACs

New 11 CFR 100.93(c)(2) generally prohibits House candidates and individuals traveling on behalf of House candidates, their authorized committees or the leadership PACs of House candidates from engaging in non-commercial campaign travel on aircraft. This prohibition cannot be avoided by payments to the service provider, even by payments from the personal funds of a House candidate.

This prohibition does not apply when the travel would be considered an expenditure by someone other than the House candidate, the House candidate's authorized committee or House candidate's leadership PAC (for example, if the House candidate were traveling on behalf of a Senate candidate instead of on behalf of his or her own campaign).

Non-Commercial Air Travel on Behalf of Other Committees

The Commission is retaining its current reimbursement rate structure for campaign travelers who are traveling on behalf of political party committees, separate segregated funds (SSFs), nonconnected committees and certain leadership PACs. Thus, the reimbursement rates (first class, coach or charter, as described above) will apply to campaign travelers who are traveling on behalf of these types of committees on non-commercial flights.

Other Means of Transportation

For non-commercial travel via other means, such as limousines and all other automobiles, trains and buses, a political committee must pay the service provider the normal and usual fare or rental charge for a comparable commercial conveyance of sufficient size to accommodate all campaign travelers, including members of the news media traveling with a candidate and security personnel, if applicable. See 100.93(d). This regulation remains the same as the prior regulation regarding other means of transportation.

Government Conveyances

Candidates and representatives of political committees may make campaign travel via government conveyances, such as government aircraft, subject to specific reimbursement requirements. HLOGA provides an exception to the prohibition on non-commercial air travel by House candidates and their authorized committees and leadership PACs, but does not specify any particular reimbursement rate for travel aboard government aircraft.

The Commission is amending its regulations to require that candidates, their authorized committees or House candidate leadership PACs reimburse the federal, state or local government entity providing the aircraft at either of the two following rates:

- "Per candidate campaign traveler" reimbursement rate, which is the normal and usual charter fare or rental charge for a comparable aircraft of sufficient size to accommodate all of the campaign travelers. The pro rata share is calculated by dividing the normal and usual charter fare or rental charge by the number of campaign travelers on the flight that are traveling on behalf of candidates, authorized committees or House candidate leadership PACs, including members of the news media, and security personnel. No portion of the normal and usual charter fare or rental charge may be attributed to any other passengers, except for members of the news media and government-provided security personnel, as provided in 100.93(b)(3). 11 CFR 100.93(e)(1)(i); or
- "Private traveler reimbursement rate," as specified by the govern-

mental entity providing the aircraft, per campaign traveler. 11 CFR 100.93(e)(1)(ii).

For campaign travelers who are traveling on government aircraft but are not traveling with or on behalf of a candidate or candidate's committee (for example, a person traveling on behalf of a political party committee or an SSF), the Commission is retaining its previous reimbursement rate, which provides that the reimbursement be equal either to the lowest unrestricted and non-discounted first class airfare to or from the city with regularly scheduled first-class commercial airline service that is geographically closest to the military airbase or other location actually used, or, for all other travel, the applicable rate from among the rates specified in 100.93(c)(3). 11 CFR 100.93(e)(2).

Members of the news media who are traveling with a candidate on government aircraft and security personnel not provided by a government entity must be included in the number of campaign travelers for the purposes of identifying a comparable aircraft of sufficient size to accommodate all campaign travelers. A comparable aircraft, however, need not be able to accommodate all government-required personnel or government-required equipment (such as security communication devices, etc.). All security personnel, including government-provided security personnel, are included in determining the number of campaign travelers for purposes of calculating each candidate's pro rata share.

A political committee must reimburse the governmental entity providing the conveyance within the time frame specified by the governmental entity. 11 CFR 100.93(e)(1).

Aircraft Owned or Leased by Candidate or Immediate Family

The Commission is also amending its regulations to conform with HLOGA's exception from the payment and reimbursement requirements for travel aboard aircraft that are "owned or leased" by a candidate or a candidate's immediate family, including an aircraft owned or leased by any entity in which the candidate or a member of the candidate's immediate family "has an ownership interest," provided that 1) the entity is not a public corporation, and 2) the use of the aircraft is not "more than the candidate's or immediate family member's proportionate share of ownership allows."

HLOGA allows expenditures on candidate-owned aircraft, but it still requires a candidate to reimburse the service providers (candidates, members of their immediate family or entities in which either owns an interest) if the candidate seeks to avoid receiving an in-kind contribution from the service provider for the candidate's use of the aircraft. Although federal candidates may make unlimited contributions to their campaigns, such contributions must be reported by their authorized committees. 11 CFR 110.10. Contributions from all other persons, including family members, are subject to the applicable amount limits and source prohibitions. 11 CFR 110.1.

New Commission regulations at 11 CFR 100.93(g) provide for instances where a candidate or immediate family member wholly owns the aircraft and where a candidate or his or her immediate family have a shared-ownership arrangement. In instances where the candidate uses the aircraft within the limits of a shared-ownership arrangement, the candidate's committee must reimburse the candidate, the candidate's immediate family member or the administrator of the aircraft for the applicable rate charged to the candidate, immediate family member or corporation or other entity through which the aircraft is ultimately available to the candidate. This amount is treated as a personal contribution from the candidate if the candidate is the owner or lessee.

House candidates are prohibited from exceeding the candidate's proportional share of ownership interest in the aircraft. 11 CFR 100.93(g). For Senate, Presidential and Vice Presidential candidates, the reimbursement rate would be based upon the pro rata share of the charter rate where the proportional share of the ownership interest is exceeded. See 11 CFR 100.93(c)(1).

In instances where a candidate or a candidate's immediate family member wholly owns the aircraft, the candidate's authorized committee need reimburse only the pro rata share per campaign traveler of the costs associated with the trip. Such costs include, but are not limited to, the cost of fuel and crew and a proportionate share of annual and recurring maintenance costs. 100.93(g)(1)(iii).

The new regulations do not require a specific time frame for repayment, except that such repayment must be made by the candidate's committee in accordance with the normal business practices of the entity administering the shared-ownership or lease agreements.

Recordkeeping Requirements

Political committees are required to maintain appropriate records for non-commercial travel. Commission regulations also require candidate committees to obtain and keep copies of any shared-ownership or lease agreements, as well as the pre-flight certifications of compliance with those agreements.

Additional Information

The final rules and Explanation and Justification were published in the December 7, 2009, issue of the *Federal Register* (74 FR 63951). They are available on the Commission's website at http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-27.pdf. The rules took effect on January 6, 2010.

—Myles Martin

FEC Web Site Offers Podcasts

In an effort to provide more information to the regulated community and the public, the Commission is making its open meetings and public hearings available as audio recordings through the FEC web site, as well as by podcasts. The audio files, and directions on how to subscribe to the podcasts are available under *Audio Recordings* through the *Commission Meetings* tab at http://www.fec.gov. To listen to the open meeting without subscribing to the podcasts, click the icon next to each agenda item. Although the service is free, anyone interested in listening to podcasts must download the appropriate software listed on the web site.

Final Rules at Coordinated Communications

On August 26, 2010, the Commission approved final rules and Explanation and Justification regarding coordinated communications. These rules comply with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III Appeal*"). See the July 2008 *Record*. The new rules take effect December 1, 2010.

The new rules add to the existing definition of coordinated communications a content standard for communications that are the "functional equivalent of express advocacy." The new rules also create a safe harbor for certain business and commercial communications and provide further explanation and justification for two "conduct standards" in the existing regulations.

Background

Commission regulations implementing the Bipartisan Campaign Reform Act of 2002 (BCRA) established a three-prong test for determining whether a communication is coordinated with a candidate, a candidate's authorized committee, a political party committee or the agents of any of these. Coordinated communications generally result in an in-kind contribution. The test includes a payment prong, a content prong and a conduct prong. The content and conduct prong each include several standards, and satisfying any one of the standards within a prong satisfies that prong of the test. 11 CFR 109.21(a)(1)-(3).

Various aspects of the coordinated communications test were challenged in court. The new regulations respond to the decision by the U.S. Court of Appeals for the District of Columbia Circuit in *Shays III Appeal*. In that decision, the court held that the Commission's decision to have an "express advocacy" standard as the only content standard that applies outside of 90-day and 120-day windows before an election runs counter to the purpose of BCRA and the Administative Procedure Act. The court noted that the FEC "must demonstrate that the standard it selects 'rationally separates election-related advocacy from other activity falling outside [the Act's] expenditure definition.'" In addition, the court invalidated the 120-day period used in the existing conduct prong to determine whether a common vendor or former campaign employee's relationship with a candidate committee or party committee would satisfy the prong. 11 CFR 109.21(d)(4) and (d)(5). The court found that the Commission failed to justify its decision to apply a 120-day window.

New Content Standard

Functional Equivalent of Express Advocacy. The Commission is revising the content prong by adding a new standard to cover public communications that are the "functional equivalent of express advocacy." See new 11 CFR 109.21(c)(5). A communication is the functional equivalent of express advocacy if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." This new standard applies without regard to the timing of the communication or the targeted audience.

In its application of the functional equivalent of express advocacy test, the Commission will be guided by the Supreme Court's reasoning and application of the test to the communications at issue in *Wisconsin Right to Life v. FEC* (*WRTL*) 551 U.S. 449 (2007) and *Citizens United v. FEC*, 130 S. Ct. 876 (U.S. Jan 21, 2010).

The new content standard is an objective, well-established standard. The functional equivalent of express advocacy test has been developed by the Supreme Court to apply to a wide range of speakers as a standalone test for separating election-related speech that is not express advocacy from non-election related speech. The new content standard applies to all speakers subject to the coordinated communications rules at 11 CFR 109.21, including individuals and advocacy organizations, without regard to when a communication is made or its intended audience. As required by *Shays III Appeal*, the new content standard also captures more communications than the express advocacy content standard outside of the 90-day and 120-day time windows.

Conduct Standards

The "common vendor" and "former employee/independent contractor" standards of the conduct prong were challenged in *Shays III Appeal*.

Current Commission regulations provide that the "common vendor" standard of the conduct prong is satisfied if the person paying for the communication had contracted or employed a commercial vendor who provided certain specified services to the candidate clearly identified in the communication, the candidate's authorized committee, the candidate's

opponent, the opponent's authorized committee or a political party committee during the previous 120 days. Also, the commercial vendor must use or convey to the person paying for the communication information about the plans, projects, activities or needs of the candidate, the candidate's opponent or political party committee, and that information must be material to the creation, production or distribution of the communication. 109.21(d)(4).

The former employee/independent contractor conduct standard is satisfied if the communication is paid for by a person or by the employer of a person who was an employee or independent contractor of the candidate clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee or a political party committee during the previous 120 days. Additionally, the former employee or independent contractor must use, or convey to the person paying for the communication, information about the plans, projects, activities or needs of the candidate or political party committee that is material to the creation, production or distribution of the communication. 109.21(d)(5).

The Commission is not revising the common vendor or former employee conduct standards at this time. In order to comply with the *Shays III Appeal* decision, the Commission has decided to provide a more detailed explanation and justification for the 120-day period.

Based on the record, 120 days has been shown to be a sufficient time period to prevent circumvention of the Act. Many commenters, in written and oral testimony, agreed that campaign information must be both current and proprietary (i.e. nonpublic) to be subject to the coordinated communications regulation. The information in the rulemaking record shows the widespread public availability of certain types of campaign information that used to remain confidential for much longer in years past. The record also demonstrates that changes in technology have significantly reduced the duration of the news cycle, further decreasing the time that campaign information remains relevant.

There is no information in the rulemaking record showing that use or conveyance by common vendors and former employees of information material to public communications outside of the 120-day period has become problematic in the time the 120-day period has been in effect. The Commission concludes that it is extremely unlikely that a common vendor or former employee may possess information that remains material when it is more than four months old.

Safe Harbor for Certain Business and Commercial Communications

The Commission is also adopting a safe harbor to address certain commercial and business communications. The new safe harbor excludes from the definition of a coordinated communication any public communication in which a federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy, so long as the public communication does not promote, attack, support or oppose (PASO) that candidate or another candidate who seeks the same office, and so long as the communication is consistent with other public communications made by the business prior to the candidacy in terms of the medium, timing, content and geographic distribution. New 11 CFR 109.21(i). The new safe harbor is meant to exclude communications that have *bona fide* business and commercial purposes from the definition of coordinated communication.

Additional Information

The final rules and Explanation and Justification were published in the *Federal Register* on September 15, 2010. The full text of the *Federal Register* Notice is available at http://www.fec.gov/law/cfr/ej_compilation/2010/notice2010-17.pdf.

—Myles Martin

Final Rules for Definition of Federal Election Activity

On August 26, 2010, the Commission approved final rules revising the regulations at 11 CFR 100.24 regarding federal election activity (FEA). The final rules modify the definitions of "voter registration activity" and "get-out-the-vote-activity" (GOTV activity) and make other changes in response to the decision of the U.S. Court of Appeals for the District of Columbia in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III Appeal*").

Scope

Under the new definitions, voter registration and GOTV activities that urge, encourage or assist potential voters in registering to vote or voting must be paid for with federal funds or with a combination of federal and Levin funds regardless of whether the message is delivered individually or to a group of people via mass communication. However, the Commission created exceptions to the new definitions for:

- Brief, incidental exhortations to register to vote or to vote;
- GOTV and voter identification activities conducted solely in connection with a nonfederal election; and
- Certain *de minimis* activities.

Definition of "Voter Registration Activity"

In compliance with the court of appeals' decision in *Shays III Appeal*, the Commission revised the definition of "voter registration activity" to cover activities that assist,

encourage or urge potential voters to register to vote. The revised definition lists the following activities as voter registration activity:

- Encouraging or urging potential voters to register to vote, whether by mail, e-mail, in person, by telephone or by any other means;
- Preparing and distributing information about registration and voting;
- Distributing voter registration forms or instructions to potential voters;
- Answering questions about or assisting potential voters in completing or filing voter registration forms;
- Submitting or delivering a completed voter registration form on behalf of a potential voter;
- Offering or arranging to transport, or actually transporting, potential voters to a board of elections or county clerk's office for them to fill out voter registration forms; or
- Any other activity that assists potential voters to register to vote.

The Commission provided two examples of voter registration activity falling under the new definition:

- Sending a mass mailing of voter registration forms; and
- Submitting completed voter registration forms to the appropriate state or local office handling voter registration.

The Commission emphasized that the new definition is a comprehensive list of activities designed to cover all means of contacting potential voters to assist, encourage or urge them to register to vote, regardless of the means used to deliver the message. However, consistent with the *Shays III Appeal* decision, the Commission carved out an exception to the new definition for brief, incidental exhortations to register to vote (discussed below).

Definition of "GOTV Activity"

The Commission also revised the definition of "GOTV activity" to comply with the court of appeals' decision in *Shays III Appeal*. The new definition covers activities that assist, encourage or urge potential voters to vote. The revised definition identifies the following activities as GOTV activity:

- Encouraging or urging potential voters to vote;
- Informing potential voters about the hours and location of polling places, or about early voting or voting by absentee ballot;
- Offering or arranging to transport voters to the polls, as well as actually transporting voters to the polls; and
- All activities that assist potential voters in voting.

The Commission provided two examples of GOTV activities falling under the new definition:

- Driving a sound truck through a neighborhood that plays a message urging listeners to "Vote next Tuesday at the Main Street community center"; and
- Making telephone calls (including robocalls) reminding the recipient of the times during which the polls are open on election day.

The Commission emphasized that the new definition is a comprehensive list of activities designed to cover all means of contacting potential voters to assist, encourage or urge them to vote. However, consistent with the *Shays III Appeal* decision, the Commission carved out an exception to the new definition for brief, incidental exhortations to vote (discussed below).

Brief, Incidental Exhortation

The Commission created a new exception to the definitions of voter registration activity and GOTV activity that allows for a brief exhortation to register to vote or to vote, so long as the exhortation is incidental to a communication, activity or event. The exception applies to brief, incidental exhortations regardless of the forum or medium in which they are made. Also, the exception does not inoculate speeches or events that otherwise would meet the definition of voter registration activity or GOTV activity, but is intended to ensure that communications that would not otherwise be voter registration activity or GOTV activity do not become so merely because they include a brief, incidental exhortation to register to vote or to vote.

To qualify for the exception, the exhortation must be both brief and incidental. For example, exhortations to register to vote or to vote that consume several minutes of a speech, or that occupy a large amount of space on a mailer, are not brief and will not qualify for the exception. Also, a message in a mailer that stated only "Register to Vote by October 1st!" or "Vote on Election Day!" with no other text would not be incidental and would not qualify for the exception from the definition of GOTV activity. Additional examples of exhortations that would qualify for the exception are provided in the final rules.

Voter Identification and GOTV Activity Solely in Connection with a Nonfederal Election

In an attempt to better distinguish between voter identification and GOTV activities that are FEA, and those activities that do not affect elections in which a federal candidate appears on the ballot, the Commission created new exceptions to 11 CFR 100.24(c) for activities exclusively in connection with nonfederal elections. Under the new provisions, FEA does not include any amount expended or disbursed by a state, district or local party committee for:

- Voter identification that is conducted solely in connection with a nonfederal election held on a date no federal election is held, and which is not used in a subsequent election in which a federal candidate is on the ballot; 100.24(c)(5); and

- Certain GOTV activity that is conducted solely in connection with a nonfederal election held on a date on which no federal election is held. 100.24(c)(6).

Activities involving De Minimis Costs

Finally, mindful of the administrative complexities that state, district and local party committees and associations of state and local candidates would face in tracking nominal, incidental costs, the Commission carved out an exception for *de minimis* costs associated with certain enumerated activities. The Commission excluded the following activities from the FEA funding restrictions:

- On the website of a party committee or association of state or local candidates, posting a hyperlink to a state or local election board's web page containing information on voting or registering to vote;
- On the website of a party committee or association of state or local candidates, enabling visitors to download a voter registration form or absentee ballot application;
- On the website of a party committee or association of state or local candidates, providing information about voting dates and/or polling locations and hours of operation; and
- Placing voter registration forms or absentee ballot applications obtained from the board of elections at the office of a party committee or association of state or local candidates.

The Commission emphasized that the exception is only for the specific activities listed and that costs associated with activities not on the list, no matter how small the amount or how closely related the activities, do not qualify for the exception. In addition, amounts incurred for the enumerated activities that are not *de minimis* do not qualify for the exception.

Additional Information

The Final Rules were published in the *Federal Register* on September 10, 2010, and take effect on December 1, 2010. The Federal Register Notice is available on the Commission's website at http://www.fec.gov/law/cfr/ej_compilation/2010/notice2010-18.pdf.

—Zainab Smith

Interpretive Rule on Electronic Redesignations of Contributions

On March 16, 2011, the Commission approved a Notice of Interpretive Rule regarding redesignations of candidate committees' contributions from one election to another. Commission regulations require that a contributor's redesignation of a contribution for another election (from a primary to a general election, for example) be in writing and be signed by the contributor. 11 CFR 110.1(b)(5) and 110.2(b)(5). However, the Commission has determined that it will interpret the Federal Election Campaign Act (the Act) and Commission regulations in a manner that is consistent with contemporary technological innovations where such technology will not compromise the intent of the Act and regulations. See, for example, AOs 1999-09 and 1995-09.

During the course of an audit of a candidate's authorized committee, the Commission determined that a specific redesignation practice by the committee provided the same degree of assurance of the contributor's identity and the contributor's intent to redesignate the contribution to another election as a handwritten signature. In that case, the political committee informed contributors through postal mail, with a follow-up e-mail, that they could choose to redesignate their contribution to that candidate's other authorized committee by visiting the committee's website. Contributors were also informed that, if they did not redesignate their contributions, they would automatically receive a refund. Contributors who visited the website were asked to fill out an electronic form affirmatively authorizing the redesignation of the contribution and verifying their identity by entering their personal information. The committee retained a record of each electronic redesignation in a database, including the personal information provided by each contributor making a redesignation, in a manner consistent with the recordkeeping requirements for signed written redesignations under 11 CFR 110.1(l).

The Commission concluded in that particular audit that the process used by the candidate's committee provided assurance of contributor identity and intent to redesignate a contribution equivalent to a written signature. Since the specific method approved by the Commission requires the contributor to provide personal information that can be verified against a committee's records, it provides a level of assurance as to the contributor's identity and intent.

The Commission will consider other methods of electronic redesignation, provided that they offer a sufficient degree of assurance of the contributor's identity and the contributor's intent to redesignate. Such consideration will be provided on a case-by-case basis unless and until the Commission initiates a rulemaking on this issue.

The Commission's Notice of Interpretive Rule was published in the *Federal Register* on March 23, 2011, and was effective upon publication.

