

Record

November 2006

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Reports

Post-General Reporting Reminder

The 30-day Post-General Election report is due on December 7. The Post-General Election report covers activity from October 19 (or from the close of books of the last report filed) through November 27. The following committees must file this report:

- All registered PACs and party committees—even committees with little or no activity to disclose. Monthly filers must submit this report in lieu of the December monthly report.¹

- Authorized committees of federal candidates running in the general election, including committees of unopposed candidates. Note that because the reporting period for the Post-General Election report spans two election cycles, candidate committees must use the Post-Election Detailed Summary Page (FEC Form 3, Pages 5-8) instead of the normal Detailed Summary Page.

Filing Electronically

Under the Commission's mandatory electronic filing regulations,

¹ Monthly filers are not required to file a December monthly report in addition to the Post-General report.

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Compliance

Comments Sought on Proposed Embezzlement Policy

The Commission requests public comment on a proposed enforcement policy regarding reporting errors that result from a misappropriation of funds. A companion document proposes internal controls that political committees could use to guard against embezzlement and unintentional reporting errors. Under the proposed policy, committees that implement certain minimum safeguards would not be held liable if a subsequent misappropriation led to reporting errors. Comments on both documents are due by November 30, 2006.

The Commission's proposal responds to a recent increase in the number of enforcement cases involving misappropriation of committee funds, often by committee employees. To address this problem, the Commission proposes that political committees adopt certain internal controls aimed at reducing the incidence of misappropriation.

The proposed safeguards, developed by the FEC's Audit Division, draw upon established accounting practices and other sources, including the Small Business Administration (SBA) and the Government

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Reports

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individuals and organizations that receive contributions or make expenditures, including independent expenditures,² in excess of \$50,000 in a calendar year—or have reason to expect to do so—must file all reports and statements with the FEC electronically. Electronic filers who instead file on paper or submit an electronic report that does not pass the Commission’s validation program will be considered nonfilers and may be subject to enforcement actions, including administrative fines. Reports filed electronically must be received and verified by 11:59 p.m. Eastern Time on the December 7 filing date.

² Disbursements for electioneering communications do not count toward the \$50,000 threshold for mandatory electronic filing. See 11 CFR 104.18(a).

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<http://www.fec.gov>

Senate committees and other committees that file with the Secretary of the Senate are not subject to the mandatory electronic filing rules, but may file an unofficial copy of their reports with the Commission in order to speed disclosure.

Timely Filing for Paper Filers

Registered and Certified Mail. Reports sent via registered or certified mail must be postmarked on or before December 7 to be considered timely filed. Please note that a certificate of mailing from the U.S. Postal Service is not sufficient to prove that a report is timely filed. A committee sending its reports by certified mail should keep its mailing receipt with the U.S. Postal Service postmark as proof of filing because the U.S. Postal Service does not keep complete records of items sent by certified mail. A committee sending its reports by registered mail should also keep its proof of mailing or other means of transmittal of its reports.

Overnight Mail. Reports filed via overnight mail³ will be considered timely filed if the report is received by the delivery service on or before the December 7 filing date. A committee sending its reports by Express or Priority Mail, or by an overnight delivery service, should keep its proof of mailing or other means of transmittal of its reports.

Other Means of Filing. Reports sent by other means—including first class mail and courier—must be received by the FEC before close of business on the December 7 filing deadline. 2 U.S.C. 434(a)(5) and 11 CFR 104.5(e).

For those filers who are not required to file their reports electronically, paper forms are available

³ “Overnight mail” includes Priority or Express Mail having a delivery confirmation, or an overnight service with which the report is scheduled for next business day delivery and is recorded in the service’s on-line tracking system.

on the FEC’s web site (<http://www.fec.gov/info/forms.shtml>) and from FEC Faxline, the agency’s automated fax system (202/501-3413).

Additional Information

For more information on 2006 reporting dates:

- See the reporting tables in the January 2006 Record;
- Call and request the reporting tables from the FEC at 800/424-9530 or 202/694-1100;
- Fax the reporting tables to yourself using the FEC’s Faxline (202/501-3413, document 586); or
- Visit the FEC’s web page at http://www.fec.gov/info/report_dates.shtml to view the reporting tables online.