—Myles Martin

New Version of FECFile Available Starting April 5

On April 5, a new version of FECFile will be available on the FEC website at http://www.fec.gov/elecfil/updatelist.html. Current FECFile users need only open their software and accept the automatic update to Format Version 7. Reports filed in previous formats will no longer be accepted. Filers may also use commercial or privately developed software as long as the software meets the Commission's format specifications, which are available on the Commission's website. Committees using commercial software should contact their vendors for more information about the Commission's latest software release.

Inflation Adjustments

Contribution Limits for 2011-2012

Under the Federal Election Campaign Act (the Act), certain contribution limits are indexed for inflation every two years, based on the change in the cost of living since 2001, which is the base year for adjusting these limits.[1] The inflation-adjusted limits are:

- The limits on contributions made by persons to candidates and national party committees (2 U.S.C. §441a(a)(1)(A) and (B));
- The biennial aggregate contribution limits for individuals (2 U.S.C. §441a(a)(3)); and
- The limit on contributions made by certain political party committees (2 U.S.C. §441a(h)).

Please see the chart on the next page for the contribution amount limits applicable for 2011-2012. The inflation adjustments to these limits are made only in odd-numbered years. The per-election limits on contributions to candidates are in effect for the two-year election cycle beginning the day after the general election and ending on the date of the next general election (i.e., November 3, 2010 – November 6, 2012). All other contribution limits are in effect for the two-calendar-year period beginning on January 1 of the odd-numbered year and ending on December 31 of the even-numbered year (i.e., January 1, 2011 – December 31, 2012).

Please note, however, that these limits do not apply to contributions raised to retire debts from past elections. Contributions may not exceed the contribution limits in effect on the date of the election for which those debts were incurred. 11 CFR 110.1(b)(3)(iii).

The Act also includes a rounding provision for all of the amounts that are increased by the indexing for inflation.[2] Under this provision, if the inflation-adjusted amount is not a multiple of $100, then the amount is rounded to the nearest $100.

—Elizabeth Kurland

2011 Lobbyist Bundling Threshold

The Federal Election Campaign Act, as amended by the Honest Leadership and Open Government Act of 2007 (HLOGA), requires certain political committees to disclose contributions bundled by lobbyists/registrants and lobbyist/registrant PACs once the contributions exceed a specified threshold amount.

The Commission must adjust the threshold amount at the beginning of each calendar year based on the change in the cost of living since 2006, which is the base year for adjusting this threshold.[1] The resulting amount is rounded to the nearest multiple of $100. 2 U.S.C. §441a (c)(1)(B)(iii). Based on this formula, the lobbyist bundling disclosure threshold for 2011 is $16,200.

—Elizabeth Kurland

1 The applicable cost of living adjustment amount is 1.23152.

1 The applicable cost of living adjustment amount is 1.08163.

[2] This provision also affects the indexing of coordinated party expenditure limits and Presidential expenditure limits in 2 U.S.C. §§441a(b) and 441a(d), as well as the disclosure threshold for lobbyist bundled contributions in 2 U.S.C.

Contribution Limits for 2011-2012

Type of Contribution	Limit
Individuals/Non-multicandidate Committees to Candidates per Election	$2,500
Individuals/Non-multicandidate Committees to National Party Committees per Year	$30,800
Biennial Limit for Individuals	$117,000[1]
National Party Committee to a Senate Candidate	$43,100[2]

[1] This amount is composed of a $46,200 limit for what may be contributed to all candidates and a $70,800 limit for what may be contributed to all PACs and party committees. Of the $70,800 portion that may contributed to PACs and parties, only $46,200 may be contributed to state and local party committees and PACs.

[2] This limit is shared by the national committee and the Senate campaign committee.

Advisory Opinions

AO 2007-33 "Stand-By-Your-Ad" Disclaimer Required for Brief Television Advertisements

A series of 10- and 15-second independent expenditure television ads Club for Growth Political Action Committee (Club for Growth PAC) plans to air in support of a federal candidate must contain the full, spoken "stand-by-your-ad" disclaimer in addition to meeting other disclaimer requirements.

Background

Under the Federal Election Campaign Act (the Act) and Commission regulations, when express advocacy ads are paid for by a political committee, such as Club for Growth PAC, and are not authorized by any candidate, the disclaimer must clearly state the full name, permanent address, telephone number or web address of the person who paid for the communication and indicate that the communication is not authorized by any candidate or candidate's committee. 11 CFR 110.11(b)(3). For televised ads, this disclaimer must appear in writing equal to or greater than four percent of the vertical picture height for at least four seconds. 11 CFR 110.11 (c)(3)(iii). Radio and television ads must also include an audio statement identifying the political committee or other person responsible for the content of the ad. 11 CFR 110.11(c)(4)(i).

In this case, Club for Growth PAC intends to pay for 10- and 15-second television ads that expressly advocate the election of a federal candidate. It plans to include the required written disclaimer indicating that it is responsible for the content and that the ads are not authorized by any candidate or candidate's committee.

However, Club for Growth PAC requested it be allowed to omit or truncate the required spoken disclaimer. Since the ads are shorter than most other political ads, which run for 30 to 60 seconds, Club for Growth PAC argued the spoken disclaimer would limit the ad's ability to get its message to viewers.

Analysis

In previous advisory opinions, the Commission has recognized that in certain types of communications it is impracticable to include a full disclaimer as required by the Act and Commission regulations. For example, in AO 2004-10, the Commission found that the specific physical and technological limitations of ads read during live reports broadcast from a helicopter made it impracticable for a candidate to read the required disclaimer himself or herself.

Likewise, in AO 2002-09, the Commission determined that certain candidate-sponsored text messages were eligible for the "small items" exception from the disclaimer requirements. Under this exception, bumper stickers, pins and other small items are not required to carry a printed disclaimer because their size would make doing so impracticable. 11 CFR 110.11(f)(l)(i).

However, Club for Growth PAC's plan presents facts that are materially different from those presented in these advisory opinions. AO 2004-10 did not dispense with the spoken disclaimer, but rather allowed the broadcaster, rather than the candidate, to read it. Moreover, the 10- and 15-second ads proposed by Club for Growth PAC do not present the same physical or technological limitations as those described in previous advisory opinions.

Likewise, the "small items" exception does not apply to the spoken disclaimer requirements for televised ads. Under Commission regulations, the "small items" exception applies only to "bumper stickers, pins, buttons, pens and other similar items upon which the disclaimer cannot be conveniently printed." 11 CFR 110.11(f)(1)(i). Thus, it does not apply to the *spoken* disclaimer for the television ads that Club for Growth PAC plans to sponsor. Additionally, the Commission noted that the Act

provides no exemptions from the spoken disclaimer requirement simply because the ads are only 10 or 15 seconds long. Thus, Club for Growth PAC must include the full spoken disclaimer in its 10- and 15-second television ads.

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—Isaac J. Baker

AO 2008-04 Publicly Funded Presidential Candidate May Redesignate General Election Contributions to Senate Election Within 60 Days

The authorized committee of a Presidential candidate receiving primary matching funds may issue refunds or obtain redesignations to his Senate campaign (the Senate Committee) for contributions made in connection with the general election. Additionally, the campaign may treat the costs associated with issuing the refunds or obtaining the redesignations as "winding down costs," which are qualified campaign expenses.

Background

Chris Dodd for President, Inc. (the Presidential Committee) is the principal campaign committee of Senator Chris Dodd, who was a candidate for the nomination of the Democratic Party for President of the United States. When Senator Dodd became a candidate for President, his Presidential Committee began accepting contributions for both the primary and general elections, which were kept in separate bank accounts. Senator Dodd applied for federal matching funds for the primary election and was certified by the Commission on November 27, 2007, as eligible to receive such matching funds.

On January 3, 2008, Senator Dodd withdrew from the Presidential race and later filed a Statement of Candidacy indicating his candidacy for U.S. Senate in the 2010 election. The Presidential Committee issued refunds to some contributors upon request and later sent requests via U.S. mail to remaining general election contributors (who had not received refunds) asking them to redesignate their contributions to Senator Dodd's Senate Committee. The Presidential Committee paid the costs associated with sending these redesignation requests with funds received for the Presidential primary election.

Analysis

A candidate may accept contributions for the general election prior to the primary election, or in the case of a Presidential candidate, before the candidate receives his or her party's nomination. 11 CFR 102.9(e)(1). The Commission has concluded that Presidential candidates do not waive their ability to participate in the general election public funding program by soliciting and raising general election funds before securing the party's nomination. See AO 2007-03. A Presidential candidate who accepted general election contributions before becoming the party's nominee may refund general election funds received from contributors, or under certain circumstances, request a redesignation for a different election. 11 CFR 110.1(b)(5) and 110.2.

Commission regulations generally limit the time period in which a committee may obtain a redesignation to 60 days and require that impermissible funds be refunded within 60 days. 110.1(b)(3)(i) and (b)(5). The Commission has previously concluded that the 60-day period begins to run on the date that the committee "has actual notice of the need to obtain redesignations… or refund the contributions." In this case, Senator Dodd withdrew from the Presidential race on January 3, 2008, which caused the 60-day period for obtaining redesignations and making refunds to run. On February 26, 2008, the Presidential committee filed an advisory opinion request, 54 days after Senator Dodd's withdrawal from the race. The Commission determined that Senator Dodd has six days (the balance of the 60-day period remaining after the advisory opinion request was filed) after the issuance of the advisory opinion to obtain redesignations and make refunds. Normally, the mere filing of an advisory opinion request does not toll any statutory or regulatory deadlines. Some Commissioners believe that the 60-day deadline for obtaining redesignations and making refunds should toll in Senator Dodd's case because he presented a novel legal question regarding two potentially conflicting regulations, as was the case in Advisory Opinion 1992-15. Other Commissioners believe that tolling is warranted here only because on January 1, 2008, and for approximately six months thereafter, a period during which Senator Dodd requested this advisory opinion and it remained pending, the Commission was unable to render any advisory opinions because it lacked a quorum of Commissioners.

Additionally, the Presidential Committee may pay costs associated with refunds and redesignations of contributions received for the general election with funds received for the primary election because such costs would qualify as "winding down costs," which are considered "qualified campaign expenses." 11 CFR 9034.11(a) and 9034.4(a). Winding down costs include costs associated with the termination of a Presidential candidate's efforts to obtain his or her party's nomination, such as the costs of complying with the post-election requirements of the Federal Election Campaign Act and the Matching Funds Act. 11 CFR 9043.11(a).

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Length: 5 pages.

—Myles Martin

AO 2008-07
Use of Campaign Funds for Legal and Media Expenses

David Vitter for U.S. Senate, the principal campaign committee of Senator David Vitter (LA) may use campaign funds to pay for, and reimburse Senator Vitter for, legal services related to a third party criminal proceeding in which he was subpoenaed as a witness.

Background

In March of 2007, Deborah Palfrey was indicted by a federal grand jury on criminal charges, including money laundering and racketeering. Senator Vitter's telephone number appeared in Ms. Palfrey's telephone records. Senator Vitter retained counsel to monitor the criminal proceedings because of the perception that Ms. Palfrey had a "strategy of dragging public figures into her legal proceedings."

In July of 2007, Ms. Palfrey released her telephone records and posted them on the Internet. Senator Vitter issued a public statement concerning the presence of his phone number in Ms. Palfrey's records. Later that month, Citizens for Responsibility and Ethics in Washington (CREW) requested that the Senate Select Committee on Ethics (Senate Ethics Committee) investigate Senator Vitter for possible violation of the Senate Rules of Conduct by allegedly soliciting for prostitution. Senator Vitter retained separate counsel to defend himself against the Senate Ethics committee complaint.

In November of 2007, Ms. Palfrey subpoenaed Senator Vitter to testify at a pre-trial hearing. In March of 2008, Ms. Palfrey subpoenaed Senator Vitter as a trial witness. Counsel hired by the Senator consulted with government attorneys and appeared in court in an attempt to quash both subpoenas. In addition to monitoring the trial, attempting to quash the subpoenas and consulting with counsel assisting Senator Vitter in the matter before the Senate Ethics Committee, counsel also consulted with Senator Vitter and his public relations professional. Counsel billed approximately $85,322 in legal fees for work relating to quashing the subpoenas; $31,341.25 in legal fees for consultations, including with the Senator, the Ethics Counsel and a public relations professional; $75,212.75 in legal fees for monitoring the Palfrey criminal proceeding; and $15,301.50 for miscellaneous expenses such as transportation and photocopying.

Analysis

The Federal Election Campaign Act (the Act) identifies six permissible uses of federal campaign funds including campaign-related expenses; ordinary and necessary expenses incurred in connection with the duties of the individual as a federal officeholder; and any other lawful purpose that is not considered "personal use." 2 U.S.C. §439a(a) and 11 CFR 113.2.

Contributions accepted by the candidate's authorized campaign committee may not be converted to personal use by any person. "Personal use" is any use of campaign funds to fulfill a commitment, obligation or expense that would exist irrespective of the candidate's campaign of officeholder duties. 2 U.S.C. §439a(b)(2) and 11 CFR 113.1(g).

The Commission has previously recognized that if a candidate can demonstrate that expenses resulted from campaign or official duties, the Commission will not consider the use to be personal. The Commission examines the use of campaign funds for legal fees and expenses on a case by case basis. Senator Vitter asked the Commission to use campaign funds to pay for legal expenses for "(1) monitoring and participating in Ms. Palfrey's trial and quashing the subpoenas issued to him; (2) assisting in the defense of a Senate Ethics Committee complaint; and (3) making informed decisions about how to manage the case and address it publicly."

Applicability of the Use of Funds Provision

The FEC determined that Senator Vitter's principal campaign committee may use campaign funds to pay some, but not all, legal fees and expenses rendered in connection with a legal proceeding against a third party. The Commission concluded that legal fees and expenses incurred in consultation with Senator Vitter's Ethics Counsel and in responding to press inquiries and news stories would not have existed irrespective of the Senator's campaign or duties as a federal officeholder and could be paid with campaign funds. The Commission further concluded that the Committee may pay miscellaneous expenses incurred in connection with assisting Ethics Counsel, and in connection with press relations, as described above, and reimburse Senator Vitter for that part of his personal payment of $70,000 to Subpoena Counsel representing legal fees and expenses that the Commission has determined the Committee could pay with campaign funds. The Committee must maintain appropriate documentation of any disbursements made to pay permissible legal expenses and report the recipient's full name, address and purpose of payment. The Commission could not reach a conclusion regarding the use of campaign funds for quashing subpoenas or monitoring the criminal proceeding.

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Length: 7 pages.

— Michelle L. Ryan

AO 2008-08 Earmarked Contribution Counts Against Current Spending Limits

An earmarked contribution sent by an individual through a nonconnected political action committee (PAC) is considered "made" when the contributor gives the money to the nonconnected PAC, not when the committee eventually forwards the contribution to the final recipient. Thus, a contribution earmarked through a nonconnected PAC in 2008 will be subject to the 2008 calendar-year contribution limit and count against the contributor's 2007-2008 biennial limit, even if the contribution is not forwarded to the intended recipient until a later election cycle.

Background

On June 25, 2008, Jonathan Zucker made an on-line credit card contribution through ActBlue, a nonconnected PAC. ActBlue solicits and accepts on-line credit card contributions for candidates and party committees and forwards them to the intended recipient via check. Mr. Zucker earmarked his contribution for the 2010 Democratic nominee for the U.S. Senate in Arizona or, in the event there is no such nominee, to the Democratic Senatorial Campaign Committee (DSCC).

Usually, a person who receives a contribution of any amount for an authorized political committee, or a contribution greater than $50 for a political committee that is not an authorized committee, must forward the contribution to the intended recipient no later than 10 days after receipt. 11 CFR 102.8(a) and (b)(1), and 110.6(c)(1)(iii) and (iv).

However, in AO 2006-30, the Commission determined that ActBlue could solicit and receive contributions earmarked for a prospective candidate and delay forwarding those contributions until no later than 10 days after the candidate had registered a campaign committee, rather than within 10 days after ActBlue's receipt of the contribution. The Commission also determined that ActBlue could forward the contribution to a named national party committee in the event the intended candidate did not register with the Commission. See also AO 2003-23.

Analysis

The Federal Election Campaign Act and Commission regulations place limits on the amount that any person can contribute to a national party committee, and this limit is indexed for inflation. For 2008, an individual can give no more than $28,500 to a national party committee. 11 CFR 110.1(c)(1). Individuals are additionally subject to a "biennial limit," which limits the total amount of contributions that any individual may make to all federal candidates, PACs and party committees during a two-year cycle. For the 2008 cycle, the overall biennial limit is $108,200, which is further broken down into separate limits for candidates and other committees. The biennial limit is also indexed for inflation every two years. 11 CFR 110.1(b)(1)(ii). Inflation adjustments beyond 2008 cannot be determined at this time. The date a contribution is "made" determines the election limit it counts against, and a contribution is considered "made" when the contributor relinquishes control over it. 11 CFR 110.1(b)(6). A credit card contribution is "made" when the credit card or number is presented because, at that point, the contributor is strictly obligated to make the payment. AO 1990-14.

In this case, Mr. Zucker's credit card has been charged for the contribution, and he is obligated to pay that amount to the credit card company. Thus, his contribution has been "made." Moreover, under Commission regulations a contribution to a candidate or committee with respect to a particular election, *including an earmarked contribution*, counts against the contribution limits in effect during the election cycle in which the contribution is actually made, regardless of the year in which the particular election is held. 11 CFR 110.5(c)(1). Accordingly, if his contribution is forwarded to a 2010 Senate nominee, it will still count against his 2007-2008 biennial limit. If there is no Democratic Senate nominee and his contribution is forwarded to the DSCC, the contribution will again count against his 2007-2008 biennial limit and against his calendar-year contribution limit to the DSCC for 2008.

The Commission further determined that, because Mr. Zucker may not know until 2010 whether his contribution was forwarded to a candidate or a political committee, the only way to ensure that he does not exceed any possible limit that may apply is to consider his contribution as if it were made to both the 2010 Democratic Senate nominee and the DSCC.

Date Issued: September 12, 2008; Length: 4 pages.

—Isaac J. Baker

AO 2008-09 Application of Loan Repayment Provision

A provision of the Bipartisan Campaign Reform Act of 2002 (BCRA) dealing with the repayment of personal loans a candidate makes to his or her campaign committee is not affected by the Supreme Court's finding that the so-called "Millionaires' Amendment" is unconstitutional. Therefore, candidates who loan their campaign committees personal funds can still only be repaid up to $250,000 of the loan amount using contributions raised after the date of the election. 2 U.S.C. §441a(j) and 11 CFR 116.11 and 116.12.

Background

On June 26, 2008, the Supreme Court ruled that sections 319(a) and 319(b) of the BCRA, known as the "Millionaires' Amendment" (2 U.S.C. §441a-1), unconstitutionally

burden the First Amendment rights of self-financed candidates for the House of Representatives. *Davis v. Federal Election Commission,* 554 U.S.__, 128 S. Ct. 2759 (2008). Section 304(a) of BCRA imposes analogous limitations on candidates for the Senate. In addition to the Millionaires' Amendment provisions, section 304(a) also includes a provision that limits to $250,000 the amount of a personal candidate loan that can be repaid by the candidate's committee with contributions made after the date of the election. 2 U.S.C. §441a(j); 11 CFR 116.11, 116.12. This loan repayment provision applies equally to all candidates, regardless of whether they or their opponents have triggered the increased campaign contribution limits.

New Jersey Senator Frank Lautenberg loaned his principal campaign committee, Lautenberg for Senate (the Committee), $1.65 million in connection with his June 3, 2008, primary election campaign. The Committee has not yet repaid those loans to Senator Lautenberg. The Committee asked whether the loan repayment provision would apply to Senator Lautenberg and the Committee in light of the Supreme Court's ruling in *Davis v FEC*.

Analysis

The Supreme Court did not address the constitutionality of the loan repayment provision. Under the BCRA, the invalidation of one BCRA provision, such as the Millionaires' Amendment, does not affect the validity of any other provisions. The Commission determined that the loan repayment provision of the BCRA is not inextricably tied to the Millionaires' Amendment and the increased contribution limits.

Therefore, the loan repayment provision applies to Senator Lautenberg and the Committee's proposal to repay his loans.

Date Issued: August, 22, 2008; Length: 3 pages.

— Isaac J. Baker

AO 2008-17
PAC May Pay Expenses Incurred by Senator's Co-Author

Expenses incurred by a Senator's co-author while preparing a manuscript of a book the two are writing may be paid for with funds from the Senator's leadership PAC. The Senator's principal campaign committee, however, may not use its funds to reimburse the co-author for the expenses.

Background

For three years, Missouri Senator Christopher "Kit" Bond has worked on a book about terrorist threats from the Far East. In December of 2005, Senator Bond and his co-author signed an agreement concerning liability, delivery of the manuscript, confidentiality responsibilities, how the advance of royalties would be split and other matters. Also in December of 2005, the Senator and co-author signed a contract with a company to publish the book, for which they received an advance of $60,000. The co-author received $43,333 of the advance and Senator Bond received $16,667. The Senator paid $15,000 of his $16,667 to the publishing agent who secured the original contract and paid the remaining amount to the co-author.

The original agreement required repayment of the advance if the publisher declined to publish the book and the authors secured a second publisher. The original publisher *did* decline to publish the book and Senator Bond and his co-author found a second publisher, who also agreed to pay them an advance. That advance will be used to reimburse the original publisher's advance. Senator Bond will not receive any profits from the book.

However, the requestor said no funds from the second advance will remain to fully compensate Senator Bond's co-author for the expenses, time and effort spent in preparing the manuscript for the second publisher. The requestor placed the fair market value of these services at $25,000.

Senator Bond asked the Commission whether Missourians for Kit Bond, the Senator's principal campaign committee (the Committee), or KITPAC, a nonconnected multicandidate committee associated with Senator Bond, could pay the book's co-author $25,000 for the expenses, time and effort spent in preparing the manuscript for the second publisher's approval.

Analysis

Missourians for Kit Bond may not reimburse the co-author for the $25,000, but KITPAC may pay these expenses.

Under the Federal Election Campaign Act (the Act) and Commission regulations, candidates and their committees have wide discretion in making expenditures to influence the candidate's election. 2 U.S.C. §439(a) and 11 CFR 113.2. However, a candidate or candidate committee may not convert contributions to personal use. Personal use occurs when a "contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 2 U.S.C. §439a(b)(2). Using this "irrespective test," the Commission concluded that the Committee's proposed payment to the co-author would amount to personal use.

While third parties are limited in what they may pay for on behalf of federal candidates, the "irrespective test" contained in the third party payment provision at 11 CFR 113.1(g)(6) differs slightly from the "irrespective test" contained in the general personal use prohibition at 11 CFR 113.1(g). This provision asks whether the third party would pay the expense even if the candidate was not running for federal office. If the answer is yes, then the payment does not constitute a contribution.

The requestor stated that Senator Bond "seeks to publish the book purely to advance the ideas and philosophies important to his campaign and leadership PAC, and not to benefit himself personally." The requestor also stated that KITPAC's interest in the book would exist even in the absence of the Senator's reelection or his campaign.

Because the book promotes KITPAC's goals and the PAC would pay for the book and the co-author's expenses irrespective of the Senator's campaign, the payment would not constitute a contribution under 11 CFR 113.1(g)(6). The Commission concluded that KITPAC may therefore make the proposed $25,000 payment to the book's co-author.

Date Issued: December 22, 2008; Length: 5 pages.

—Isaac J. Baker

AO 2008-19 Campaign Committee Employee May Serve as Leadership PAC's Treasurer

An employee of a candidate's principal campaign committee may also serve as the treasurer of a leadership PAC sponsored by the same candidate.

Background

Ms. O'Lene Stone is a paid staff member of Texans for Lamar Smith (the Committee), which is the principal campaign committee for Representative Lamar Smith. In her position as the Committee's office manager, she collects mail, supervises volunteers, occasionally acts as a contact person for fundraising firms and performs other day-to-day administrative tasks for the Committee. She is not involved in any fundraising or in preparing or filing any Commission reports for the Committee.

Ms. Stone is also the treasurer of the Longhorn Political Action Committee (Longhorn PAC), a leadership PAC sponsored by Representative Smith. In this position, she signs Longhorn PAC's FEC reports and has final approval of all disbursements. She does not prepare FEC reports for the PAC and does not sign checks or make deposits.

Ms. Stone maintains separation between her two roles. She performs all of her duties for Longhorn PAC on her own time, outside of her paid hours for the Committee. No Longhorn PAC resources or funds are used in the performance of Ms. Stone's Committee duties, and no Committee resources or funds are used in the performance of her Longhorn PAC duties.

Analysis

Neither the Federal Election Campaign Act nor any Commission regulation bars a person from serving as an employee of a principal campaign committee and as the treasurer of a leadership PAC sponsored by that candidate simultaneously. Therefore, Ms. Stone may continue to serve as the treasurer of Longhorn PAC while she is employed by the Committee.

Date Issued: January 16, 2009; Length: 3 pages.

—Isaac J. Baker

AO 2008-22 Senator's Committee May Repay Certain Personal Loans With Campaign Funds

A Senator's authorized committee may use money raised for the 2008 general election to repay loans made by the Senator to the committee (personal loans) of up to $250,000 for the 2008 primary campaign. Also, the Senator's authorized committee may use money raised for the 2008 and 2014 campaigns to repay the Senator's personal loans of any amount for his 2002 campaign.

Background

Lautenberg for Senate (the Committee) is New Jersey Senator Frank Lautenberg's principal campaign committee for the 2002 and 2008 Senate elections.

Between October 6 and 17, 2002, Senator Lautenberg made personal loans totaling $1.51 million to the Committee for the 2002 general election. Of that money, $1.09 million remains as outstanding debt. For the 2008 primary election, Senator Lautenberg also loaned the Committee a total of $1.65 million, of which $250,000 remains as outstanding debt and $1.4 million has been converted to contributions from the Senator himself.

Analysis

The Bipartisan Campaign Reform Act of 2002 (BCRA) limited the extent to which candidates' personal loans to their committees could be repaid after their elections. Under BCRA, a committee may only repay up to $250,000 of a candidate's loan to the campaign using contributions made after the date of the election. 2 U.S.C. §441a(j); 11 CFR 116.11(b)(2).

2008 Primary Election. The $250,000 limit on repayment of loans applies separately to the primary election and the general election. Therefore, the Committee may use general election contributions received after the 2008 primary election to repay the outstanding $250,000 in personal loans made by Senator Lautenberg for the primary election.

2002 Elections. The Committee may use contributions received for the 2008 election, or funds that will be received for the 2014 election, to repay the entire outstanding amount of Senator Lautenberg's personal loan to the Committee for the 2002 election. The $250,000 limit on repayment of personal loans imposed by BCRA does not apply to loans made before the effective date of the legislation, which was November 6, 2002. 2 U.S.C. §441a(j); Pub. L. 107-155, Sec. 402, Mar. 27, 2002. Because Senator Lautenberg made the loans for his 2002 election in October 2002, BCRA does not limit

the amount of personal loans for that election that the Committee can repay using contributions received after the 2002 election.

The Commission has previously permitted candidates' authorized committees to use otherwise lawful campaign contributions to repay debts from previous elections. The Commission concluded in AO 1989-22 that Representative David R. Nagle's authorized committee could use contributions made with respect to the 1990 primary campaign to retire debt incurred by his 1988 campaign committee. In that case, the Commission determined the use of contributions "does not require that they be counted against the limits applicable to the previous election unless there are facts and circumstances indicating that the contributions were actually solicited to pay the debts remaining from the previous election, or that contributors gave to the current campaign with knowledge that the funds would be applied only to debt retirement."

Also, in AO 2003-30, the Commission concluded that Senator Peter Fitzgerald's principal campaign committee could use contributions for the 2004 primary election to repay loans made to the committee in connection with the 1998 election, including personal loans from Senator Fitzgerald.

As such, the Committee may use contributions made in connection with Senator Lautenberg's 2008 and 2014 elections to repay debts from the 2002 election, including the Senator's personal loans.

Date Issued: January 30, 2009; Length: 4 pages.

—Isaac J. Baker

AO 2009-02 Independent Expenditures by Single Member LLC

The True Patriot Network, LLC (TPN), a single natural person member limited liability company (LLC), may make independent expenditures subject to the limitations and disclosure requirements that apply to individuals.

Background

TPN is a limited liability company organized under the laws of the State of Washington. Nicolas Hanauer is the sole member and manager of TPN. As TPN's manager, he has the "sole and exclusive right" to manage TPN's affairs.

TPN plans to expand its activities to include communications that influence federal elections. Such communications would endorse and urge support for specific federal candidates and officeholders who share TPN's principles and ideals. In undertaking these activities, TPN states that it will not coordinate with federal candidates or party committees.

Analysis

TPN may make independent expenditures, subject to the limitations and disclosure requirements that apply to individuals. An LLC is treated as a person under the Federal Election Campaign Act (the Act). 2 U.S.C. §431(11). As such, LLCs are subject to the Act's provisions regarding contributions and expenditures made by persons. 2 U.S.C. §§431(8) and (9).

Commission regulations address LLCs in the context of the Act's contribution limitations and prohibitions. The Commission generally treats contributions by LLCs consistent with the tax treatment that the entities elect under the Internal Revenue Code. An LLC that is treated as a partnership under the Internal Revenue Code is subject to the contribution limits that apply to partnerships. Similarly, an LLC that elects to be treated as a corporation by the Internal Revenue Service (IRS) is subject to the Act's rules on corporate activity. 11 CFR 110.1(g)(3).

For federal income tax purposes, a single member LLC cannot elect to be classified as a partnership. It may either choose to be treated as a corporation or to be disregarded as an entity separate from its owner. 26 CFR 301.7701-3(a). Commission regulations provide that contributions by an LLC with only a single natural person member that does not elect to be treated as a corporation for federal income tax purposes "shall be attributable only to that single member." 11 CFR 110.1(g)(4).

Since TPN is a single natural person member LLC that has not elected corporate tax treatment, TPN is subject to the contribution limitations of Mr. Hanauer, its sole member. The Commission has not previously determined whether or not expenditures by a single member LLC, like contributions, are attributable solely to the LLC's single member. Under the circumstances presented here, the Commission concludes that they are.

As a result of the unity between Mr. Hanauer and TPN, any independent expenditures made by TPN shall be treated as if they were made by Mr. Hanauer. However, if circumstances change such that TPN could be construed as a "group of persons," TPN may need to consider whether it may also be a "political committee" under the Act and Commission regulations. 2 U.S.C. §431(4)(A) and 11 CFR 100.5(a).

Date Issued: April 17, 2009; Length: 4 pages.

—Myles Martin

AO 2009-04
Recount and Election Contest Funds

A national party committee may establish a recount fund subject to the Federal Election Campaign Act's (the Act) amount limits, source prohibitions and reporting requirements to pay expenses incurred in connection with recounts and election contests of federal elections.

Background

Al Franken was the Democratic candidate for the U.S. Senate for Minnesota in 2008, facing Republican Senator Norm Coleman. The close outcome of the general election led to a mandatory recount that gave a 225-vote lead to Mr. Franken. In January 2009, Mr. Coleman filed a lawsuit to contest the recount, which has resulted in a protracted legal battle with no final winner yet being determined or seated in the Senate.

The Democratic Senatorial Campaign Committee (DSCC), a national committee of the Democratic Party, wishes to establish a recount fund, separate from its other accounts and subject to a separate limit on amounts received, to pay expenses incurred in connection with the 2008 Senatorial recount and election contest in Minnesota. Donations to the proposed separate recount fund would be subject to the limits, prohibitions and reporting requirements of the Act.

In addition, Mr. Franken's principal campaign committee, Al Franken for U.S. Senate (the Committee), established a recount fund to pay for expenses incurred in connection with the recount, and has used the fund for expenses related to the election contest. The Committee wishes to establish a separate election contest fund that would be subject to the Act's limits, prohibitions and reporting requirements, but would have a limit separate from its recount fund on amounts received. This proposed fund would be used to pay expenses incurred only in connection with the election contest.

Analysis

In AO 2006-24, the Commission concluded that "because election recount activities are in connection with a Federal election, any recount fund established by either a Federal candidate or the State Party must comply with the amount limitations, source prohibitions, and reporting requirements of the Act." The advice provided by AO 2006-24 applies to a national party committee as well. Thus, the DSCC may establish a recount fund subject to the Act's amount limits, source prohibitions and reporting requirements to be used for expenses incurred in connection with recounts and election contests of federal elections, such as the 2008 Senatorial recount and election contest in Minnesota. The contribution limits for a national party committee for 2009 ($30,400 per calendar year from an individual and $15,000 per calendar year from a multicandidate political action committee) apply for any recounts and election contests during 2009. Donations to recount funds are not aggregated with contributions from those same individuals for purposes of the calendar-year and aggregate biennial contribution limits of 2 U.S.C. §§441a(a)(1)(B) and (a)(3).

The Commission could not approve a response by the required four affirmative votes with regard to whether Al Franken for U.S. Senate may establish an election contest fund, separate from its existing recount fund, and subject to a separate donation limit.

Date Issued: March 20, 2009; Length: 4 pages.

—Zainab Smith

AO 2009-06
Federal Officeholder's State Campaign Committee May Raise Nonfederal Funds to Retire Debts

A U.S. Senator who was formerly a lieutenant governor may, under certain circumstances, solicit, receive and spend funds outside of the Federal Election Campaign Act's (the Act) amount limitations and source prohibitions for the sole purpose of retiring debts from a previous state campaign.

Background

Prior to becoming a U.S. Senator, Senator Jim Risch served as Lieutenant Governor of Idaho. He set up the Jim Risch for Lieutenant Governor Committee (the Committee) as his campaign committee for this state office. As of December 1, 2008, the Committee had outstanding debts of more than $331,000, which is the balance of a loan Senator Risch made to the committee in connection with the 2002 primary election.

The Committee wishes to raise funds in accordance with Idaho state law to retire this debt. Under Idaho law, individuals, corporations and other recognized legal entities may contribute up to $5,000 per election to state candidate committees. Also, if a political committee has debt outstanding, it may accept additional contributions to retire the debt, subject to the prescribed limits.

Analysis

Under the Act, federal candidates and officeholders cannot raise or spend funds in connection with a nonfederal election unless those funds comply with the amount limitations and source prohibitions of the Act. 2 U.S.C. §441i(e)(1)(B) and 11 CFR 300.62. However, the Act provides a limited exception for federal candidates and officeholders who also seek, or have sought, state or local office. Specifically, the restrictions on raising and spending funds for nonfederal elections do

not apply to any federal candidate or officeholder who is or was also a candidate for a state or local office, so long as the solicitation, receipt or spending of funds:

- Is solely in connection with his or her state or local campaign;
- Refers only to him or her, to other candidates for that same state or local office, or both; and
- Is permitted under state law.

Because Senator Risch is a federal officeholder, and the Committee is directly established, financed, maintained and controlled by him, the Committee and its agents are subject to the Act's restriction on raising and spending nonfederal funds. 2 U.S.C. §441i(e)(1)(B) and 11 CFR 300.62. However, soliciting, receiving and spending funds solely to retire debts outstanding from a previous state candidacy are actions that are solely in connection with that election to state office. See AO 2007-01. As long as (1) the Committee raises funds solely to retire debts outstanding from Senator Risch's previous state candidacy, (2) the Committee's fundraising solicitations refer only to James Risch, to one or more of his former opponents in the campaign for lieutenant governor of Idaho, or both, and (3) the Committee's fundraising is permitted under Idaho law, the three criteria for the exception will be satisfied and the Committee's proposed fundraising will be permissible.

Date Issued: April 23, 2009; Length: 3 pages.

—Isaac J. Baker

AO 2009-08
Use of Campaign Funds for Home Security Upgrades

Representative Elton Gallegly may use campaign funds to pay for enhanced security for his home without the payments being considered a personal use of campaign funds because the ongoing threat to his safety, and that of his family, would not exist irrespective of his candidacy or his duties as an officeholder.

Background

Representative Gallegly is a member of the US House of Representatives from California, and his wife is his longtime campaign manager. In October and November 2008, Representative Gallegly ran for reelection. On October 23, 2008, a man approached Mrs. Gallegly at her home and claimed to be a gardener looking for work. Mrs. Gallegly told the man that she did not have any work for him, and asked him to leave her property.

On October 27, 2008, Mrs. Gallegly found a hand-addressed, unstamped letter in her mailbox. The envelope was addressed "To: Elton and republican [sic] party," and was signed by the man who had approached Mrs. Gallegly on her property four days earlier. The letter demanded that he be allowed to stay at the Gallegly residence "or anywhere filled with republicans [sic] for a guaranteed win of office." Mrs. Gallegly contacted the local police department, which instructed the individual not to contact the Galleglys or go to their residence.

On November 7, 2008, the individual entered the Galleglys' property again, and Mrs. Gallegly obtained a Restraining Order and an Order to Stop Harassment. However the individual violated the terms of the Restraining Order when he entered the Galleglys' property a fourth time and hid in the bushes near the front door of their home. The individual was arrested and served thirty days in jail for violating the Restraining Order and was released on probation. After his release, the individual violated the terms of his probation and was arrested again. At the hearing, the judge set the individual's bail at $100,000, citing the risk he posed to the Congressman's and Mrs. Gallegly's safety.

Representative Gallegly consulted the U.S. Capitol Police about the incidents with the individual. The U.S. Capitol Police recommended various upgrades to Representative Gallegly's home security system which would cost between $6,000 and $7,500. Representative Gallegly wishes to pay for the upgrades using campaign funds. He confirmed that the security upgrades would not involve any structural improvements to, and are not intended to increase the value of, the Galleglys' property.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations prohibit campaign funds from being converted to "personal use" by any person. 2 U.S.C. §439a(b)(1) and 11 CFR 113.2(e). Personal use occurs when a contribution or amount is used to fulfill any commitment, obligation or expense of a person that would exist irrespective of the candidate's election campaign or his duties as a federal officeholder. 2 U.S.C. §439a(b)(2).

Certain enumerated expenses are automatically considered personal use under the Act and Commission regulations, such as payments for mortgage, rent and household food items. See 2 U.S.C. §439a(b)(2) and 11 CFR 113.1(g)(1)(i). However, if the expense is not listed under the Act or Commission regulations, the Commission will make a case-by-case determination of whether any other use of campaign funds is personal use. If a candidate can reasonably show that the expense resulted from his campaign or officeholder activities, the Commission will not consider it to be personal use. Explanation and Justification for Final Rules on Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995).

Payments for a home security system are not specifically listed as a personal use under the Act or Commission regulations. In this case, the Commission concluded that Representative Gallegly's payment for the home security system from his campaign funds would not be personal use. The Commis-

sion found that the content of the individual's letter and the timing of his actions strongly suggest that it was Representative Gallegly's role as a candidate and officeholder that resulted in the threats. Also, the security upgrades were recommended by the U.S. Capitol Police specifically because of the continuing threat posed by the individual. Because the on-going harassment occurred as a result of Representative Gallegly's re-election campaign and public position as a Member of Congress, the need for the proposed upgrades to the Congressman's security system would not exist irrespective of the Congressman's campaign or duties as a federal officeholder. Therefore the use of campaign funds to pay for these security system upgrades would not constitute personal use of campaign contributions, and would not be prohibited by the Act or Commission regulations.

Date Issued: May 7, 2009;
Length: 4 pages.

—Zainab Smith

AO 2009-07 Campaign's Use of Candidate-owned LLC's Boat

A limited liability company (LLC) partially owned by a member of Congress may provide free or discounted use of its recreational boat to the member's campaign as an in-kind contribution, subject to the LLC's contribution limits. The campaign must pay the usual and normal charge for any rental value of the boat that exceeds the LLC's limits, just as any other political committee would.

Background

Rep. Randy Neugebauer, along with several members of his family, formed an LLC under Texas law that elected to be treated as a partnership for federal income tax purposes. Rep. Neugebauer and his wife own a sixty-percent share in the company, with the remaining forty percent held by family. After its formation, the LLC purchased a recreational boat to be harbored in the Washington, D.C., area with the intention of renting the boat to third parties at the seasonal fair market value.

The Neugebauer for Congress Committee, Rep. Neugbauer's principal campaign committee, asked if it could use the LLC's boat for campaign events without charge so long as that use did not exceed Rep. Neugebauer's right to use the boat, and if so, whether it could pay the LLC fair-market-value rental charge upon exceeding his right to use. As an alternative, the committee asked if it could simply pay the LLC the fair-market-value rental charge for use of the boat, and if so, whether Rep. Neugebauer could use his personal funds to make that payment. If so, the committee wanted to know how to report such an expenditure as well as whether or not the LLC could rent the boat to other political committees at the fair-market rate.

Analysis

Candidates for federal office, except Presidential candidates electing to accept public funding, may make unlimited expenditures from personal funds. 11 CFR 110.10. Personal funds include candidate's assets. 2 U.S.C. §431(26); 100.33(a). The facts presented in the request, however, indicate that the boat is an asset of the LLC. Accordingly, the LLC, rather than Rep. Neugebauer, would be providing the use of the boat to the Committee. Thus, any value deriving from the boat would not constitute "personal funds" of Rep. Neugebauer under the Act.

Because the LLC would be providing the use of the boat to the Committee, the Commission analyzed this transaction under the statutory framework applying to LLCs. By allowing the Committee to use the boat for campaign events without charge, the LLC would be providing the rental value of the boat to the Committee for the purpose of influencing the election of Rep. Neugebauer. The Committee's use of the LLC's boat without charge, therefore, would be an in-kind contribution by the LLC.