—Elizabeth Kurland

Compliance

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Accountability Office (GAO). Some of the recommended safeguards include regular account reconciliations and the separation of accounting duties.

The Commission asks that members of the regulated community and other interested persons submit comments on these proposals either by e-mail to embezzlepolicy@fec.gov, or in written form to Federal Election Commission, 999 E Street NW, Washington, D.C., 20463, ATTN: Joseph Stoltz. The Commission strongly encourages commenters to use electronic mail to ensure timely receipt and consideration. Both the proposed enforcement policy and the internal controls document are available on the Commission’s web site at <http://www.fec.gov/law/policy/embezzlepolicy.pdf>. For more information, please contact the FEC Audit Division Director Joseph Stoltz at 202/694-1200 or 800/424-9530.

Court Cases

Christian Civic League of Maine v. FEC

Recently two courts ruled against the Christian Civic League of Maine (CCL) in its challenge to the ban on corporate financing of electioneering communications. On September 27, 2006, the U.S. District Court for the District of Columbia granted partial motions to dismiss and for judgment on the pleadings, and dismissed all other CCL claims as moot. On October 2, 2006, the Supreme Court dismissed as moot CCL's appeal of the district court's May 2006 denial of a preliminary injunction.

Background

CCL is a nonprofit corporation organized under section 501(c)(4) of the Internal Revenue Code that allegedly engages in some business activity. CCL wanted to use its general treasury funds to broadcast a radio ad prior to a 2006 Senate vote on a particular proposed constitutional amendment. The ad identified Senator Olympia Snowe by name and was to air in close proximity to her June 13, 2006, primary election. If the ad had aired in Senator Snowe's state within 30 days prior to her primary (or 60 days prior to the general), it would have qualified as an electioneering communication (EC). 2 U.S.C. 434(f)(3)(A)(i). Under the Federal Election Campaign Act (the Act), as amended by the Bipartisan Campaign Reform Act, corporate funds cannot be used to finance an EC. CCL's suit contends that this financing restriction prevents it from exercising its First Amendment right to free speech.

The Supreme Court upheld the electioneering communications provision in *McConnell v. FEC*, stating that, although the provision might apply to some so-called "issue ads," it is narrowly tailored to meet a compelling government interest. 540 U.S. 93, 206 (2003). After *McConnell*, the Supreme Court held in *Wisconsin*

Right to Life v. FEC that *McConnell* had not foreclosed all as-applied challenges to the electioneering communications provision. 126 S.Ct. 1016, 1018 (2006).

CCL did not broadcast its proposed ad, and the Senate voted on the legislation it referenced in early June 2006.

District Court Decision

The district court dismissed CCL's request for a permanent injunction to prevent the FEC from applying its EC rules to CCL's proposed ad, concluding that the Senate's vote on the legislation referenced in the ad had rendered the issue moot. CCL contended that its situation fit within the "capable of repetition, yet evading review" exception to the mootness doctrine. The court disagreed, noting that CCL's claims were closely tied to the facts surrounding the spring 2006 ad, circumstances that were unlikely to recur and would not necessarily evade review even if they did recur.

The court further granted defense motions for dismissal of CCL's claims about possible other ads because they were not ripe for review and were too speculative. CCL admittedly had no firm plans to create or distribute any future ads besides the spring 2006 ad. The Constitution requires an actual "case or controversy" for the court to decide, so a party's grievance cannot be solely hypothetical. U.S. District Court for the District of Columbia, CV06-0614 (JWR, LFO, CKK).

Supreme Court Decision

On October 2, 2006, the U.S. Supreme Court dismissed as moot CCL's appeal of the district court's May 9, 2006, denial of a preliminary injunction. 529 U.S. 05-1447 (Oct. 2, 2006); see [June 2006 Record](#).

—Meredith Metzler

FEC v. Club for Growth, Inc.

On October 10, 2006, the U.S. District Court for the District of Columbia denied Club for Growth, Inc.'s (the Club's) motion for the court to certify its June 5, 2006, decision for interlocutory appeal.

Background

In response to a complaint filed by the Democratic Senatorial Campaign Committee, the FEC found reason to believe and opened an administrative investigation of the Club in 2003 for failure to register with the FEC as a political committee. Following the Commission's vote finding probable cause to believe and unsuccessful conciliation efforts, the FEC filed an enforcement lawsuit in the district court. See [November 2005 Record](#).