The Commission generally treats contributions by LLCs consistent with the tax treatment that the entities elect under the Internal Revenue Code. Because the LLC in this case has elected to be treated as a partnership for federal income tax purposes, it would be allowed to contribute up to $2,400 per election. 11 CFR 110.1(b) and (e). Accordingly, the Committee could use the LLC's boat without charge up to $2,400 in rental value of the boat, per election. In this case, the LLC would be contributing the charge for the boat rental at a commercially reasonable rate in the Washington, D.C., area prevailing at the time the services of the boat were rendered to the Committee. 11 CFR 100.52(d)(2).

When the Committee's use of the boat exceeds $2,400 per election, the Committee may continue using the boat if it pays the LLC the usual and normal charge for a comparable boat rental in the Washington, D.C., area. The payment for the use of the boat at the usual and normal charge would not be treated as an in-kind contribution from the LLC to the Committee. 11 CFR 100.52(d)(1) and (d)(2).

The committee would report the free or discounted use as an in-kind contribution from the LLC and its rental payments as operating expenditures. 11 CFR 110.1(b) and (e), also 11 CFR 100.52(d)(1) and (2). Payments from Rep. Neugbauer's personal funds would be reported as in-kind contributions. 11 CFR 104.13. The Commission would treat interactions between the LLC and any other campaign committee, leadership PAC or party committee in the same manner.

Date Issued: June 26, 2009;
Length: 6 pages.

—Christopher B. Berg

AO 2009-10
Federal Officeholder May Use Campaign Funds to Pay Certain Legal Fees

A federal officeholder may use campaign funds to pay legal fees and expenses incurred in connection with a federal investigation of allegedly improper campaign contributions and legislative appropriations because the fees would not exist irrespective of his campaign or duties as a federal officeholder. However, use of campaign funds to pay for the Congressman's representation in legal proceedings regarding allegations that are not related to his campaign activity or duties as a federal officeholder would constitute an impermissible personal use of campaign funds.

Background

Representative Visclosky is the U.S. Representative from the First District of Indiana. Visclosky for Congress (the Committee) is Rep. Visclosky's principal campaign committee.

According to media reports contained in the advisory opinion request, the FBI and federal prosecutors are investigating whether a lobbying firm, PMA Group, made improper political contributions to Rep. Visclosky and other members of the U.S. House of Representatives. Although many details of the federal investigation are not public at this time, media reports indicate that the investigation centers on more than $500,000 in alleged campaign contributions from PMA Group and its clients to three Congressmen, including Rep. Visclosky.

Analysis

The Federal Election Campaign Act (the Act) identifies six categories of permissible uses of contributions accepted by a federal candidate, including otherwise authorized expenditures in connection with the candidate's campaign for federal office and ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of federal office. 11 CFR 113.2(a)-(e). The Act prohibits the "personal use" use of campaign contributions by any person. 2 U.S.C. §439a(b)(1) and 11 CFR 113.2(e). The Act specifies that conversion to personal use occurs when a contribution or amount is used "to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 2 U.S.C. §439a(b)(2); see also 11 CFR 113.1(g).

The Committee may use campaign funds to pay legal fees and expenses incurred by Rep. Visclosky in connection with a federal investigation into the alleged provision of illegal campaign contributions by the PMA Group and its clients to the Committee and Rep. Visclosky's alleged improper earmarking of appropriations for clients of PMA, and any other legal proceedings that involve the same allegations. These allegations relate to Rep. Visclosky's campaign or duties as a federal officeholder, or both, and the legal fees would not exist irrespective of Rep. Visclosky's campaign or duties as a federal officeholder. The Committee may not, however, use campaign funds to pay legal fees or expenses regarding allegations unrelated to Rep. Visclosky's campaign or duties as a federal officeholder.

In accordance with the Act and Commission regulations, the Committee must maintain appropriate documentation of any disbursements made to pay legal expenses incurred in connection with the federal investigation and other legal proceedings. 11 CFR 102.9(b) and 104.11.

Date Issued: June 18, 2009; Length: 5 pages.

—Myles Martin

AO 2009-12
Candidate May Use Campaign Funds for Certain Legal Fees

A Senator's principal campaign committee may use campaign funds to pay legal fees relating to ethics complaints, a possible FBI investigation and lawsuits implicating the Senator, but not for allegations unrelated to his campaign or duties as a federal officeholder.

Background

Senator Norm Coleman and Coleman for Senate '08, the candidate's principal campaign committee (the Committee), seek to use campaign funds to pay legal expenses associated with two lawsuits filed in Texas and Delaware, a possible FBI investigation and two complaints filed with the Senate Select Committee on Ethics (Senate Ethics Committee). While the Senator is not named as a defendant in the lawsuits, both suits, the possible FBI probe and one of the ethics complaints involve allegations that a company employing the Senator's wife received improper payments from a corporate entity. The other ethics complaint alleges a possible violation of Senate gift rules.

In the Texas lawsuit, the Chief Executive Officer of Deep Marine Technology, Inc. (DMT) and Deep Marine Holdings, Inc. (DMH) sued the companies, their controlling shareholder Nasser Kazeminy and others for using "the companies and their assets as their own personal bank account." Among the specified misuses of corporate funds is an alleged payment of $75,000 to the Hays Companies (Hays), an insurance brokerage company that purportedly employed Senator Coleman's wife. The lawsuit alleges that payments to Hays were "for the stated purpose of trying to financially assist United States Senator Norm Coleman."

After the Texas lawsuit was filed, a shareholder derivative action (the

"Delaware Lawsuit") was filed against certain officers, directors and the controlling shareholders of DMH and DMT. The Delaware lawsuit, like the one in Texas, raised allegations concerning Senator Coleman. The complaint alleged that, "Kazeminy is a large donor to Senator Coleman's campaign and that the two men have vacationed together at Kazeminy's expense using Kazeminy's private plane in 2004 and 2005." The Delaware lawsuit also alleged that news articles reported that, "Kazeminy may have paid large bills for clothing purchases at Neiman Marcus in Minneapolis by Senator Coleman and his wife." The Delaware lawsuit alleged that Mr. Kazeminy instructed DMT's Chief Financial Officer to have DMT send quarterly payments to Senator Coleman, stating, "'We have to get some money to Senator Coleman' because the Senator 'needs the money.'" The Delaware lawsuit alleged that Mr. Kazeminy was informed that such payments to Senator Coleman would be improper and that Mr. Kazeminy then allegedly directed payment from DMT to Hays, the alleged employer of Senator Coleman's wife.

In the wake of these lawsuits, the Alliance for a Better Minnesota (ABM) posted online a letter it had sent to the FBI seeking an investigation. ABM also filed a complaint against Senator Coleman with the Senate Ethics Committee. ABM alleged that Senator Coleman may have violated Senate gift and disclosure rules and the Ethics in Government Act as a result of the alleged payments from DMT to Hays described in the complaint in the Texas lawsuit.

In a separate ethics complaint, Citizens for Responsibility and Ethics in Washington (CREW) alleged that Senator Coleman accepted free or discounted lodging for his Washington, D.C., apartment, in possible violation of Senate gift rules.

Senator Coleman continues to incur legal expenses in connection with these matters, and he and his Committee seek to use campaign funds to pay those costs.

Analysis

Under the Federal Election Campaign Act (the Act) and Commission regulations, campaign funds may be used for expenses in connection with the individual's campaign for federal office, duties as a federal officeholder and for any other lawful purpose that is not "personal use." *See* 2 U.S.C. §439a(a); see also 2 U.S.C. §439a(b); 11 CFR 113.2. The Commission determines, on a case-by-case basis, whether the use of campaign funds to pay legal fees and expenses constitutes personal use. See 11 CFR 113.1(g)(1)(ii)(A).

In this case, the Commission determined that the Committee may use campaign funds to pay for legal costs incurred in the following: reviewing the complaints to the Senate Ethics Committee and ABM's letter to the FBI; representing Senator Coleman in the FBI's investigation of alleged violations of federal law or rules governing the office of a Senator or the conduct of campaigns; monitoring and representing Senator Coleman in the Texas and Delaware lawsuits; and responding to media inquiries. However, the Committee may not use campaign funds to pay legal costs incurred representing Senator Coleman in an FBI investigation of allegations unrelated to Senator Coleman's campaign or duties as a federal officeholder.

The Commission has previously concluded that efforts to respond to the Senate Ethics Committee are directly related to an individual's duties as a federal officeholder, and that legal fees and expenses incurred in responding to the Senate Ethics Committee's inquiries or investigations are ordinary and necessary expenses incurred in connection with the duties of a federal officeholder. See Advisory Opinions 2008-07, 2006-35 and 1998-01. Accordingly, the Commission determined that the Committee may use campaign funds to pay for legal counsel's review of the Senate Ethics Committee complaints.

In past advisory opinions, the Commission has concluded that a candidate's authorized committee may use campaign funds to pay legal fees incurred in representing a candidate or federal officeholder before a non-congressional investigation or legal proceeding when the allegations in that investigation are directly related to a candidate's campaign activity or duties as a federal officeholder. See AOs 2006-35, 2005-11 and 1996-24. To the extent that the FBI is investigating allegations that Senator Coleman may have received unreported gifts in violation of federal law or violated campaign finance law, the allegations would not exist irrespective of Senator Coleman's campaign or duties as a federal officeholder. Therefore, the Commission determined that the Committee may use campaign funds to pay for counsel to review ABM's letter to the FBI and to represent Senator Coleman in the FBI's investigation into allegations that the Senator violated federal law or rules governing the office of a Senator or the conduct of campaigns. The Committee, however, may not use campaign funds to pay for Senator Coleman's legal fees that stem from allegations not directly related to his campaign or duties as a holder of federal office.

Although the causes of action in the Texas and Delaware lawsuits do not, on their face, relate to Senator Coleman's campaign or his duties as a federal officeholder, factual allegations made in the suits do. For that reason, the Committee may use campaign funds to pay for the legal fees and expenses incurred in representing Senator Coleman in these lawsuits.

The Commission has recognized that "the activities of candidates and officeholders may receive heightened scrutiny and attention in the news media." AOs 2008-07

and 1998-01. The Commission determined that a candidate or officeholder's need to respond to intense media scrutiny would not exist irrespective of the candidate's campaign or duties as a holder of federal office. Therefore, the Committee may use campaign funds to pay Senator Coleman's legal fees and expenses incurred in responding to the press regarding the FBI investigation, Senate Ethics Committee complaints and the Texas and Delaware lawsuits.

The Committee may also use campaign funds to pay certain miscellaneous legal expenses, including copying and phone calls, to the extent that those expenses relate to legal fees the Commission has determined may be paid with campaign funds.

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—Isaac J. Baker

AO 2009-13

Political Committee Status of Consultants Serving LLCs Who Make Independent Expenditures

A communications consulting company established as a Limited Liability Company (LLC) may serve as a commercial vendor to a single-member, natural-person LLC that makes independent expenditures concerning federal elections or candidates without triggering political committee status. This consulting company may also serve as a commercial vendor to two or more of these LLCs without triggering political status assuming that it does not facilitate communications between the LLCs and does not convey information from one LLC to another.

Background

Black Rock Group (BRG) is an LLC that assists its clients, including CEOs, elected officials and Fortune 500 companies, in building public policy campaigns through communication, "earned media" and grassroots messaging. BRG intends to extend these strategic communication and general consulting services to single-member, natural-person LLCs established for the sole purpose of making independent expenditures that expressly advocate the election or defeat of one or more federal candidates.

The LLCs that BRG plans to work with will all be established for the sole purpose of making independent expenditures supporting or opposing federal candidates. BRG will only work with an LLC if it consists of a sole member and manager, is treated as a disregarded entity (not as a corporation) for federal income tax purposes, receives all capital contributions solely from the personal funds of its only member, accepts no donations from any other individual or entity and engages in no for-profit business activities.

Each single-member, natural-person LLC will spend more than $1,000 per calendar year on independent expenditures expressly advocating the election or defeat of one or more federal candidates via television, radio, direct mail, phone banks and print ads. In no case will any communication be funded by more than one LLC. However, in some cases more than one LLC may make independent expenditures for or against the same federal candidate. Neither BRG nor its LLC clients nor any other vendor providing services to each LLC will coordinate any communications with any federal candidate or political party committee. The same BRG personnel will service all of the LLCs, and BRG will manage other consultants such as pollsters, media production and placement companies and other communication vendors who will provide services to each LLC. BRG will not have firewalls preventing BRG personnel advising one LLC from discussing that client's private plans and activities with staff advising another LLC. BRG anticipates facilitating certain communications between LLCs by, for example, scheduling meetings or conveying messages between them.

Analysis

Treatment of LLC as an Individual. Under the Federal Election Campaign Act (the Act) and Commission regulations, contributions and independent expenditures made by a single-member, natural-person LLC are treated as if they were made by an individual. 2 U.S.C. §431(8) and (9); 11 CFR 110.1(g). In AO 2009-02, the Commission determined that independent expenditures made by an LLC with a sole natural person member should be treated as if they were made by that member. Because the LLC is a third party and is not the requestor of this advisory opinion, the Commission could not state in advance that the LLC at issue would have the same kind of unity with the sole member of the LLC demonstrated in AO 2009-02. However, for purposes of this advisory opinion, the Commission assumed that the LLC to which BRG is providing its services will be similar in all material respects to the single-member LLC addressed in AO 2009-02. Therefore, the single-member, natural-person LLCs addressed by this opinion are treated as individuals, not as "political committees" under the Act.

Political Committee Status of BRG. This advisory opinion addresses two "political committee" status issues: first, the possible status of BRG as a political committee and, second, the status of BRG and one single-member, natural-person LLC as a "group of persons" constituting a "political committee." The Act and Commission regulations define "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. §431(4)

(A); 11 CFR 100.5(a). The Supreme Court limited the scope of the term to organizations that are controlled by a federal candidate or whose major purpose is the nomination or election of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

The request, as well as the information available on BRG's website, indicates that BRG is organized and operated for commercial purposes, and not for purposes of nominating or electing a candidate. BRG is a vendor of communication consulting services to a range of clients. BRG indicates that it has not in the past advocated the election of any federal candidate, supported any political party or stated any political purpose, and does not plan to do so in the future. BRG is neither owned nor controlled by any federal candidate. Therefore, the Commission concludes that BRG is not itself a political committee.

BRG and one single-member, natural-person LLC as a Group of Persons. Although BRG will advise its LLC client on message development and the communication of its views on federal candidates, it offers similar consulting services to its non-political clients by advising them on media strategy, message campaigning and building public policy campaigns. The LLC will retain ultimate control over the timing, content, method and candidate referenced in each communication constituting an independent expenditure, and BRG itself will not pay for any communications. The relationship between BRG and its LLC client is consistent with that of a commercial vendor, defined by Commission regulations as "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services." 11 CFR 116.1(c). The consulting services BRG will provide to its LLC client are consistent with its usual and normal business practice; thus, BRG and its LLC client will not constitute a "group of persons."

Political Committee Status of BRG and Multiple LLCs. Assuming that none of the LLCs directly communicate with one another and that BRG does not facilitate communication between them, the Commission agreed that there was nothing to suggest that either the LLCs or the LLCs together with BRG would be a political committee. The Commission has previously concluded that individuals using a common commercial vendor did not constitute a "group of persons" and thus were not a political committee. See AO 2008-10. In that advisory opinion, the requestor represented that it did not facilitate communications or arrangements among its clients. If BRG does not facilitate communication between any of its LLC clients or otherwise convey any information about one LLC to any other LLC, BRG will simply be establishing a separate commercial relationship with each individual LLC, and the LLCs or the LLC together with BRG will not become a political committee. The Commission did not address whether any agreements or collaboration between the LLCs that does not involve BRG would result in the creation of a political committee.[1]

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—*Christopher B. Berg*

AO 2009-15 Candidate Committee May Accept Contributions for Potential Special Election

An authorized committee of a candidate may accept contributions that may be used for a special or emergency election or runoff in 2009 or 2010, even though an election has not been scheduled and may not occur.

Background

Bill White is the current mayor of Houston, Texas, and also a candidate for election to the U.S. Senate from Texas in 2012. Bill White for Texas (White Committee) is Mayor White's Senatorial campaign committee registered with the FEC. Currently, Senator Kay Bailey Hutchison holds the Senate seat that will be contested in the 2012 primary and general elections. However, Senator Hutchison has indicated that she will not be a candidate for re-election in 2012, and she has formed a committee under Texas law to raise funds in order to run for Governor of Texas in 2010. Senator Hutchison has publicly discussed the possibility of resigning from her Senatorial seat during the course of the gubernatorial campaign.

Under Texas law, if Senator Hutchison were to resign from the Senate before her term expires, a special election to fill that seat may be scheduled for November 3, 2009, May 8, 2010, or November 2, 2010, depending on the timing of her resignation. However, the Governor of Texas may schedule an "emergency election" on another date to fill the vacancy if the Governor determines that an emergency exists. The Governor has considerable discretion in deciding whether to call an emergency election.

Regularly scheduled primary and general elections for the Senate seat will be held in 2012. In those elections, if no candidate receives a majority in the party primary elections, a runoff will be held. In that case, it is possible that Mayor White could be a candidate in up to five elections for the same U.S. Senate seat between now and November 2012: a special election in 2009 or 2010; a runoff for that election; the 2012 Democratic party primary; a primary runoff for that election; and a general election in November 2012. The White Committee requests guidance concerning how it may raise funds for these potential and future elections.

Analysis

Undesignated contributions. Commission regulations permit the White Committee to use undesignated contributions for a Senate special election that is called after the contribution is made. The Federal Election Campaign Act (the Act) and Commission regulations permit individuals to contribute up to $2,400 "with respect to any election." Under Commission regulations, "with respect to any election" means: (1) in the case of a contribution designated in writing by the contributor for a particular election, the election so designated; and (2) in the case of a contribution not designated in writing by the contributor, the next election for the federal office after the contribution is made. 11 CFR 110.1(b)(2).

Under the circumstances presented in the advisory opinion, a special election that has been called would be the next federal election after the undesignated contribution is made by the contributor. Therefore, the undesignated contribution may be used for that election, but subject to the reporting requirements described below under "Reporting."

Contributions designated by the contributor. Contributors may alternatively designate up to $2,400 for a special Senate election if one is held, or for the 2012 primary election if there is no special Senate election. Additionally, contributors may alternatively designate up to $2,400 for either a runoff election following the special Senate election if a runoff is held, or to the 2012 general election if there is no such runoff.

Commission regulations allow designation of contributions by a contributor for "a particular election." 11 CFR 110.1(b)(2), (3) and (4). The Commission concludes that designations for the special election and for the runoff would qualify as being designated for "a particular election," because the Governor is required by law to call a special election and the likelihood of the occurrence of a special or election is sufficiently real in this situation. Although the designations present these particular elections in the alternative (*i.e.* (1) the special election if held before 2012 and, if a special election is not held, the 2012 primary; or (2) the special election runoff if held before 2012 and, if a special election and runoff are not held, the 2012 general election), the specific use of the contribution will be clear to both the White Committee and the contributor.

The White Committee should use an acceptable accounting method to distinguish between the contributions received for each of the two elections, for example, by designating accounts for each election or maintaining separate books and records for each election. 11 CFR 102.9(e)(1).

If Senator Hutchison were to announce her resignation and a special election was called, the designations that the White Committee had received for the special election would be treated as designations for the special election or runoff. At that point, the contributions designated for the special election could no longer be considered to be designated for the 2012 regularly scheduled elections. After the end of any pre-2012 elections (special or runoff) in which Mayor White actually participates as a candidate, the White Committee may use surplus funds for the 2012 primary election. 11 CFR 110.3(c)(4).

Redesignations. With respect to a contribution to the White Committee that exceeds $2,400 and that is made before a special election is called, the Committee may use a form that states that $2,400 would be used for the first election and $2,400 "for any subsequent election."

If at the time the contribution is made Senator Hutchison has not resigned (and therefore no special or runoff election is called), current contributors must conclude that the "first election" referenced in the form means the 2012 primary and that the second election would mean the 2012 general election. Accordingly, barring any further instruction from a contributor, the first $2,400 contributed would be designated for the 2012 primary election and any remaining amount up to $2,400 would be considered designated for the 2012 general election.

Contributions that are already designated must be redesignated by obtaining a written instruction from the contributor; simply issuing a notice to the contributor informing him or her of the redesignation will not suffice. Therefore, if the White Committee wishes to use contributions that have been designated for the 2012 primary and general elections for a 2009 or 2010 special election or runoff once the special election is called, the White Committee must first obtain written contributor redesignations for the special election or runoff in accordance with Commission regulations. See 11 CFR 110.1(b)(5)(ii)(A)(1) and (2).

Contributions designated for a Special or Runoff Election that does not occur. If the White Committee raises money for a special election and the special election does not occur, Commission regulations require those contributions to be refunded to the contributor within 60 days of the last date that a special election may be scheduled under Texas law, unless the White Committee receives a written redesignation or combined redesignation and reattribution from the contributor. 11 CFR 110.1(b)(3)(i)(C). Likewise, although the Committee may accept contributions designated for the runoff once it is apparent that a special election will occur, it may not use those contributions unless Mayor White participates in the runoff as a candidate. Contributions that are designated for an election that does not occur, or in which a person is not a candidate, must be refunded, redesignated or reattributed accordingly.

Reporting. If a contributor designates a contribution to be made with respect to a particular special or runoff election and a particular 2012 election, the White Committee should indicate on Schedule A either a "Primary" contribution or a "General" contribution for the 2012 elections and include a memo text stating either (1) "Designated for special or emergency election if scheduled before 2012" or (2) "Designated for special or emergency election runoff if scheduled before 2012." Such reporting reflects the use of the contributions as they are intended by the contributor at the time the contribution is made.

If Senator Hutchison announces her resignation, and Mayor White becomes a candidate in a special election called by the Governor, the White Committee must inform the Commission that the contributions are considered to be designated for the special election or the runoff election. Under the current circumstances, where the White Committee is attempting to deal with uncertainty as to the proper way to designate contributions in an unusual electoral situation, the Commission considers it to be sufficient for the White Committee to file amended reports, simply indicating the proper designations of the contributions. The Commission recommends that to avoid any confusion, the White Committee include a memo text specifically referencing this advisory opinion.

In the case of undesignated contributions, in the event that a special election is called, the White Committee should similarly file amended reports for these contributions.

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—Myles Martin

AO 2009-19
PAC May Use Contributor Information for Limited Communication

A separate segregated fund may use contributor information obtained from reports filed with the Federal Election Commission to notify contributors to Senator Arlen Specter's 2010 Senate reelection campaign that the Senator has switched his party affiliation and has publicly offered to refund contributions upon request.

Background

On April 28, 2009, Pennsylvania Senator Arlen Specter announced he had decided to switch his party affiliation and to run as a Democrat for the 2010 Senate election. Senator Specter stated that he would return campaign contributions made during the 2010 election cycle upon request.

Club for Growth (Club) is an incorporated nonprofit membership organization, and Club for Growth PAC (Club PAC) is the separate segregated fund of the Club.

The Club and Club PAC wish to communicate with individual contributors to the Specter Committee to inform them of Senator Specter's decision to run as a Democrat in the 2010 election. The Club and Club PAC propose to compile a list of contributors from information contained in campaign finance reports that the Specter Committee has filed with the Commission. The communication would notify contributors about Senator Specter's stated policy of providing refunds upon request to those who contributed to his campaign while he was running as a Republican. Club PAC indicated that the communication would not contain any express advocacy or mention any other candidate.

Either the Club or Club PAC would send a one-time letter to Specter's contributors or, alternatively, for those contributors with published phone numbers, the Club or Club PAC may make one telephone call.

The communications would not contain any solicitation of any kind for the Club, Club PAC, any candidate or any other entity. No follow up mailings or telephone calls would be made unless, during the initial telephone call, the contributor requests further information from the Club or Club PAC on how to request a refund. The communications would be made independently of any candidate or political party.

The Club and Club PAC would not use the list for any purpose other than the communication proposed in the advisory opinion request, and would not retain the list for any other purpose. The Club and Club PAC would not put any of the contact information obtained from the Specter Committee's Commission filings into either the Club or the Club PAC's general membership database. The Club and Club PAC would not make the list of contributors to the Specter Committee available to any other entity.

Analysis

Under the Federal Election Campaign Act (the Act) and Commission regulations, political committees are required to file reports with the Commission identifying the names and mailing addresses of their contributors. 2 U.S.C. §§434(b)(2)(A) and (b)(3)(A); 11 CFR 104.8(a). The Act provides that the Commission shall make reports and statements filed with it available for public inspection and copying within 48 hours of receipt. Any information copied from such reports or statements, however, "may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes," other than using the name and address of a political committee to solicit contributions from that political committee. 11 CFR 104.15(a). Under Commission regulations, "soliciting contri-

butions" includes soliciting any type of contribution or donation, such as political or charitable contributions. 11 CFR 104.15(b).

In AO 1981-05, the Commission concluded that a candidate could use information obtained from disclosure reports to mail letters to contributors to his opponent's campaign to correct allegedly defamatory charges made by his opponent. In Advisory Opinion 1984-02, a nonconnected political committee calling itself "Americans for Phil Gramm in 84" solicited contributions without the permission of Phil Gramm or his authorized campaign committee. The Commission concluded that Representative Gramm and his authorized campaign committee could use contributor information contained in Americans for Phil Gramm in 84's disclosure reports to inform contributors that the nonconnected committee was not Phil Gramm's authorized committee.

In these AOs, the Commission pointed out that the purpose of the sale and use prohibition is to prevent contributor information from being used for commercial purposes or for making solicitations. The prohibition does not, "foreclose the use of this information for other, albeit political, purposes, such as correcting contributor misperceptions." (AO 1984-02.)

In this advisory opinion the Commission noted that the Club and Club PAC will not solicit contributions for any reason and will not use the contributor information for any commercial purpose. The Club and Club PAC will use contributor information obtained from the Specter Committee's disclosure reports only for the limited purpose of notifying contributors that Senator Specter has switched parties and of his refund policy. Each donor will only be contacted once. Also, the Club and Club PAC indicated that they will safeguard the contributor information obtained from the reports to avoid using the contributor information for any purpose not presented in the advisory opinion request.

Therefore, in this limited situation, the Commission concludes that the use of contributor information obtained from the Specter Committee's disclosure reports does not violate the solicitation and commercial use prohibition at 2 U.S.C. §438(a)(4).

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—Isaac J. Baker

AO 2009-20 Federal Officeholder May Use Campaign Funds to Pay Certain Legal Fees of Current and Former Staff Members

A federal officeholder may use campaign funds to pay legal fees and expenses incurred by current and former staff members in connection with a federal investigation of allegedly improper campaign contributions because the fees would not exist irrespective of the officeholder's campaign or duties as a federal officeholder. However, the use of campaign funds to pay for any such employee's representation in legal proceedings regarding allegations that are not related to the Congressman's campaign activity or duties as a federal officeholder would constitute an impermissible personal use of campaign funds.

Background

Representative Visclosky is the U.S. Representative from the First District of Indiana. Visclosky for Congress (the Committee) is Rep. Visclosky's principal campaign committee.

According to provided media reports, the FBI and federal prosecutors are investigating whether a lobbying firm, PMA Group, made improper political contributions to Rep. Visclosky and other members of the U.S. House of Representatives. Although many of the details of the federal investigation are not public at this time, media reports indicate that the investigation centers on more than $500,000 in alleged campaign contributions from PMA Group and its clients to three Congressman, including Rep. Visclosky. The media reports also indicate that Rep. Visclosky allegedly improperly earmarked appropriations for clients of PMA. As part of the ongoing federal investigation, Rep. Visclosky's former Chief of Staff has been served with a grand jury subpoena to produce documents.

Analysis

The Federal Election Campaign Act (the Act) identifies six categories of permissible uses of campaign funds, including otherwise authorized expenditures in connection with the candidate's campaign for federal office, ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of federal office and any other lawful purpose not prohibited by the Act. 2 U.S.C. §§439a(a), (b) and 11 CFR 113.2(a)-(e). The Act prohibits "personal use" of campaign contributions by any person. 2 U.S.C. §439a(b)(1) and 11 CFR 113.2(e). The Act specifies that conversion to personal use occurs when a contribution or amount is used to "fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 2 U.S.C. §439a(b)(2); see also 11 CFR 113.1(g).

The Commission determined that the Committee may use campaign funds to pay legal fees and expenses incurred by Rep. Visclosky's current and former staff members in connection with a federal investigation into the alleged provision of illegal campaign contributions by PMA Group and its clients to the Committee, and Rep. Visclosky's allegedly improper earmarking of appropriations for clients of PMA, as well as any other legal proceedings that

involve the same allegations. Rep. Visclosky's current and former staff members are involved in the federal investigation because of their current and former employment relationships with Rep. Visclosky in his capacity as a U.S. Congressman and a candidate.[1] Therefore, the Commission concluded that the current and former staff members' legal fees and expenses associated with the federal investigation would not exist irrespective of Rep. Visclosky's campaign or duties as a federal officeholder. The Committee may not, however, use campaign funds to pay legal fees or expenses regarding allegations unrelated to Rep. Visclosky's campaign or duties as a federal officeholder.

The Commission noted that, because many of the details of the federal investigation are not public at this time, it is possible that portions of the investigation could involve allegations not related to Rep. Visclosky's campaign or his duties as a federal officeholder. The use of campaign funds to pay any such legal fees would be impermissible. See AOs 2009-10 and 2005-11. In accordance with the Act and Commission regulations, the Committee must maintain appropriate documentation of any disbursements made to pay legal expenses incurred in connection with the federal investigation or other legal proceedings. 11 CFR 102.9(b) and 104.11. The Committee must report all funds disbursed for such legal expenses as operating expenditures, noting the payee's full name, address and a detailed description of the purpose of the payment. 11 CFR 104.3(b)(2) and (4).

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—Katherine Wurzbach

AO 2009-21 FECA Preempts West Virginia Law Affecting Federal Candidates

The Federal Election Campaign Act (the Act), preempts a West Virginia law insofar as it limits polling expenditures by federal candidates and their principal campaign committees.

Background

West Virginia law allows political committees to pay for a limited number of election expenses. Allowed expenses include public opinion polls, which are prohibited from being "deceptively designed" or conducted in a manner that would influence anyone polled to vote for or against "any candidate, group of candidates, proposition or other matter to be voted on by the public at any election." Furthermore, Chapter 3 of the West Virginia Code, concerning elections, explicitly applies to "every general, primary, and special election in which candidates are nominated or elected" and defines "any election" or "all elections" to include elections for federal offices.

In response to a complaint from a citizen alleging that Ms. Anne Barth, a candidate for the 2nd Congressional District of West Virginia, and Anne Barth for Congress (the Barth Committee), her principal campaign committee, conducted a poll in violation of West Virginia Code 3-8-9(a)(10), the West Virginia Secretary of State sought information about the poll from both the Barth Committee and the polling company. Counsel for the Barth Committee responded that federal law preempts West Virginia law on this subject, citing AO 1995-41. The Secretary of State maintained that state laws held jurisdiction in the matter and sought an advisory opinion to that effect, asking if the West Virginia statute regulating spending for election expenses by political committees is preempted by the Act or Commission regulations with respect to federal candidates.

Analysis

The Act and Commission regulations preempt West Virginia law insofar as it purports to regulate spending by federal candidates and their principal campaign committees. The Act states that its provisions and rules "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. §453; see also 11 CFR 108.7(a). The legislative history indicates that Congress intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that Federal law will be the sole authority under which such elections will be regulated." *HR Rep. No 93-1239*, 93d Cong, 2d Sess. 10 (1974).

Moreover, in promulgating regulations at 11 CFR 108.7, which address Commission regulations' effect on state law, the Commission stated that federal law supersedes state law with respect to the organization and registration of political committees supporting federal candidates, disclosure of receipts and expenditures by federal candidates and political committees and the limitations on contributions and expenditures regarding federal candidates and political committees. See *Explanation and Justification of the Disclosure Regulations*, *House Document No. 95-44*, at 51 (1977). In contrast, the manner of qualifying as a candidate or political organization, the date and place of election, voter registration, voting fraud, ballot theft, candidate financial disclosure, or funds used to purchase or build a state or local party office building are left exclusively to the jurisdiction of the states. See *H.R. Rep. No. 93-1438* at 69, 100-101 and 11 CFR 108.7(c).

[1] *In a previous Advisory Opinion, the Commission concluded that the allegations relate to Rep. Visclosky's campaign and duties as a federal officeholder because Rep. Visclosky allegedly received the contributions in question as part of his campaign and his alleged actions regarding the congressional appropriations process are directly related to his duties as a federal officeholder. See AO 2009-10.*

In this case, the West Virginia statute at issue limits expenditures by federal political committees (including candidate committees), which is one of the areas specifically regulated by the Act and Commission regulations. Furthermore, the West Virginia statute does not address any of the areas that Congress intended to leave exclusively to the jurisdiction of the states (the manner of qualifying as a candidate or political organization, date and place of election, voter registration, voting fraud, ballot theft, candidate financial disclosure, or funds used to purchase or build a State or local party office building).

Accordingly, the West Virginia statute is expressly preempted by federal law with respect to federal elections. 2 U.S.C. §453; 11 CFR 108.7(b)(3).

Commission regulations govern permissible and prohibited expenditures by federal candidates, including expenditures for polling expenses. 11 CFR 100.131-155, 106.2, 106.4, 113.2, 116.2, 116.11 and 116.12. With respect to this request, the West Virginia statute, if applied to federal candidates, would impede those candidates' ability to make payment of polling expenses governed by the Act and Commission regulations. Under the Act's preemption clause, only federal law could limit the ability of a federal candidate to make expenditures for polling. 2 U.S.C. §453.

Similarly, in AO 2000-23, in which the Commission concluded that because a New York statute limited state party expenditures regarding federal candidates, rather than "those areas defined as interests of the State," the New York law was preempted by the Act and Commission regulations.

Therefore, the Commission concludes that, because West Virginia. Code 3-8-9 limits expenditures by candidates and their principal campaigns that are otherwise lawful under the Act and Commission regulations, the West Virginia statute is preempted where federal candidates and their principal campaign committees—such as Ms. Barth and the Barth Committee—are concerned.

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—Christopher Berg

AO 2009-26

Federal Candidate May Fund Certain Activities from State Campaign Account

Illinois State Representative Elizabeth Coulson, who is also a federal candidate for the U.S. House, may use her state campaign committee funds or her state office account to sponsor a seniors fair and to mail postcards publicizing that event because those activities are not in connection with any federal or nonfederal election. She may also use her state campaign account or her state office account to pay for a "health care legislative update" letter because the letter is also not in connection with any federal or nonfederal election. Neither the postcards nor the letter would constitute "coordinated communications" under Commission regulations.

Background

Elizabeth Coulson is an Illinois State Representative and a candidate for the U.S. House in 2010. Coulson for Congress (Federal Committee) is Representative Coulson's principal campaign committee. The Coulson Campaign Committee (State Campaign Committee) is Rep. Coulson's state campaign committee. Under Illinois law, Rep. Coulson also receives an office allowance (State Office Account) for the purpose of defraying official office, personnel and constituent services expenses. Illinois law allows state candidates to raise funds in connection with state races from corporations and labor organizations and raise funds from individuals without limits. At least some of the donations in the State Campaign Committee exceed the limitations set by the Federal Election Campaign Act (the Act) or come from sources which are prohibited by the Act.

Rep. Coulson plans to undertake three activities: 1) to organize a "seniors fair"; 2) to mail a postcard publicizing the seniors fair; and 3) to mail a "health care legislative update" letter to health care professionals in her state legislative district.

Seniors Fair. Rep. Coulson plans to organize a "seniors fair" at a local community center in her district. The purpose of this event is to promote health and safety programs available to seniors in Rep. Coulson's state legislative district. Rep. Coulson has sponsored similar seniors fairs for the past eight years in her role as a state officeholder. Rep. Coulson states that this event will not be used to expressly advocate her election or to promote or support her federal candidacy, nor will it be used to attack or oppose any of her federal election opponents. The seniors fair will not be used for any federal election activity, nor will Rep. Coulson or her agents solicit any contributions at the seniors fair.

Promotional Postcard. Additionally, Rep. Coulson will mail approximately 12,000 postcards to seniors in her district publicizing the seniors fair that she plans to organize. The postcard will note the date, time and location of the seniors fair, in addition to the telephone number of Rep. Coulson's district office that the recipients may call for more information about the fair. The contents, timing and distribution of the planned postcard mailing will be the same in all material respects as in previous years when Rep. Coulson was not a federal candidate. Rep. Coulson plans to pay for the mailing with funds from her State Office Account or the State Campaign Committee's account.

Legislative Update. Finally, Rep. Coulson also plans to mail a "legislative update" letter to approximate-

ly 4,000 health care professionals in her legislative district which describes various health care legislative proposals being considered by the Illinois legislature. As with the postcard, the contents, timing and distribution of the planned mailing will be the same in all material aspects as in previous years when Rep. Coulson was not a federal candidate, and Rep. Coulson plans to pay for the mailing with funds from her State Office Account or her State Campaign Committee account.

Analysis

Seniors Fair. Rep. Coulson may sponsor the seniors fair because the event is not in connection with any federal or nonfederal election and it does not involve making any "public communications" as defined by the Act. 2 U.S.C. §431(22). The seniors fair also does not result in the making of any contributions to Rep. Coulson.

Federal candidates, their agents and entities directly or indirectly established, financed, maintained or controlled by, or acting on behalf of, federal candidates, may not raise or spend funds in connection with federal elections unless those funds are subject to the limitations, prohibitions and reporting requirements of the Act. 2 U.S.C. §441i(e)(1)(A) and 11 CFR 300.61. Also, federal candidates, their agents and entities directly or indirectly established, financed, maintained or controlled by, or acting on behalf of, federal candidates, may not raise or spend funds in connection with nonfederal elections unless those funds are subject to the limitations and prohibitions of the Act. 2 U.S.C. §441i(e)(1)(B) and 11 CFR 300.62. Since Rep. Coulson is a federal candidate and her state committee acts on her behalf, Section 441i(e) would apply to the seniors fair if it were in connection with any federal or nonfederal election. The Commission has previously stated, "if the funds are not raised or spent in connection with an election, then the funds do not fall within the scope of Section 441i(e)." See AO 2003-20.

Although Rep. Coulson is a federal candidate and the State Campaign Committee is established, financed, maintained or controlled by Rep. Coulson, the Commission concludes that the seniors fair is not in connection with any federal or nonfederal election, because the event will not be used to solicit any contributions for Rep. Coulson, nor will any information about the participants be provided to Rep. Coulson's Federal Committee. The event will not involve any express advocacy of Rep. Coulson's election or the defeat of her opponents, nor will it be used for any "federal election activity" as defined in 2 U.S.C. §431(20) and 11 CFR 100.24.

Similarly, the Commission concludes that the seniors fair is not in connection with any nonfederal election. Rep. Coulson is not a candidate for state office and the seniors fair will not be used to solicit any donations to Rep. Coulson's State Campaign Committee. The event will rather be held as a service to Rep. Coulson's constituents and will be consistent with similar events that Rep. Coulson has held in previous years when she was not a candidate for federal office.

Since the seniors fair is not in connection with any federal or nonfederal election and will not involve public communications or the solicitation of contributions, Rep. Coulson may use nonfederal funds to pay for any costs associated with sponsoring this event.

Promotional Postcard. Rep. Coulson may also pay for postcards publicizing the seniors fair using funds in her State Office Account or her State Campaign Committee because, as with the seniors fair, the postcards are not in connection with any federal or nonfederal election and because the postcards would not be "coordinated communications." Instead, the postcards will promote an event that the Commission determined is not in connection with a federal or nonfederal election.

The Act and Commission regulations prohibit a state officeholder from spending funds for a public communication that clearly identifies a federal candidate and promotes or supports a candidate unless the funds are subject to the limitations, prohibitions and reporting requirements of the Act. 2 U.S.C. §441i(f); 2 U.S.C. §431(20)(A)(iii). The postcards would be "public communications" under the Act and the postcards would clearly identify Rep. Coulson.[1] However, the Commission concluded that the postcards, as proposed, do not promote, attack, support or oppose (PASO) any candidate for federal office. Although the postcards clearly identify Rep. Coulson, the Commission has previously determined that the mere identification of an individual who is a federal candidate does not, in itself, PASO that candidate. See AOs 2007-34, 2007-21, 2006-10 and 2003-25. The postcards do not PASO Rep. Coulson, and no other candidate is clearly identified in their proposed contents. As such, Rep. Coulson is not required to pay for the costs of this mass mailing with federal funds.

Furthermore, the Commission concluded that the payment for the postcards by the state campaign committee would not constitute a coordinated communication because the communication would not meet the "payment prong" of the Commission's three-prong test for determining coordination. If the communication were determined to have been coordinated, the payment for the communication would be considered an in-kind contribu-

[1] A public communication includes any communication by means of a mass mailing. A "mass mailing" is defined as "a mailing…of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period." 2 U.S.C. §431(23) and 11 CFR 100.27.

tion from the person paying for the communication to the candidate or committee with whom it was coordinated. 11 CFR 109.21.