The Club moved to dismiss the complaint based on several alleged procedural violations of the Federal Election Campaign Act (the Act). On June 5, 2006, the court denied the Club's motion to dismiss. See [August 2006 Record](#).

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Campaign Guides Available

For each type of committee, a *Campaign Guide* explains, in clear English, the complex regulations regarding the activity of political committees. It shows readers, for example, how to fill out FEC reports and illustrates how the law applies to practical situations.

The FEC publishes four *Campaign Guides*, each for a different type of committee, and we are happy to mail your committee as many copies as you need, free of charge. We encourage you to view them on our web site www.fec.gov.

If you would like to place an order for paper copies of the *Campaign Guides*, please call the Information Division at 800/424-9530.

Court Cases

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Analysis

The Club asked the court to certify its June 5, 2006, decision for an interlocutory appeal. An interlocutory appeal allows an appellate court to review a lower court's decision prior to the final judgment in the case. Interlocutory appeals are rare, in part because the moving party, in this case the Club, has the burden to show exceptional circumstances that justify the expedited process. The court held that the Club failed to do so.

One requirement for granting certification for an interlocutory appeal is that there must be a substantial basis for a difference of opinion about the ruling. While the Club disagreed with the court's application of a previous case, *FEC v. Legi-Tech., Inc.*, 75 F.3d 704 (D.C. Cir. 1996), to the circumstances, the Club did not cite any case law to contradict the court's decision. The court stated that the June 5, 2006, decision was not based on "novel and untested legal theories." Instead, the decision was based on the legal doctrine of harmless error, deference to the FEC, the plain language of the Act and settled principles of law regarding agency ratification actions. Since the Club did not show a substantial ground for difference of opinion, the court denied the Club's motion to certify the decision for an interlocutory appeal.

U.S. District Court for the District of Columbia, CV05-1851 (RMU).

—Meredith Metzler

Advisory Opinions

Advisory Opinion 2006-20: "Unity 08" Political Committee Status

Unity 08, a Section 527 political organization whose self-avowed purpose is electing federal candidates, must register as a political committee once it receives more than \$1,000 in contributions or makes more than \$1,000 in expenditures. As such, Unity 08 will be subject to the limitations, prohibitions and reporting requirements of the Federal Election Campaign Act (the Act) and may incorporate for liability purposes.

Background

Unity 08 is a political organization organized under Section 527 of the Internal Revenue Code that describes itself as a "nascent political party." Unity 08 seeks to nominate and support a "Unity Ticket" for president and vice-president of the United States in the 2008 presidential election. Unity 08 has stated that they may either choose to support one of the two major party tickets, or may nominate one candidate from each party to form the Unity Ticket. Alternatively, they may select nominees through an "online nominating convention" sometime in the summer of 2008.

Unity 08 plans to fund its activities through sales of t-shirts and other items and through direct Internet solicitations. Unity 08 states that no funds collected will be used to support or oppose any federal candidates, but will instead be used to fund Unity 08's organization building efforts. They also state that they will seek to qualify for the ballot in a number of states, and that they do not intend to support or oppose candidates for any other office than for the presidency and vice-presidency.

Analysis

Under the Act and Commission regulations, political committees are subject to certain registration and reporting requirements, as well as limitations and prohibitions on contributions received and made, and on expenditures made. The Act defines a political committee as "any committee, club, association, or other group of persons" which receives contributions or makes expenditures aggregating in excess of \$1,000 in a calendar year. 11 CFR 100.5(a).

The Act defines "expenditure" as a "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. 431a(9)(A)(i). The Commission has previously determined that expenses incurred in gathering signatures to qualify for a ballot for federal office are expenditures. Although Unity 08 plans to qualify for ballot access for itself as an organization, but not yet for any named candidates, the Commission found that Unity 08 is, in effect, using its name as a placeholder for its candidates' names on the ballot. Thus, in promoting itself through petition drives to obtain ballot access, the Commission concluded that Unity 08 is promoting its presidential and vice-presidential candidates and any expenses incurred by Unity 08 for this purpose constitute expenditures.