Under the first prong of the definition of coordinated communication, a communication is only subject to the regulations if it "is paid for, in whole or in part, by a person other than that candidate, authorized committee, or political party committee." 11 CFR 109.21(a)(1). Under this scenario, the postcards would be paid for by Rep. Coulson's State Office Account or her State Campaign Committee. In AO 2007-01, the Commission concluded that the payment prong was not met if a U.S. Senator's former state campaign committee paid for solicitations for the purpose of retiring debts remaining from her previous candidacies for state offices, because "the candidate and her agents are paying for these communications." Thus, since the postcards are being paid for by Rep. Coulson and her agents, the payment prong of the coordination test is not met.

Legislative Update Letter. Rep. Coulson may also use either her State Office Account or her State Campaign Committee to pay for the "health care legislative update letter" because the letter is not in connection with any federal or nonfederal election and it similarly does not PASO any federal candidate. As with the proposed postcard described above, Section 441i(e) would only apply to Rep. Coulson if the activity involved were in connection with any federal or nonfederal election, including any federal election activity described at 11 CFR 100.24. The letter describes Illinois State legislative developments to health care professionals residing in Rep. Coulson's district, and it neither solicits any donations nor expressly advocates Rep. Coulson's election, or the defeat of any of her opponents. As such, the Commission concluded that it is not in connection with any election.

With respect to the Commission regulations on "coordinated communications," the Commission concluded that, like the postcard proposal described above, the health care letter would not constitute a coordinated communication because the letter would not satisfy the "payment prong" of the coordination three-part test because Rep. Coulson and her agents would be paying for the communication. 11 CFR 109.21(a)(1).

Date Issued: November 6, 2009; Length: 10 pages.

—Myles Martin

AO 2009-32 Proposed Sale of Art on Behalf of Committees is Not a Contribution

An individual who conducts a web-based business as a sole proprietor may sell artwork as fundraising items for political committees and provide the political committees with solicitation e-mails. The sale of these fundraising items, and the provision of the solicitation e-mails, would not constitute contributions from the sole proprietor to the political committees as long as the fee received by the sole proprietor is the usual and normal charge.

Background

The requestor, Richard Jorgensen, operates a web-based business as a sole proprietor. Through this website, Dr. Jorgensen sells, among other things, prints of President Barack Obama and Secretary of State Hillary Clinton. Dr. Jorgensen sells these prints for $49.95 plus $5 for shipping and handling.

Dr. Jorgensen proposes to enter into agreements with political committees to sell these prints as fundraising items. Dr. Jorgensen plans to draft solicitation e-mails promoting the artwork and provide those solicitation e-mails to the committees he deals with. The political committees can request changes to the solicitation e-mails or customize them. Dr. Jorgensen will charge the political committees a fee for providing the solicitation e-mails, and the committees will disseminate the e-mails through their own distribution lists.

The e-mails will contain images of the products offered for sale and hyperlinks to purchase the products from Dr. Jorgensen's website. The hyperlinks will contain an embedded ID tag, unique to each political committee, so that purchases resulting from each committee's fundraising efforts can be appropriately credited to that committee and contributor information can be collected and forwarded to the political committee for reporting purposes. Dr. Jorgensen will request and provide to the committees information from contributors, including their names, addresses and the amount of their purchases and, for contributors whose purchases exceed $200, their occupations and employers.

For sales made through the proposed arrangements with political committees, the price will be marked up by an amount that Dr. Jorgensen and the political committee agree upon, so that Dr. Jorgensen will receive the same dollar amount he would receive from any other sale. When purchases are made from the website, payment will be collected via PayPal Pro, and deposited on a weekly basis into a separate bank account for each political committee. From those accounts, funds will be sent to the artist for the prints and shipping costs, to PayPal Pro for transaction fees and to Dr. Jorgensen for his commissions. The political committees will retain the remaining amount.

Analysis

Dr. Jorgensen asked the Commission whether he could provide solicitation e-mails to the political committees without the provision of those e-mails constituting a contribution to the political committees. The Commission determined that Dr. Jorgensen could provide solicitation e-mails to the political commit-

tees, and that his provision of those e-mails would not constitute contributions to the political committees as long as Dr. Jorgensen receives the usual and normal charge for such services. Under Commission regulations, the "usual and normal charge" for services means the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered. 11 CFR 100.52(d)(2). As long as the fee for drafting the solicitation e-mail is commercially reasonable at the time the service is provided, it will constitute the "usual and normal charge" and therefore not result in a contribution. The Commission also determined that Dr. Jorgensen could sell artwork on behalf of political committees as fundraising items, and that his provision of the artwork will not constitute a contribution to the purchasing committees because the commission Dr. Jorgensen proposes to receive is the usual and normal charge in a commercially reasonable transaction.

Dr. Jorgensen proposes to sell the artwork for $49.95 in addition to a markup to be agreed upon with the political committees and a $5 fee for shipping and handling. The Commission determined that Dr. Jorgensen will not be making contributions to the political committees because the amount he will receive on sales to the political committees would be the same amount he would receive on sales that are not made to political committees. 11 CFR 100.52(d). Because the political committees will receive funds from individual contributors and not from Dr. Jorgensen's sole proprietorship, the transactions will not result in contributions from Dr. Jorgensen. See, e.g., AO 2008-18.

The Commission noted that the political committees participating in this proposed plan will authorize Dr. Jorgensen as their agent to receive contributions, and, therefore, Dr. Jorgensen will be subject to certain recordkeeping and reporting obligations. 11 CFR 102.9. Dr. Jorgensen will have to request and forward to the political committees the name and address of any person contributing more than $50, and the date and full amount of the contribution, as well as the occupation and employer of anyone who contributes more than $200 to a particular committee. 2 U.S.C. §432(c); 11 CFR 102.9(a). Also, Dr. Jorgensen will have to forward the contributions, along with the required contributor information, to the treasurer of the recipient committee within the required time period. 2 U.S.C. §432(b)(1); 11 CFR 102.8(a).

Date Issued: January 29, 2010; Length: 5 pages.

—Isaac J. Baker

AO 2010-01 State Party Activity on Behalf of Presumptive Nominee

Payments by the Nevada State Democratic Party (the State Party) for campaign materials may be exempt from the definitions of "contribution" and "expenditure" if the materials are distributed by volunteers on behalf of the State Party's presumptive nominees.

Background

The State Party plans to purchase campaign materials to be used in connection with volunteer activities on behalf of candidates seeking to become the State Party's nominees in the general election. Specifically, the State Party plans to have volunteers distribute campaign materials on behalf of federal candidates whom the State Party believes will either run unopposed in the Nevada primary election, or whom the State Party believes are "assured of winning the nomination." The State Party asked whether these proposed disbursements will be exempt from the Federal Election Campaign Act's (the Act's) definitions of "contribution" and "expenditure."

Analysis

Under the Act and Commission regulations, certain disbursements by a state or local committee of a political party are exempt from the definitions of "contribution" and "expenditure" when they are made in connection with volunteer activities. 2 U.S.C. §§431(8)(B)(ix) and (9)(B)(viii); 11 CFR 100.87 and 100.147. This "volunteer materials exemption" is limited in several respects. In this instance, the most important limitation is that the materials purchased by the state or local party committee must be used in connection with volunteer activities "on behalf of nominees of such party." 2 U.S.C. §§431(8)(B)(ix) and (9)(B)(viii); 11 CFR 100.87, 100.147.

Although neither the Act nor Commission regulations define the term "nominee," the Commission has previously determined that the volunteer materials exemption may apply before the nominee is formally selected through the primary process if the party is able to identify its nominee "as both a matter of fact and as a matter of state law." See Matter Under Review (MUR) 4471.

Under Nevada law, a candidate of a major political party must be nominated in the primary election. In 2010, the Nevada primary will be held on June 8th. However, the the period to file as a candidate in the primary closes on March 12, 2010, in effect closing the ballot and establishing the field of candidates seeking major party nominations. At this point, any candidate of the State Party who is on the state ballot and has no primary opponent will be the State Party's presumptive nominee. Any candidate who does have an opponent in the primary will not be the State Party's presumptive nominee.

Therefore, payments made by the State Party Committee, for materials that are used in connection with volunteer activities on behalf of candidates not facing primary challengers, will qualify for the

volunteer exemption if those activities take place after March 12. These payments will not count against the State Party's coordinated party expenditure limit or $5,000 per candidate contribution limit. 2 U.S.C. §441a(a) and §441a(d). By contrast, payments made by the State Party, for materials that are used in connection with volunteer activities on behalf of candidates, will not qualify for the volunteer materials exemption if those activities take place before March 12, 2010. Such payments would either count against the State Party's contribution limit or its coordinated party expenditure limit, if the expenditures are in connection with the general election.

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Length: 5 pages.

—Christopher B. Berg

AO 2010-03

Members of Congress May Solicit Nonfederal Funds for Redistricting Trust

The activities of a trust established to raise funds for pre-litigation and litigation costs arising from the next redistricting process are not considered to be in connection with an election. Therefore, Members of Congress may solicit funds on behalf of the trust outside the limitations and source prohibitions of federal law.

Background

The National Democratic Redistricting Trust (the Trust) was established by individuals, not Members of Congress, to raise funds to pay for the pre-litigation and litigation costs of the next legislative redistricting process. The Trust is run by a trustee and an executive director, neither of whom are Members of Congress. The Trust is not directly or indirectly established, financed, maintained or controlled by any Member of Congress, any authorized candidate committee or any national, state, district or local party committee.

The Trust does not seek to fund attempts to directly influence elections. No funds raised will be used to pay for communications that expressly advocate the election or defeat of any clearly identified candidate for office. The solicitations of funds will not expressly advocate the election or defeat of any clearly identified candidate.

The Trust asked if Members of Congress could solicit funds on its behalf. These solicitations would request funds that do not comply with the amount limitations or source prohibitions of the Federal Election Campaign Act (the Act). Solicitations by Members of Congress would not advocate the election or defeat of any candidate for office.

Analysis

The Bipartisan Campaign Reform Act of 2002 (BCRA) and Commission regulations prohibit federal candidates and officeholders from soliciting, receiving, directing, transferring or spending any funds in connection with an election for federal office unless such funds are subject to the limitations, prohibitions and reporting requirements of the Act. 2 U.S.C. §441i(e)(1)(A); 11 CFR 300.61. BCRA and the Commission's regulations also prohibit federal candidates and officeholders from soliciting, receiving, directing, transferring or spending any funds in connection with an election other than an election for federal office unless the funds are consistent with the Act's amount limitations and source prohibitions. 2 U.S.C. §441i(e)(1)(B); 11 CFR 300.62.

To determine whether Members of Congress can solicit nonfederal funds on behalf of the Trust, the key question is whether the federal candidate or officeholder is soliciting funds in connection with an election, be it a federal or nonfederal election. If the funds being solicited are not raised or spent in connection with an election, they do not fall under the scope of 2 U.S.C. §441i(e).

Since the passage of BCRA, the Commission has addressed the issue of whether certain activities are considered to be in connection with an election. The Commission cited AO 2005-10, in which the Commission found that federal candidates and officeholders were not prohibited from raising funds for committees formed solely to support or oppose ballot measures, including a ballot measure specifically related to redistricting. The committees, as described by the AO requester, were not established, financed, maintained or controlled by a federal candidate, officeholder or anyone acting on their behalf, or by any party committee. No federal candidates appeared on the same ballot as the ballot measure.

The Commission also cited AO 2003-15, in which the Commission found that a federal candidate's costs for defending against a lawsuit seeking a special general election were not in connection with any election.

In this case, the Trust seeks to engage in litigation over the redistricting process that will govern how the electoral process is conducted in the future. BCRA does not directly address whether redistricting activities are considered to be activities "in connection with" elections. The Commission determined that, although the outcome of redistricting can have political consequences, funds raised and spent on the litigation process surrounding redistricting are not "in connection with" the actual elections.

The Commission concluded that donations to the Trust for the sole purpose of paying the pre-litigation and litigation costs associated with reapportionment and redistricting legal matters are not in connection with any election under 2 U.S.C. §441i(e)(1)(A) and (B). Therefore, the funds are not subject to the limitations and prohibitions of the Act and, accordingly, a Member of Congress may solicit unlimited funds on behalf of the Trust for the purposes

of paying the legal expenses associated with the Trust's redistricting efforts.

Date Issued: May 7, 2010;
Length: 5 pages.

—Isaac J. Baker

AO 2010-05

Sale of Ad Time on a Foreign-Owned Television Station

Starchannel Communications, Inc. (Starchannel), the domestic representative of Televisa, a Mexican broadcasting corporation, may sell advertising time on Televisa television stations to federal candidates. A prohibited contribution would not result from offering federal candidates the "Lowest Unit Charge" (LUC) for time slots on Televisa since it is the usual and normal charge for similar federal candidate advertisements in the market in which the advertisements will be aired.

Background

Starchannel is a Delaware corporation that sells advertising time slots on television broadcast stations in Mexico that are owned by Televisa. The broadcast stations that carry these ads broadcast into markets in areas of Texas that are located on the border between the United States and Mexico ("U.S. border market"). Through a contractual agreement, Starchannel acts as the exclusive representative of Televisa in the sale of advertising time in the U.S. border market. The contract states that Starchannel may not negotiate a price with a buyer for an advertising time slot that is lower than the Televisa-established minimum price, but it may negotiate higher prices. The two corporations are independent of each other and Televisa does not exercise any ownership or control over Starchannel.

Starchannel wishes to expand its business by selling advertising time slots on Televisa's broadcasting stations to federal candidates. Starchannel plans to offer federal candidates the LUC for time slots on Televisa. Starchannel does not believe it is required to offer federal candidates the LUC because Televisa is a Mexican corporation.[1] Nevertheless, Starchannel plans to offer the LUC because, in its business judgment, it could not otherwise compete with American television stations that offer advertising time to federal candidates at the LUC. Starchannel plans to require federal candidates to comply with all paperwork, disclaimer and other requirements of the Communications Act and Federal Communications Commission regulations, just as if the ads were being run on a U.S. station.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations prohibit foreign nationals, including foreign principals such as partnerships, associations, corporations, organizations or other combination of persons, from making a contribution or donation of money or other things in connection with a federal, state or local election. 2 U.S.C. §441e(a)(1)(A) and 22 U.S.C §611(b)(3); see also 11 CFR 110.20(b). The Act also prohibits corporations from making contributions in connection with any federal election. 2 U.S.C. §441b(a).

Any gift, subscription, loan, advance or deposit of money or "anything of value" made by any person for the purpose of influencing a federal election is a "contribution." 2 U.S.C. §431(8)(A)(i) and 11 CFR 100.52(a); see also 2 U.S.C. §441b(b)(2) and 11 CFR 114.2(b)(1). "Anything of value" includes goods or services provided without charge or at less than the "usual and normal charge." 11 CFR 100.52(d)(1). "Usual and normal charge" means the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time the services were rendered. 11 CFR 100.52(d)(2).

Based on the information provided by Starchannel, the Commission concluded that it does not appear that Televisa would be providing any goods or services at less than the usual and normal charge. Under Televisa's contract with Starchannel, Televisa establishes a minimum price for advertising time that does not depend upon the identity of the buyer. Because Televisa's role in the sale of advertising time remains the same and conforms to its usual and normal business practices regardless of the buyer's identity, Televisa would not be making a contribution under the plan.

With respect to Starchannel, the Commission noted that Starchannel plans to offer advertising time to federal candidates using the same business practices in which it customarily engages when offering advertising time to other customers, except that it plans to offer federal candidates the LUC even if it is not required to do so under 47 U.S.C. §315(b) and 47 CFR 73.1942.

The Commission concluded that Starchannel may sell advertising time on Televisa stations to federal candidates at the LUC, consistent with the Act and Commission regulations, under the specific facts present here. Because Starchannel plans to offer the LUC only to federal candidates who comply with all relevant requirements of the Communications Act, these federal candidates would be entitled to receive the LUC from a U.S. broadcaster for advertisements airing in the U.S. border market, even if Starchannel is not required to offer them the LUC. Thus, the LUC reflects the usual and normal charge for Communications Act-compliant candidate advertising

[1] *The Communications Act sets certain requirements for U.S. broadcasters providing advertising time to federal candidates. See 47 U.S.C. §315 and 47 CFR 73.1942.*

in the U.S. border market. 11 CFR 100.52(d). Further, the LUC represents the commercially reasonable rate prevailing for ads complying with the Communications Act at the time the ads are broadcast. 11 CFR 100.52(d)(2). Thus, Starchannel also would not be making a contribution under the plan by charging the LUC.

Accordingly, the Commission ruled that no contribution would result from the sale of advertising time to federal candidates on behalf of Televisa at the LUC rate for ads that comply with the Communications Act.

Date issued: May 27, 2010;
Length: 6 pages.

—Stephanie Caccomo

AO 2010-07

Members of Congress May Solicit Funds for State Ballot Measure

Members of Congress may solicit funds on behalf of a state ballot measure in the state of California outside the amount limitations and source prohibitions of the Federal Election Campaign Act (the Act) during the period before the initiative qualifies for the ballot. After the initiative qualifies for the ballot, Members of Congress may solicit funds within the amount limitations and source prohibitions of the Act and may also solicit up to $20,000 from individuals on behalf of the state ballot measure. The Commission was unable to agree on whether, during the post-qualification period, Members of Congress may solicit donations of more than $20,000 and from persons other than individuals.

Background

Yes on FAIR is a ballot measure committee in the state of California that has applied to the Internal Revenue Service for recognition as a section 501(c)(4) organization under Title 26 of the Internal Revenue Code. Karen Bass, who is currently a federal candidate (and state officeholder), is identified in Yes on FAIR's official name.[1] However, the requestor maintains that Yes on FAIR was not directly or indirectly established by, and is not financed, maintained or controlled by, any federal candidate or officeholder.

The requestor represents that Yes on FAIR's sole purpose is to support the qualification and passage of the Financial Accountability In Redistricting Act (FAIR Act), a proposed ballot initiative, for the statewide November 2, 2010, general election ballot.

Once the ballot initiative has qualified for the general election ballot in California, Yes on FAIR intends to engage in "an extensive campaign to promote the FAIR Act's passage," including, among other things, get-out-the vote programs specifically designed to get the measure's supporters to the polls on election day. Yes on FAIR maintains that their campaign advertisements will not promote, support, attack or oppose any federal candidate or result in coordinated communications under Commission rules.

Analysis

Members of Congress may solicit funds outside the amount limitations and source prohibitions of the Act and Commission regulations on behalf of Yes on FAIR during the period before the initiative qualifies for the November ballot. The Act prohibits federal candidates and officeholders, their agents and entities directly or indirectly established, financed, maintained or controlled by them or acting on their behalf from raising and spending funds in connection with an election unless the funds are consistent with the limitations and prohibitions contained in the Act. 2 U.S.C. §441i(e)(1) and 11 CFR 300.61 and 300.62. The Commission concludes under the facts of this advisory opinion that 2 U.S.C. §441i(e)(1) does not apply to solicitations on behalf of the initiative before it qualifies for the ballot.

Members of Congress may also solicit funds within the limitations and prohibitions of the Act on behalf of Yes on FAIR after the initiative qualifies for the ballot. However, the Commission is unable to agree on whether Members of Congress may solicit funds outside the Act's limits and prohibitions.

Finally, the Commission concludes that Members of Congress may solicit up to $20,000 from individuals on behalf of Yes on FAIR after the initiative has qualified for the ballot.[2] However, as discussed above, the Commission is unable to agree on whether Members of Congress may solicit funds outside the Act's limitations and prohibitions after the initiative qualifies for the ballot.

Date Issued: June 14, 2010;
Length: 4 pages.

—Myles Martin

[1] The requestor's full name is Yes on FAIR, a coalition of entrepreneurs, working people, Karen Bass, and other community leaders devoted to eliminating bureaucratic waste of taxpayer dollars on the political game of redistricting committee ("Yes on FAIR"). The requestor represents that California state law requires that the official name of a ballot initiative committee identify state officeholders who have contributed $50,000 or more to the committee. Ms. Bass is a California State legislator, and state political committees associated with her have made two contributions to Yes on FAIR totaling $50,000. Subsequently, Ms. Bass decided to run for election to the U.S. House of Representatives from California.

[2] The Act contains an exception to the limitations of 2 U.S.C. §441i(e)(1) that applies to solicitations for specific types of federal election activity on behalf of certain tax exempt organizations, provided that the solicitations are made only to individuals and do not seek more than $20,000 per individual. 2 U.S.C. §441i(e)(4) and 11 CFR 300.65.

AO 2010-15

Candidate May Receive Refund from His Committee

A candidate who made undesignated contributions to his authorized campaign committee and is not a candidate in the general election may receive refunds, even though the contributions were reported as primary election contributions.

Background

Douglas Pike was a first-time Democratic candidate for the House of Representatives in the May 18, 2010, primary in Pennsylvania's Sixth District. In December of 2009 Mr. Pike gave $340,000 in personal funds to Pike for Congress, his principal campaign committee (the Committee). In March he made another contribution of $100,000. Neither of these contributions was designated for a particular election, although the candidate maintained they were intended for the general election.

In its year-end 2009 report and its April 2010 quarterly report, the Committee reported these two of Mr. Pike's contributions as primary election contributions. Mr. Pike made other contributions to the Committee, totaling more than $600,000, which Mr. Pike maintains were meant for the primary election, and were reported as such.

After losing the primary, Mr. Pike was no longer a candidate. Therefore, the committee refunded all the contributions it received for the general election from other contributors. After doing so, the Committee had no outstanding debts and almost $550,000 leftover in its account. The Committee asked if it could refund contributions totaling $440,000 to Mr. Pike.

Analysis

Despite the fact that the candidate's undesignated contributions made on December 31, 2009, and March 31, 2010, were treated as primary election contributions and therefore are not required to be refunded as excessive contributions, they may be refunded to the candidate.

The Federal Election Campaign Act (the Act) provides that candidates may contribute an unlimited amount of their personal funds to their campaign committees. 11 CFR 110.10; AOs 1985-33 and 1984-60. Contributions that are not specifically designated by the contributor for use in a particular election are considered to be for the next election for that federal office. 11 CFR 110.1(b)(2)(ii). In Mr. Pike's case, his contributions were undesignated and made before the primary election. As the next election was the May 2010 primary election, the Committee correctly reported Mr. Pike's contributions as having been made for the primary election.

Under Commission regulations, a contributor, including a candidate, may request a refund for a primary election contribution, and the candidate committee is free to make such a refund. In its advisory opinion, the Commission noted that the Committee had no outstanding debts, had already refunded the contributions it received for the general election from other contributors and had enough cash on hand to make the refund.

While the Act contains a restriction on converting campaign funds to personal use, the proposed refund would not violate this personal use ban. 11 CFR 113.2(e). The Committee may therefore refund Mr. Pike's contributions and must report the refund in accordance with the Act and Commission regulations.

Date Issued: August 26, 2010; Length: 4 pages.

—Isaac J. Baker

AO 2010-17

Undesignated Contributions May Be Applied to General or Special Election

A Congressional candidate who is running in both a special and general election that are being held on the same day may treat undesignated contributions as contributions made for the general election or for the special election. The candidate committee may divide undesignated contributions between the two elections as long as those contributions do not exceed the contributor's combined limit for both elections. If the combined contribution limits for both elections are not exceeded, no redesignation is necessary.

Background

Stutzman for Congress (the Committee), is the principal campaign committee of Marlin Stutzman, a Republican candidate in Indiana's Third Congressional District. The incumbent holder of that office, Representative Mark Souder, won the Republican primary election on May 4. After the primary, Representative Souder resigned from office. Indiana's governor then scheduled a special election to fill Souder's office. That special election will be held on November 2, which is the same day as the general election. The winner of the special election will serve the remainder of Representative Souder's term of office. The candidate elected in the general election will serve the next full two-year term of office.

The Republican Party held a caucus to nominate a candidate for the special election and a new candidate for the general election. Stutzman was nominated as the Republican Party candidate for both of those elections. Stutzman is campaigning in both elections and the Committee anticipates it will receive undesignated contributions that exceed the Federal Election Campaign Act's (the Act) contribution limits for a single election. The Committee

wishes to redesignate the excessive portion of those contributions from the general election to the special election without seeking written redesignations from the contributors.

Analysis

The Commission determined that the Committee may apply undesignated contributions to the general election or to the special election. As long as those contributions do not exceed the contributor's combined limit for both elections, the Committee may divide the contributions between the two elections. The Committee need not seek a redesignation from the contributor if the combined contribution limits for both elections are not exceeded.

Individuals may contribute up to $2,400 to a candidate "with respect to any election for Federal office." 11 CFR 110.1(b)(1). These contributions limits "apply separately with respect to each election." 2 U.S.C. §441a(a)(6); 11 CFR 110.1(j)(1). The Act and Commission regulations define "election" to include both a general election and a special election.

Under the Act and Commission regulations, an undesignated contribution is considered a contribution for the next election for that federal office. 11 CFR 110.1(b)(2)(ii). In these circumstances, because the special election and the general election for the same federal office will be held on the same day, both elections are considered "the next election" for purposes of treating undesignated contributions. In this situation, although the federal office sought by Mr. Stutzman is the same in both elections, each election will fill a vacancy for a different term of that office. AO 1984-42 dealt with a similar situation in the State of Kentucky, which held a special election for a Congressional district seat on the same day as the general election. The Commission concluded in that opinion that each election is subject to a separate contribution limit.

In AO 1986-31, the Commission addressed a nearly identical situation: North Carolina held a special election on the same day as the general election for the same Senate seat after the incumbent Senator John East died in office. In that case the Commission concluded that a candidate's authorized committee could treat undesignated contributions as made with respect to either election or divide them between the two elections as long as the contributor did not exceed the combined contribution limits for both elections. The Commission also determined that the committee did not need to seek redesignations from contributors.

Therefore, in this case, the Committee may treat undesignated contributions as made with respect to either election or as divided between the two elections. This means the Committee may accept up to the contributor's combined $4,800 limit for both elections ($2,400 for the special election and $2,400 for the general election). Accordingly, the Committee does not have to seek written designations or redesignations for these contributions from the contributors. However, undesignated contributions that exceed the contributor's combined contribution limits for both elections are prohibited to the extent they exceed the combined limits.

Date Issued: September 23, 2010; Length: 4 pages.

—Isaac J. Baker

AO 2010-26 Campaign Funds May be Used for Moving-Related Storage Costs

A retiring Member of Congress may use campaign funds to pay for temporary storage costs associated with his move from Washington, D.C., back to his home state. These expenses arise from the ordinary and necessary duties of a federal officeholder, and can therefore be paid with campaign funds.

Background

Representative Brian Baird plans to retire from Congress when the current term ends, and return to his home state.

To prepare for the move, the Baird family has placed nearly half of the items from its Washington, D.C. residence into a storage facility. These items will remain in storage from mid-August to mid-December 2010. Baird for Congress, the Congressman's principal campaign committee, seeks to pay the storage costs with campaign funds.

The Baird family is paying the full, normal rate for the storage and neither Representative Baird nor his family members have any personal, commercial or political relationship with the storage company.

Analysis

The Federal Election Campaign Act (the Act) prohibits personal use of campaign funds. The Act and Commission regulations define "personal use" as the use of funds "to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 2 U.S.C. §439a(b)(2), 11 CFR 113.1(g).

The Act and Commission regulations provide a non-exhaustive list of items that are considered *per se* personal use. 11 CFR 113.1(g)(1)(i)(A)-(J). For items not on that list, such as the storage expenses incurred by Representative Baird and his family, the Commission determines on a case-by-case basis whether the expense is considered "personal use."

In previous advisory opinions, the Commission has addressed whether Members of Congress can use campaign funds to move themselves, their family members and their household and office furnishings between Washington, D.C. and their home states. AOs 1980-138, 1987-11, and 1996-14. In each case, these expenses were considered to

be in connection with the duties of a federal officeholder, meaning the personal use ban did not apply.

In keeping with these precedents, the Commission found the costs of temporarily storing the Baird family's household items to be part of the moving process, and thus ordinary and necessary expenses in connection with Representative Baird's duties as a holder of federal office. As a result, Baird for Congress may use campaign funds to pay the storage expenses.

The Committee must report the payments as "other disbursements."

Date Issued: November 18, 2010; Length: 4 pages.

—Isaac J. Baker

AO 2010-27 Transfers Between Authorized Committees

The principal campaign committee for a Presidential ticket may transfer general election funds to retire debts from the Vice-Presidential nominee's Presidential primary campaign.

Background

Former Senator Joseph Biden was a candidate in 2008 for the Democratic nomination for President. His principal campaign committee, Biden for President ("BFP"), received public financing for his campaign for the Presidential nomination. On January 3, 2008, former Senator Biden ended his campaign for the Presidential nomination.

On August 27, 2008, the Democratic Party nominated former Senator Barack Obama for President and former Senator Biden for Vice President for the upcoming general election. In September 2008, the Obama for America ("OFA") campaign committee amended its Statement of Organization to list the former Senators as the candidates on whose behalf it would operate. OFA did not elect to receive public financing for the 2008 Presidential primary or general elections.

Following the 2008 Presidential election, the Commission conducted a mandatory audit of BFP pursuant to the rules at 2 U.S.C. §9038(a) and 11 CFR 9038.1. The Commission approved findings requiring BFP to make $133,105 in payments to the U.S. Treasury within 30 days of issuance of the Final Audit Report ("FAR") and to make a payment to the U.S. Treasury for $85,900 in stale-dated checks, which has not yet occurred. The Commission has not yet issued the Final Audit Report. BFP does not have enough cash on hand to pay its outstanding debts and obligations, including the expected payments to the U.S. Treasury.

BFP and OFA asked the Commission whether OFA may transfer $138,000 to BFP pursuant to 11 CFR 110.3(c)(4), or in the alternative, may OFA pay BFP's debts. The requestors also asked whether the Commission would toll the running of BFP's 30-day deadline to make payments to the U.S. Treasury.

Analysis

The Commission concluded that OFA may transfer funds to BFP pursuant to 11 CFR 110.3(c)(4) to cover BFP's net debts, including its expected payments to the U.S. Treasury.

The Commission noted that the Federal Election Campaign Act ("the Act") does not limit the transfers of funds between principal campaign committees of a candidate seeking nomination or election to more than one federal office so long as: (1) such a transfer is not made when the candidate is actively seeking nomination or election to both such offices; (2) the contribution limits are not exceeded by such a transfer; and (3) the candidate has not elected to receive public financing. 2 U.S.C. §441a(a)(5)(C). Commission regulations provide two sets of rules for transfers between a federal candidate's authorized federal campaign committees.

The Commission determined that the rules at 110.3(c)(5) concerning dual-candidacy transfers do not apply since former Senator Biden's candidacies were not concurrent. He withdrew from the Presidential race on January 3, 2008 and his Vice Presidential candidacy did not begin until August 27, 2008. The Commission noted that former Senator Biden's principal campaign committee for his 2008 Senate candidacy is not at issue because he does not seek to transfer funds to or from Citizens for Biden.

The Commission found that the transfer rules at 110.3(c)(4), which permit unlimited transfers between previous and current federal campaign committees or between two previous federal campaign committees, would apply. The Commission noted that both BFP and OFA would fulfill the definition of previous federal campaigns as they were organized to further former Senator Biden's campaigns for the 2008 Presidential nomination and Vice-Presidency, respectively. 11 CFR 110.3(c)(4)(i).

Since OFA was former Senator Biden's principal campaign committee for the 2008 Presidential general election, OFA must be able to demonstrate that the transferred funds consist only of general election funds. OFA must also be able to demonstrate that they do not include contributions made in violation of the Act. 11 CFR 110.3(c)(4).

Finally, the Commission noted that the transferred funds do not need to be aggregated with contributions to BFP from the same contributor and would not be aggregated for purposes of the contribution limits at 11 CFR 110.1, 110.2. However, under the rules at 110.3(c)(4)(iii), contributions that make up the transferred funds would still need to be aggregated with contributions from the same contributor for the next election unless the contributions were designated for another election, and the candidate has net debts outstanding for the election so designated.

Since OFA may transfer funds to BFP, the Commission found the requestors' question about OFA paying BFP's debts moot. The Commission also found the question on tolling the 30 day deadline moot as the FAR has not been issued.

Date issued: November 18, 2010;
Length: 6 pages.

—Stephanie Caccomo

AO 2010-28 State Party Refund to Federal Campaign Not a Contribution

A state party committee may refund all or a portion of funds transferred to it by a federal campaign committee without making a contribution subject to the limitations of the Act.

Background

Indiana Democratic Congressional Victory Committee (the State Committee) is registered with the Commission as a state committee of a political party. Hoosiers for Hill is the principal campaign committee of Representative Baron Hill, a candidate for the U.S. House of Representatives for the 9th Congressional District of Indiana.

On September 14, 2010, Hoosiers for Hill transferred $34,600 to the State Committee's federal account to be used for general party projects on behalf of its candidates in connection with the 2010 general election. Because the State Committee will not be engaging in the activities, Hoosiers for Hill requested a full refund of the transfer. The State Committee asks if it may refund all or a portion of the funds transferred to it by Hoosiers for Hill without making a contribution subject to the limitations of the Federal Election Campaign Act (the Act).

Analysis

A candidate's authorized committee may transfer an unlimited amount of campaign funds to a national, state or local party committee. *See* 2 U.S.C. §439a(a)(4) and 11 CFR 113.2(c). These provisions do not limit the purposes that any transferred funds may be put to, nor do they restrict the amount that may be transferred. Furthermore, such transfers are not subject to the contribution limitations of 2 U.S.C. §441a(a)(1)(D) or 11 CFR 110.1(c)(5).

Although the Act and Commission regulations provide for the refund of a contribution, the Commission acknowledged that the regulations do not address the specific question presented here. *See* 2 U.S.C. §434(b)(4)(F), 2 U.S.C. §434(b)(5)(E), 11 CFR 103.3(b). Instead, the Commission cited two advisory opinions where it previously held that a refund could be made notwithstanding the fact that the amount of the refund would exceed the applicable contribution limits. In Advisory Opinion 2002-08, the Commission permitted a state exploratory committee to refund $700,500 to the federal candidate's principal campaign committee. It concluded that the refund was permissible because the federal committee raised the funds within the limits and prohibitions of the Act, and the state committee kept the funds in a segregated account and had not commingled the funds with nonfederal funds. In Advisory Opinion 1995-43, the Commission determined that a refund by a law firm of $150,000 in legal fees that were paid by a federal candidate would not be a contribution to the candidate because the scope of the services to be provided by the law firm had been "materially altered" from those originally contemplated by the parties.

In this case, the Commission found that Hoosiers for Hill transferred the funds from its federal account to the State Committee's federal account, and determined that the transferred funds had not been commingled with nonfederal funds. The Commission also concluded that the transfer was made with the understanding that the State Committee would undertake certain activities that it did not, which materially altered the circumstances justifying the transfer. Finally, the Commission concluded that, since the transfer occurred just weeks before the committees requested an advisory opinion and well within the 30- and 60-day deadlines for refunding contributions under 11 CFR 103.3(b), the parties were seeking a refund rather than making a contribution subject to the Act.

If the State Committee decides to refund the transferred funds to Hoosiers for Hill, the Commission advised the State Committee and Hoosiers for Hill to maintain appropriate documentation of the transaction and to disclose the refund in their reports. Since the reporting forms do not have a method for reporting the specific refund here, the Commission advised the State Committee to report its refund to Hoosiers for Hill on Form 3X, Schedule B, Line 28c. Hoosiers for Hill should report the receipt of the refund on Form 3, Schedule A, Line 15. The committees should also include memo text in their reports explaining the circumstances of the refund.

Date Issued: October 27, 2010;
Length: 4 pages.

—Zainab Smith

AO 2011-01 Funds Received and Spent by Legal Defense Fund not Contributions or Expenditures

A legal defense fund may be established to pay the costs incurred by a Congressional campaign committee in defending against a copyright infringement and misappropriation lawsuit. The monies received and spent by the fund would not be "contributions" or "expenditures" as defined in the Federal Election Campaign Act (the Act) and Commission regulations.

Background

Robin Carnahan for Senate (the Committee) is the principal campaign committee for Ms. Carnahan, who was a candidate in the 2010 Senate election in Missouri. On September 15, 2010, Fox News Network, LLC, and Chris Wallace filed a complaint against the Committee alleging that an ad aired by the Committee that contained footage of a Fox News interview infringed Fox News' copyright, invaded Mr. Wallace's rights of privacy and publicity and misappropriated his likeness and persona (the Fox News lawsuit). The litigation was recently settled by the parties. The Committee's costs to defend the lawsuit total more than $85,000, and may continue to accrue until the settlement is finalized.

The Committee proposes that a separate legal defense fund (the Fund) be established to defray the Committee's legal costs. The Fund would be independent from the Committee and would not be administered or controlled by the Committee. The Committee would not be involved in soliciting donations to the Fund. None of the individuals involved in establishing, administering or operating the Fund would be federal candidates or federal officeholders. Solicitations for the Fund, either in person or in writing, would be accompanied by a letter stating the purpose of the Fund and noting that no amounts given to the Fund would be used for the purpose of influencing any federal election. Solicitations for the Fund would be conducted separately from any solicitations for the Committee or any other federal political committee. The Fund plans to accept unlimited amounts from individuals, political committees, corporations and labor organizations. The Fund would terminate once all legal costs were paid, and any excess funds would be refunded or donated to charity.

Analysis

The Act and Commission regulations define the term "contribution" as any gift, subscription, loan, advance or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office. 2 U.S.C. §431(8)(A); 11 CFR 100.52(a). Similarly, the term expenditure is defined as any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made by any person for the purpose of influencing any election for federal office. 2 U.S.C. §431(9)(A); 11 CFR 100.111(a).

The Commission has previously concluded that funds received or disbursed for the purpose of defending against certain types of lawsuits are not for the purpose of influencing a federal election, and are therefore not contributions or expenditures. *See* AOs 1981-16, 1981-13 and 1980-04.

The money received and disbursed by the Fund would be strictly for the purpose of paying the Committee's legal costs in connection with the Fox News lawsuit. Specifically, this money would compensate the Committee's counsel for legal services that enabled the Committee to present a defense to a civil complaint in a lawsuit alleging copyright infringement, invasion of privacy and right of publicity, and misappropriation of likeness and identity, and to settle the case. The proposed Fund would be established and administered separately and independently from the Committee. Solicitations for the Fund would be conducted separately from any solicitation for the Committee, and all amounts received by the Fund will be held separately from the Committee's funds. No amounts given to the Fund could be used for the purpose of influencing any federal election. Therefore such receipts and disbursements would not be "contributions" to, or "expenditures" by, the Fund, as defined in the Act and Commission regulations, nor would they be in-kind "contributions" from the Fund to the Committee.

Since the funds received and disbursed by the Fund are not contributions or expenditures, they are not subject to the source prohibitions, amount limitations or reporting requirements of the Act and Commission regulations

Accordingly, nothing in the Act or Commission regulations would limit or prohibit the Fund from receiving unlimited donations from individuals, political committees, corporations and labor organizations. Also, the Fund would not be required to register or file disclosure reports under the Act or Commission regulations.

Date Issued: February 17, 2011;
Length: 4 pages.

—Isaac J. Baker

AO 2011-02 Campaign Committee May Purchase Copies of Senator's Autobiography if Publisher Donates Royalties to Charity

The Scott Brown for U.S. Senate Committee (the Committee) may purchase copies of Senator Scott Brown's autobiography from the publisher at fair market value, and the publisher may donate Senator Brown's royalties from that purchase to charity. The Committee may additionally post a *de minimis* amount of material promoting the book on its website and social media sites. Senator Brown may also reimburse the Committee personally for the fair market value of the rental of its mailing and e-mail lists to promote the book.

Background

Senator Brown will promote his book in a national book tour. His agreement with the publisher provides for the payment of advances as well as publishing royalties to be determined as a percentage of net sales revenue. Senator Brown and the Committee proposed a number of activities related to the book and the promotional tour.

First, the Committee wishes to purchase several thousand copies of the book for campaign-related activities, such as distributing the books as "thank you" gifts to campaign contributors and supporters. The Committee plans to purchase the books either at the bulk rate or at the usual retail price if the bulk rate is not available. The publisher, under normal industry practice, may make the bulk rate available to large purchasers. Senator Brown proposes to donate the royalties from the Committee's purchase of the book to a charitable organization. Alternatively, the publisher itself is willing to donate Senator Brown's royalties from this sale to a charitable organization.

Second, the Committee proposes to promote the book by posting information on the Committee's website. Under the Committee's proposal, this information would consume no more than 25 percent of its home page. The Committee also proposes to use the social media sites Facebook, Twitter and LinkedIn by posting promotional information about the book and Senator Brown's book tour.

Third, the Committee proposes to promote the book to individuals on the Committee's e-mail and mailing lists.

Fourth, when Senator Brown travels to promote the book on the national book tour, he proposes to host fundraising events for the Committee in the book tour cities. The travel costs of the book tour will be paid by the book's publisher.

Finally, the Committee proposes to have a campaign staffer collect e-mail addresses from people who attend Senator Brown's book-signing events while on the book tour. The Committee plans to use the e-mail addresses that it collects to apprise people of Committee news and activities and for fundraising.

Analysis

Campaign Purchase of Book. The Committee may use campaign funds to purchase copies of the book from the publisher at the fair market price under the proposal where the publisher donates to charity the amount that Senator Brown would have otherwise earned as royalties from that purchase.