Additionally, because Unity 08 has publicly stated that its main goal is the nomination and election of a presidential and vice-presidential candidate in 2008, the Commission concluded that Unity 08 satisfies the "major purpose" requirement of *Buckley v. Valeo*, and must register as a political committee once it receives contributions or makes expenditures in excess of \$1,000.

The Commission also determined that, as a political committee, Unity 08 may incorporate for liability

purposes only, without violating the Act's prohibition on corporate contributions or expenditures. 11 CFR 114.12.

Date Issued: October 10, 2006

Length: 6 pages.

—Myles Martin

Advisory Opinion 2006-24: Limits, Prohibitions and Reporting Requirements Apply to Recount Activities

Funds raised and spent by a candidate or a state party committee to pay recount and election contest expenses resulting from the general election are subject to the amount limitations, source prohibitions and reporting requirements of the Act, but are not contributions or expenditures. Similarly, the state party must spend federal funds to support the recount effort, but those payments are not subject to the coordinated spending limitations of 2 U.S.C. 441a(d)(3). National party committees may also participate in the recount process, but must finance their activities using federal funds.

Background

Commission regulations promulgated before the enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA) exempt from the definition of "contribution" and "expenditure" payments made with respect to a recount of a federal election, but expressly bar the receipt or use of funds from foreign nationals, corporations, labor organizations and national banks. 11 CFR 100.91 and 100.151.

Under BCRA, candidates and officeholders may not solicit, receive, direct, transfer or spend funds "in connection with an election for federal office" unless the funds are subject to the limitations, prohibitions and reporting requirements of the Act. 2 U.S.C. 441i(e)(1)(A). Similarly, national party committees, including the NRSC and DSCC, may

not solicit, receive, direct or spend any funds that are not subject to the limitations, prohibitions, and reporting requirements of the Act. 2 U.S.C. 441i(a)(1); 11 CFR 300.10(a).

Analysis

Limits, Prohibitions and Reporting by Federal Candidates. The Commission's 1977 regulations pertaining to recounts are premised on the conclusion that recounts are "in connection with federal elections." See 2 U.S.C. 441b(a), 441e(a)(1)(A), 11 CFR 100.91 and 100.151. Because of the limitations of 2 U.S.C. 441i(e)(1)(A), federal officeholders, candidates, their agents and entities directly or indirectly established, financed, maintained or controlled by or acting on behalf of one or more federal officeholders or candidates are prohibited from soliciting, receiving, directing, transferring or spending funds for expenses related to a recount of the votes cast in a federal election unless those funds are subject to the limitations, prohibitions, and reporting requirements of the Act. Therefore, donations to a recount fund established by a federal candidate may not exceed \$2,100 per person or \$5,000 per multicandidate political committee. Donations to a federal candidate's recount fund are not "contributions" and therefore are not aggregated with contributions to the candidate for the general election nor are they subject to the aggregate biennial contribution limit.

A federal candidate may establish a recount fund either as a separate bank account of the candidate's authorized committee, or as a separate entity. If the recount fund is a separate account of the federal candidate's authorized committee, then its receipts and disbursements must be reported on the authorized committee's report as "other receipts" and "other disbursements." 11 CFR 104.3(a)(3)(x)(A) and (b)(2)(vi)(A). If the recount fund is a separate entity established by the federal candidate, then the separate

entity must report as an authorized committee under 11 CFR 100.5(d).¹

Limits, Prohibitions and Reporting by Political Party Committees. Payments for recount activities involving federal races are disbursements "in connection with a federal election." Therefore, a state party committee may not allocate payments for recount activities between federal and nonfederal funds. The state party must establish a separate federal account to pay for all federal recount activities and report all of the recount fund's receipts and disbursements to the Commission in accordance with 2 U.S.C. 434 and 11 CFR 104.3. Donations to the recount fund must comply with the amount limitations of the Act and thus may not exceed \$10,000 from a person or \$5,000 from a multicandidate political committee per calendar year. However, as noted above, these donations are not aggregated with contributions made to the committee.

National party committees, including the NRSC and DSCC, and their agents may participate in strategy sessions regarding the raising and spending of funds on recount activities without violating the Act or Commission regulations, provided that the state party does not use non-federal funds to pay expenses related to their participation. The NRSC and DSCC must pay for all recount activities they conduct using entirely federal funds.