The Federal Election Campaign Act (the Act) and Commission regulations prohibit the conversion of campaign funds by any person (including the candidate) to "personal use." 2 U.S.C. §439a(b); 11 CFR 113.1(g) and 113.2(e)(5). Under the Act, "a contribution or a donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 2 U.S.C. §439a(b)(2). In several previous Advisory Opinions, the Commission has considered whether an authorized committee's purchase of its own candidate's book is personal use. *See*, e.g. AOs 2006-18 and 2001-08. Here, the Committee's funds would be used to purchase the book solely for distribution as gifts to the Committee's financial contributors and political supporters, and thus would be used by the Committee only for the purpose of influencing Senator Brown's election to federal office. As in AO 2001-08, the publisher is willing to donate the resulting royalties to a charitable organization and not increase the royalty calculation that would go to the candidate.

Senator Brown may not personally accept royalties resulting from the campaigns purchase of his book, even if he then makes a charitable donation equal to that amount. Although the Act specifically allows campaign funds to be donated to a charity, it also provides that such a contribution or donation cannot be converted to personal use. 2 U.S.C. §439a(a) and (b)(1). Senator Brown must not receive any benefit, tangible or intangible, from the publisher's donation of the royalty amounts.

Promotional Information. The Committee may post a *de minimis* amount of material promoting the book on its website and on social media sites such as Facebook, Twitter and LinkedIn without violating the restriction of personal use of campaign funds. The use of an authorized committee's asset, such as the Committee's website, to promote the candidate's book would ordinarily constitute a prohibited personal use. However, the Commission has previously determined that the addition of one or two sentences of promotional material about a candidate's book to an authorized committee's website did not constitute personal use of campaign funds, since the amount of promotional material and the cost to the candidate's committee were *de minimis*. *See* AO 2006-07. The Commission concluded in this case that the Committee's proposal to devote up to 25 percent of the Committee website's homepage, Facebook page and LinkedIn page to book promotion, and up to 10 percent of the Committee's Twitter page, is not *de minimis*. The Committee may, however, consistent with Advisory Opinion 2006-07, post a *de minimis* amount of material on its own website and social media sites.

Committee E-mail and Mailing Lists. Senator Brown may personally reimburse the Committee for the fair market value of the rental of its e-mail and mailing lists, based on an independent list appraisal, and then use the e-mail and mailing lists to promote the sale of his book. Commission regulations provide that the transfer of campaign committee assets does not constitute personal use, provided that the transfer is for fair market value. 11 CFR 113.1(g)(3). The Commission has previously determined that a committee's mail-

ing lists are assets that have value and are frequently sold, rented or exchanged. *See*, e.g., AOs 2002-14 and 1982-41. Since Senator Brown will receive royalties from the sale of the book, the use of the Committee's e-mail and mailing lists for promotion of Senator Brown's book are subject to the personal use regulations. However, since Senator Brown proposes to reimburse the Committee personally for the fair market value of the lists, this will not result in prohibited personal use of campaign funds.

Travel Expenses. The Commission could not approve by the required four votes a response to the question of whether Senator Brown may host fundraising events in cities where the book's publisher pays his travel costs as part of the book's promotion.

Collection of E-mail Addresses by the Committee. The Commission could not approve by the required four votes a response to the question of whether the Committee could collect the e-mail addresses of people who attend the Senator's book-signing and promotional events for the purpose of soliciting contributions in the future.

Date Issued: February 17, 2011;
Length: 9 pages.

—Myles Martin

AO 2011-04 Candidate Position Papers Posted on Members-Only Section of Website

A nonprofit corporation may post candidate position papers on the members-only section of its website.

Background

The American Israel Public Affairs Committee (AIPAC) is a nonprofit 501(c)(4) corporation dedicated to maintaining and improving the bonds between the United States and Israel that the Commission has previously determined qualifies as a membership organization under 11 CFR 114.1(e). Although primarily a lobbying organization, AIPAC also encourages its members to be involved in campaign activities, such as volunteering for campaigns and making contributions. AIPAC compiles information on candidates and races for federal office, including the political history of the district or state, information about money raised by the candidates, public polling data, recent news about the race and a list of announced candidates for the office. AIPAC also compiles voting records of incumbents and encourages its members to review those records, but the organization does not itself rate or endorse candidates.

AIPAC would like to encourage all federal candidates to prepare position papers on the United States-Israel relationship, and asks the Commission if it can post the position papers unedited and in their entirety on a portion of its website that is accessible only to AIPAC members. The position papers would set forth the candidates' views on issues affecting the United States-Israel relationship and would not contain any express advocacy.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations prohibit corporations, including incorporated membership organizations, from making contributions in connection with a federal election. 2 U.S.C. §441b(a); 11 CFR 114.2(b). However, communications by a membership organization to its restricted class are exempt from the definition of contribution and expenditure, and an incorporated membership organization may communicate with its restricted class on any subject, including by making express advocacy statements. 2 U.S.C. §431(9)(B)(iii) and (8)(B)(vi); 11 CFR 114.1(a)(2)(x) and 114.3(a)(2).

The Commission concluded that AIPAC may post candidate-prepared position papers on a section of its website accessible only by its members. Because posting the position papers constitutes a permissible communication between AIPAC and its membership, the Commission concluded that any costs associated with posting the papers would not be contributions or expenditures.

The Commission pointed out that, although a membership organization must report the costs incurred that are directly attributable to an express advocacy communication to its membership if those costs exceed $2,000 for any election,[1] the member communications at issue do not contain express advocacy. Therefore AIPAC need not report any costs associated with the communications to the Commission. See 2 U.S.C. §431(9)(B)(iii); 11 CFR 114.3(b), 100.134(a) and 104.6(a).

Date: April 7, 2011;
Length: 4 pages.

—Zainab Smith

[1] *Communications containing express advocacy but that are "primarily devoted to subjects other than the express advocacy" need not be reported. 2 U.S.C. §431(9)(B)(iii); 11 CFR 114.3(b), 100.134(a) and 104.6(a).*

AO 2011-05
Use of Campaign Funds for Security Upgrades

Representative Lee Terry may use campaign funds to pay for enhanced security for his home. The payments would not be considered a prohibited personal use of campaign funds because the need for enhanced security stems from threats to Representative Terry stemming from his roles as a Member of Congress and as a candidate for federal office.

Background

Representative Terry is a member of the U.S. House of Representatives from Nebraska. Representative Terry was a federal officeholder and a candidate for re-election when, in October 2008, an individual became angry at receiving campaign literature from him and caused several disturbances at his Congressional office. After Representative Terry's staff informed the individual that he should contact the Committee to complain, the individual stated that he knew where Representative Terry's residence was and that he would go to the residence to complain. This led the local Sheriff's office to increase its patrol presence in Representative Terry's neighborhood.

Between December 2008 and April 2009, the individual escalated his behavior, first leaving voicemails with the Nebraska Governor's office indicating his intention to appear at Representative Terry's house, and then leaving campaign literature on Representative Terry's front step. The individual was incarcerated from March to August, 2010. Since his release from custody, the individual has been observed driving past Representative Terry's Congressional office and through Representative Terry's neighborhood.

Several security measures were recommended by the Capitol Police. Representative Terry asks if he could use campaign funds to offset the costs of installing those recommended security measures at his home.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations prohibit campaign funds from being converted to personal use by any person. 2 U.S.C. §439a(b)(1) and 11 CFR 113.2(e). For items not listed in the regulations as examples of personal use, the Commission determines on a case-by-case basis whether an expense would fall within the definition of "personal use." 2 U.S.C. §439a(b)(2)(A)-(I); 11 CFR 113.1(g)(1)(i).

The Commission has previously concluded that payments for a home security system under circumstances similar to those presented here do not constitute personal use under the Act and Commission regulations. AO 2009-08. In the facts at issue here, Representative Terry's campaign and his role as a Member of Congress appear to have motivated the individual to threaten him. The individual became angry at receiving campaign literature from Representative Terry, and left campaign literature addressed to him at the front step of his residence. The individual has stated to law enforcement that he is "striving against the abuse of power by public officials," and appears to have a history of stalking, harassment and threats. The individual may continue to pose a risk to Representative Terry and additional security measures, which are not intended to increase the value of Representative Terry's residence, have been recommended by authorities.

Based on these facts, the Commission concludes that the individual's actions would not have occurred had Representative Terry not been a Member of Congress or a candidate for re-election. The expenses for the proposed upgrades suggested by the U.S. Capitol Police would not exist irrespective of the Congressman's campaign or duties as an officeholder, and therefore, the use of campaign funds to pay the costs of the additional security measures would not constitute personal use of campaign funds under 2 U.S.C. §439a(b).

Date Issued: April 1, 2011;
Length: 5 pages.
—Christopher Berg

AO 2011-06
Vendor May Collect and Forward Contributions Without Making Impermissible Contribution

A vendor may collect contributions from a group of subscribers and forward them to recipient political committees. The vendor's services in collecting and forwarding these contributions do not amount to impermissible corporate contributions from the vendor. A convenience fee paid by the contributor to the vendor does not constitute a contribution by the contributor to any of the recipient political committees.

Background

Democracy Engine, LLC (the vendor) is the sole stockholder of Democracy Engine, Inc. Democracy Engine, Inc. is the connected organization of the separate segregated fund (SSF) Democracy Engine, Inc., PAC (the PAC). Mr. Jonathan Zucker and Mr. Erik Pennebaker are United States citizens who qualify as part of the restricted class of Democracy Engine, Inc., and therefore may be solicited by and contribute to the PAC. The vendor is a for-profit limited liability company offering a web-based payment service that provides "subscribers" with the opportunity to make contributions to federal political committees and donations to non-political entities. Mr. Zucker and Mr. Pennebaker plan to become subscribers and use the vendor's services.

A subscriber wishing to make a contribution using the vendor's service must first go to the vendor's

website and choose the intended recipient political committee and the amount of the contribution. If the recipient political committee is not already included in the vendor's directory of potential recipients, the vendor will add that recipient political committee to its directory. If the recipient political committee is an SSF, the vendor ensures that the subscriber is a member of the restricted class of the SSF's connected organization. The vendor does not solicit contributions for any political committee or other entity, nor does the vendor exercise any direction or control over any subscriber's choice of recipient political committees. If a subscriber designates a political committee as a recipient, the vendor informs the subscriber of the contribution limits established by 11 CFR 110.1. The vendor will not process contributions that the vendor determines or believes will exceed those limits.

The subscriber is required to provide information to the vendor that the recipient political committee must maintain or report, including the subscriber's name, mailing address, employer and occupation. 11 CFR 104.8(a). The vendor will forward this information to the recipient political committee.

The vendor deducts a convenience fee from the subscriber's payment before transmitting the remaining amount to the recipient political committee. The convenience fee covers all of the costs of the financial institutions involved in the credit card transaction and the vendor's costs, and provides a reasonable profit to the vendor. The vendor, and not the recipient political committee, pays the fees and costs to those financial institutions.

The vendor indicates that it will set the convenience fee in a commercially reasonable manner in accordance with market conditions with respect to all recipients, regardless of whether the recipient is a political committee or a non-political entity. This amount will reflect a complete payment of the vendor's costs plus an amount as profit. After the subscriber provides the vendor with the required information, attests to his or her ability to make the contribution and agrees to the terms of service, the vendor accepts the subscriber's payment by means of credit card, debit card or electronic check. The vendor then deposits the subscriber's contribution, via a vendor merchant account, into a vendor bank account that is completely separate from the vendor's corporate operating funds.

The vendor will transfer the subscriber's funds from its transfer account to the recipient political committee no later than ten days after the subscriber authorizes the contribution to the recipient political committee. The vendor will also forward all the necessary contributor information required for the recipient committees' reports.

Analysis

The Federal Election Campaign Act (the Act) and Commission regulations prohibit corporations from making a contribution in connection with federal elections. 2 U.S.C. §441b(a); 11 CFR 114.2(b)(1). A "contribution" includes, among other things, the provision of goods or services without charge or at a charge that is less than the usual and normal charge.

In this case, the vendor's services in processing subscribers' contributions to the committee and other recipient political committees would not result in impermissible corporate contributions by the vendor to those political committees because the vendor is not providing services or anything else of value to any recipient political committee.

The payment of the convenience fee will not relieve the PAC or any other recipient political committee of a financial burden that it would otherwise have had to pay for itself. Therefore, a subscriber's payment of the convenience fee would not constitute a contribution by the subscribers to the PAC or any other recipient political committee. Because the subscriber's payment of the convenience fee is not a contribution or any other form of receipt, the convenience fee does not need to be reported to the Commission.

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—Isaac J. Baker

AO 2011-07

Principal Campaign Committee May Pay Certain Campaign Consultant's Legal Fees

A principal campaign committee may use campaign funds to pay a campaign consultant's legal fees and expenses described in the advisory opinion request because the payment is for a lawful purpose that would not constitute personal use.

Background

Chuck Fleischmann is the U.S. Representative from the Third District of Tennessee. Chuck Fleischmann for Congress, Inc. (the Committee) is Representative Fleischmann's principal campaign committee. In the 2010 primary election, Representative Fleischmann won the Republican Party nomination for the Third District of Tennessee over his opponent, Robin Smith.

During the 2010 campaign, John Saltsman, Jr. was a consultant employed by S&S Strategies LLC. Through S&S Strategies LLC, Mr. Saltsman provided campaign advice to then-candidate Fleischmann. Mr. Saltsman has been sued by Mark Winslow, a former campaign staffer for then-candidate Robin Smith, for tortuous interference with a contractual relationship and defamation. Mr. Winslow's complaint alleges that Mr. Saltsman helped create attack ads directed at Ms. Smith and "improperly obtained" and disseminated to the press a confidential employment agreement between Mr. Winslow and his former em-

ployer, the Tennessee Republican Party. The complaint also alleges that then-candidate Fleishmann used the employment agreement to attack then-candidate Smith and that Mr. Saltsman made defamatory statements about Mr. Winslow. The complaint alleges Ms. Smith was defeated in large part due to Mr. Saltsman's actions.

The Committee has asked the Commission if it may use campaign funds to pay Mr. Saltsman's legal fees and expenses that arise from the Mr. Winslow's civil suit.

Analysis

The Federal Election Campaign Act (the Act) identifies six categories of permissible uses of campaign funds, including: (1) payments for expenses in connection with the candidate's campaign for federal office; (2) payments for ordinary and necessary expenses incurred in connection with the duties of the individual as a federal officeholder; and (3) for any other lawful purpose not prohibited by 2 U.S.C. §439a(b). 2 U.S.C. §439a(a); 11 CFR 113.2(a)-(e). However, campaign funds may not be converted to "personal use." 2 U.S.C. §439a(b)(1); 11 CFR 113.2(e). Personal use is any use of campaign funds "to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 2 U.S.C. §439a(b)(2). The Act and Commission regulations provide a non-exhaustive list of items that would constitute personal use. *See* 11 CFR 113.1(g)(1)(i)(A-J). For items not on this list, the Commission determines on a case-by-case basis whether the expense is personal use. Commission regulations specifically provide that "legal expenses" are subject to a case-by-case determination. 11 CFR 113.1(g)(1)(ii)(A).

The Commission noted that in previous advisory opinions, it has concluded that the use of campaign funds for legal expenses did not constitute personal use when the legal proceedings involved allegations directly related to the candidate's campaign or duties as a federal officeholder. See, e.g., AO 2009-20, 2009-10, 2008-07, 2006-35, 2005-11 and 2003-17. The Commission specifically cited to 2009-20, where it approved the use of campaign funds for legal fees of persons other than the candidate. In that case, Representative Visclosky's current and former congressional staff members received, or were expecting to receive, grand jury subpoenas related to a federal investigation of Representative Visclosky. The Commission concluded that the staffers' legal expenses would not exist irrespective of the Congressman's campaign or duties as a federal officeholder and could be paid using campaign funds.

In distinguishing the facts in AO 2009-20 from the facts here, the Commission pointed out that in 2009-20, although approving the use of campaign funds for the legal fees of persons other than the Congressman, the Congressman's alleged activity was the subject of the federal investigation. In this case, the basis of the lawsuit is the alleged activity of Mr. Saltsman, not Representative Fleishmann. Nonetheless, the Commission concluded that the legal fees and expenses involve allegations directly relating to campaign activities engaged in by Mr. Saltsman in his role as a campaign consultant for Representative Fleischmann's campaign. As a result, the lawsuit against Mr. Saltsman would not exist irrespective of Representative Fleischmann's campaign.

The Commission concluded that, to the extent that the legal proceedings derive from allegations directly relating to campaign activity, the Committee may use campaign funds to pay the campaign consultant's legal fees and expenses.

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—Zainab Smith

AO 2011-12

Fundraising by Candidates, Officeholders and Party Officials for Independent Expenditure-Only Political Committees

Federal candidates, officeholders and national party officers may solicit only those contributions that are subject to the Federal Election Campaign Act's (the Act's) amount limitations and source prohibitions when they solicit contributions on behalf of independent expenditure-only political committees (IEOPCs). Moreover, federal candidates, officeholders and officers of national party committees are limited to soliciting funds up to $5,000 for independent expenditure-only committees where those funds are from individuals and other sources not barred from making contributions.

Background

On January 21, 2010, the U.S. Supreme Court held in *Citizens United* that corporations may make unlimited independent expenditures and electioneering communications using corporate treasury funds. *Citizens United v. FEC*. 558 U.S. __, 130 S. Ct. 876 (2010). Shortly after the *Citizens United* decision, the U.S. Court of Appeals for the District of Columbia Circuit held that the Act's contribution limits are unconstitutional as applied to individuals' contributions to political committees that make only independent expenditures. *SpeechNow v. FEC,* 599 F.3d 686 (D.C. Cir. 2010). Consistent with the *Citizens United* and *SpeechNow* opinions, the Commission concluded in Advisory Opinion 2010-11 (Commonsense Ten) that IEOPCs may solicit and accept unlimited contributions from corporations, labor organizations, political committees and individuals, but must follow the Act's registration and reporting requirements.

In accordance with AO 2010-11 (Commonsense Ten), Majority PAC,

formerly known as Commonsense Ten, and House Majority PAC (the Committees) registered with the Commission as IEOPCs.

The Committees asked the Commission whether federal officeholders, candidates and officers of national party committees may solicit unlimited contributions from individuals, corporations and labor organizations on the Committees' behalf. The Committees also asked if federal officeholders and candidates, and officers of national party committees, may participate in fundraisers at which unlimited individual, corporate and labor organization contributions will be solicited.

Analysis

The Commission found that federal officeholders, candidates and officers of national party committees may not solicit unlimited contributions from individuals, corporations or labor organizations on the Committees' behalf.

The Commission noted that Section 441i limits federal officeholders and candidates to soliciting funds for a federal election within the Act's limitations and prohibitions. 2 U.S.C. §441i(e)(1)(A). Section 441i also prohibits national party committees and their officers from soliciting funds that are outside the Act's limitations and prohibitions. 2 U.S.C. §441i(a)(1). Since neither *Citizens United* nor *SpeechNow* disturbed Section 441i, federal candidates, officeholders and national party committee officers are prohibited from raising funds that are outside the limitations and prohibitions of the Act for IEOPCs.

Additionally, the Act limits contributions by any person to any other political committee to $5,000 per calendar year. 2 U.S.C. §441a(a)(1)(C). Therefore, federal candidates, officeholders and national party committee officers are limited to soliciting $5,000 per year for any political committee that is neither an authorized committee nor party committee.

Finally, the Commission noted that federal candidates, officeholders and national party committee officers cannot solicit contributions from sources prohibited by the Act from making contributions, including corporations, labor organizations, federal government contractors, national banks and foreign nationals. 2 U.S.C. §§441b(a), 441c and 441e.

Thus, federal officeholders and candidates, and officers of national party committees, may only solicit up to $5,000 from individuals and federal political action committees on behalf of an IEOPC.

Regarding the Committees' second question, the Commission found that federal officeholders and candidates and officers of national party committees, may attend, speak at or be featured guests at fundraisers for the Committees, at which unlimited individual, corporate and labor organization contributions will be solicited, so long as the officeholders, candidates and officers of national party committees restrict any solicitations they make to funds subject to limitations, prohibitions and reporting requirements of the Act. 11 CFR 300.64(b).

The Commission enacted new rules in April 2010 that allow federal candidates or officeholders to attend, speak at or be a featured guest at such a fundraising event. The new rules do not allow a federal candidate to solicit any funds that are not subject to the limitations, prohibitions and reporting requirements of the Act. 11 CFR 300.64 (b). Rather a federal candidate or officeholder who solicits at such an event must limit any solicitation to funds that comply with the amount limitations and source prohibitions of the Act. 11 CFR 300.64(b)

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—Stephanie Caccomo