While party committees may coordinate recount activities with their candidates, the limitations on coordinated spending by a state party for a particular federal candidate are not applicable to a state party's recount fund. The limitations of 441a(d)(3) are applicable only "in connection with the general election

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¹ To the extent that AOs 1978-92 and 1998-26 permitted donations in excess of the contribution limits and did not require recount receipts to be reported, they are superseded.

Advisory Opinions

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campaign of a candidate for federal office.” Recount expenses are not in connection with the general election campaign of a federal candidate because the campaign has ended and because such funds are not otherwise permitted to be used for campaign activity.

Preemption. The Act supersedes and preempts any provision of state law with respect to election to federal office. 2 U.S.C. 453(a); 11 CFR 108.7(a). Specifically, 11 CFR 108.7(b)(3) preempts state laws concerning limitations on contributions made and received by and expenditures made by federal candidates and political committees. Although receipts and disbursements of the state party’s recount fund are not “contributions” or “expenditures” under the Act, these receipts and disbursements are “in connection with a federal election,” and not in connection with any nonfederal election. Thus, such recount funds are subject to the amount limitations and source prohibitions in the Act, preempting state law. Moreover because the state party’s recount fund is a separate federal account that is not used for nonfederal election spending, the reporting requirements of the Act and Commission regulations preempt the reporting requirements of state law.

Dissenting Opinion

On October 20, 2006, Commissioner Hans von Spakovsky issued a dissenting opinion.

Length: 12 pages

Date: October 5, 2006

—Amy Pike

Advisory Opinion 2006-31

The Commission released for public comment, but did not approve, two alternative draft advisory opinions concerning whether a television station’s sale of advertising time to a political committee at

the lowest unit charge would result in an in-kind contribution. Approval of an advisory opinion requires the affirmative vote of four members of the Commission.

Advisory Opinion Request

AOR 2006-32

Whether communications constitute expenditures, solicit contributions, or indicate campaign activity under the major purpose doctrine of the political committee definition (Progress for America Voter Fund and Progress for America, Inc., September 22, 2006)

Nonfilers

Congressional Committees Fail to File Reports

The Claude Oliver for Congress Committee failed to file a 12-Day Pre-Primary report for the September 19, 2006, Washington primary election. The Dunkelbarger for Congress Committee failed to file a 12-Day Pre-Primary report for the September 19, 2006, Massachusetts primary election.

Prior to the reporting deadlines, the Commission notified all affected committees of their filing obligations. Committees that failed to file the required reports were subsequently notified that their reports had not been received and that their names would be published if they did not respond within four business days.

The Federal Election Campaign Act requires the Commission to publish the names of principal campaign committees if they fail to file 12-day pre-election reports or the quarterly report due before the candidate’s election. 2 U.S.C. §437g(b). The agency may also pursue enforcement actions against nonfilers and late filers on a case-by-case basis.

—Meredith Metzler

Web Site

Daily IE Updates Available on FEC.gov

The Commission has enhanced its on-line disclosure of campaign finance data by providing daily updates on all independent expenditures made in connection with the November 7 general election. Both summary data and detailed expenditure information is available, sorted by candidate, committee and race. The data is compiled as it arrives, regardless of whether the report was filed electronically or on paper.

To see the very latest independent expenditure statistics, visit http://www.fec.gov/finance/disclosure/ie_reports.shtml. For more information on the rules governing independent expenditures, consult the FEC’s Independent Expenditures brochure at <http://www.fec.gov/pages/brochures/indexp.shtml>.

—Kathy Carothers

FEC Accepts Credit Cards

The Federal Election Commission now accepts American Express, Diners Club and Discover Cards in addition to Via and MasterCard. While most FEC materials are available free of charge, some campaign finance reports and statements, statistical compilations, indexes and directories require payment.

Walk-in visitors and those placing requests by telephone may use any of the above-listed credit cards, cash or checks. Individuals and organizations may also place funds on deposit with the office to purchase these items. Since pre-payment is required, using a credit card or funds placed on deposit can speed the process and delivery of orders. For further information, contact the Public Records Office at 800/424-9530 or 202/694-1120.

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